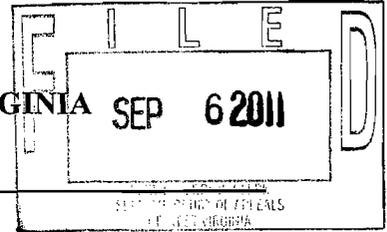


IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON



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DAVID C. TABB.,

PETITIONER,

VS.

Docket Number: 11-0701

ANGIE BANKS, ASSESSOR OF  
JEFFERSON COUNTY

RESPONDENT

---

**BRIEF OF THE RESPONDENT**

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**I. TABLE OF AUTHORITIES**

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## **SUMMARY OF THE ARGUMENT**

The Petitioner is prohibited from representing a corporation before the Circuit Court. The Petitioner filed a Tax Appeal pursuant to W.Va. Code § 11-3-25 on behalf of a corporation, Shenandoah Sales and Services, of which corporation he services as the vice-president. When the Petitioner filed pleadings and appeared before the Court to contest the assessment of Shenandoah Sales and Services, he was engaging in the unauthorized practice of law by representing another in legal proceedings before the circuit court. The Petitioner is prohibited from doing so, and must hire an attorney to represent the interests of the corporation in any legal proceedings, as corporations must always appear on behalf of an attorney in all legal proceedings.

## **II. STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rule 18(a)(3) and (4) oral argument is not required in this case. The dispositive issues regarding representation of a corporation and the resulting unauthorized practice of law when one who is not a licensed attorney undertakes to represent a corporation have been authoritatively decided by *West Virginia State Bar v. Earley* and *Frieson v. Isner*. In addition, it is clear from the relevant case law that a Petitioner's right to due process is not violated in a tax appeal when the Petitioner is given a hearing before the Board of Review and Equalization. Finally, the legal arguments and facts are adequately set forth in the briefs and records, and oral argument would not aid the Court in reaching a decision.

### III. ARGUMENT

#### A. THE CIRCUIT COURT DID NOT COMMIT REVERSIBALE ERROR BECAUSE IT WAS PREVENTING THE UNAUTHORIZED PRACTICE OF LAW BY PROHIBITING THE VICE-PRESIDENT OF A CORPORATION TO REPRESENT THE CORPORATION IN LEGAL PROCEEDINGS.

When lay persons appear in Circuit Court on behalf of a corporation, those persons are engaging in the unauthorized practice of law. The practice of law has been defined by this Court and a person will be deemed to “be practicing law whenever 1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures.” *West Virginia Supreme Court of Appeals Definition of Practice of Law*. Furthermore, in order to practice law, pursuant to W.Va. Code § 30-2-4, one must be licensed and admitted to practice. “It shall be unlawful for any natural person to practice or appear as attorney-at-law for another in a court of record in this state. . .without first having been duly and regularly licensed and admitted to practice law in a court of record in this state.” *Id.*

When the Petitioner appeared in Court to represent the interests of Shenandoah Sales and Services, Inc., he was engaging in the unauthorized practice of law. “A non-lawyer

who undertakes, for pay, to bring lawsuits on the claims of third persons and to perform the necessary legal services incident to such lawsuit, such as preparing and filing complaints affidavits and other legal documents, and appearing in court, is engaged in the unauthorized practice of law.” Syl. Pt. 3, *Frieson v. Isner*, 168 W.Va. 758, 285 S.E.2d 641 (1981). During the course of the litigation before the circuit court, the Petitioner was representing the interests of Shenandoah Sales and Services, Inc. The Petitioner prepared several legal documents, including a complaint and motions, on behalf of the corporation. Moreover, the Petitioner appeared before the Circuit Court on behalf of Shenandoah Sales and Services, Inc. Because the Petitioner was not representing himself, but the interests of the corporation, he was not appearing *pro se*, but in a representative capacity on behalf of a corporation, for which corporation he serves as the vice president. Accordingly, the Petitioner has engaged in the practice of law by preparing legal instruments on behalf of another and appearing to represent the interest of another before the judicial tribunal.

This Court has held that a corporation must be represented by an attorney. “A corporation is not a natural person but is an artificial entity created by law and for that reason in legal matters it must act through duly licensed attorneys.” *West Virginia State Bar v. Earley*, 144 W.Va. 504 at 527, 109 S.E.2d 420 at 435 (1959) *quoting Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977. A corporation or other lay agency can not practice law or hire lawyers to practice law for it. [citations omitted].” *West Virginia State Bar v. Earley*, 144 W.Va. 504, 526, 109 S.E.2d 420, 435 (1959) In addition, the West Virginia Legislature has enacted legislation that prohibits a corporation from practicing law. West Virginia Code § 30-2-5 provides in relevant part that “[e]xcept as provided in section five-a of this article, it shall be unlawful for any corporation. . .to render or furnish legal services or advice . . .or in any other manner to assume

to be entitled to practice law. . .” When the Petitioner appeared to represent Shenandoah Sales and Services, he was furnishing legal services to the corporation. Although the Petitioner is the vice president of Shenandoah Sales and Services, he alone does not constitute the entire corporation, and according to the website of the West Virginia Secretary of State, Shenandoah Sales and Services has at least one other member, Nadine Tabb, who serves as the corporation’s president. Accordingly, Shenandoah Sales and Services is a separate entity created by law and must be represented by a licensed attorney.

Other courts have explained the rationale for requiring a corporation to be represented by an attorney in a court of record. The Supreme Court of California explained that a person appearing on behalf of a corporation is clearly practicing law. “The qualification of the human representing the corporation—or for that matter any other person or entity—in court is one of vital judicial concern. Such person is clearly engaged in the practice of law in a representative capacity. . . formal rules of procedure and evidence are to be observed by representatives of the parties, and the court is entitled to expect to be aided in resolution of the issues by presentation of the cause through qualified professionals rather than a lay person.” *Camille v. Alcoholic Beverage Controls Appeals Board*, 99 Cal. App.4<sup>th</sup> 1094 at 1102 (2002) quoting *Merco Constr. Engineers, Inc. v. Municipal Court*, 21 Cal.3d 724 (1978).

Clearly, Mr. Tabb is representing the Petitioner, Shenandoah Sales and Services in a representative capacity both before this Court and the Circuit Court, providing legal representation on behalf of the corporation, Shenandoah Sales and Services. As such, Mr. Tabb is engaging in the unauthorized practice of law. Because the Petitioner is a corporation, it must be represented by an attorney in all legal proceedings, and the vice-president of the company is

prohibited from appearing on its behalf. Accordingly, the circuit court did not err when it prohibited Mr. Tabb from representing the corporation in a legal proceeding before the Circuit Court of Jefferson County.

To support the contention that a corporation may appear by its officers, the Petitioner relies upon *Quarrier Trustee v. Peabody Insurance Company*, 110 W.Va. 507, 1877 WL 3470 (W.Va.)(1877), and its progeny. However, *Quarrier Trustee* does not hold that a corporation can represent itself in litigation but rather addresses how a corporation may make a plea to the jurisdiction of the Court. In *Quarrier*, the corporation appeared by counsel to contest the jurisdiction. The Court reasoned that neither a corporation nor a natural person could appear by attorney to plea to the jurisdiction of the court. Explaining the rationale for this the Court stated, “In pleas to the jurisdiction of the court, the defendant must plead in *propria personae* for he cannot plead by attorney without leave of court first had, which leave acknowledges the jurisdiction; for the attorney is the officer of the court; and if the defendant puts in a plea by an officer of the court, that plea must be supposed to have been put in by leave of court.” *Id.* at 519. However, the Court goes on to recognize the principle of law that a corporation may not appear *pro se* and must be represented by an attorney. The Court states in relevant part, “***it is necessarily true that a corporation aggregate, can not appear in any case, in propria personae.***” Accordingly, the *Quarrier* case addresses only pleas to jurisdiction of the court which pleas must always be made in person and can never be made through an attorney, regardless of whether the entity is a corporation or a natural person. Beyond pleas to jurisdiction, however, the Court recognizes that a corporation must be represented by an attorney and may not represent itself through the appearance of one of its officers.

Furthermore, even if the Court in *Quarrier* were condoning the *pro se* appearance of a corporation, which it clearly is not, it holds that the appearance for plea to jurisdiction of the court should be by the president. Mr. Tabb is the vice-president of the corporation, Shenandoah Sales and Services, and as such cannot even to appear to make a plea of jurisdiction of the court.

Additionally, Mr. Tabb, on behalf of the Petitioner corporation, makes the legal argument that W.Va. Code § 11-3-25, which code section provides for an appeal from the Board of Review and Equalization, provides authority for a corporation to appear by an agent rather than an attorney. However, the word corporation does not even appear in the code section, and there is nothing providing express authority for a corporation to represent itself and avoid the strictures of W.Va. Code § 30-2-5 and *West Virginia State Bar v. Earley*. Petitioner relies upon the language allowing an applicant to take an appeal of the application through “his agent or attorney.” This phrase does not permit a corporation to appear *pro se* through one of its officers, nor does it permit a corporation to engage in the unauthorized practice of law in violation of W.Va. Code § 30-2-5, *supra*. Rather it states that some applicants may appear by an agent. However, when the applicant is a corporation, like Shenandoah Sales and Services, it must appear through its attorney as provided by *Earley* as corporations are prohibited from practicing law. If the legislature intended to allow a corporation to appear through one of its officer rather than an attorney, it would have expressly stated an exception to the rule that a corporation may not engage in the practice of law. It did not do so in W.Va. Code § 11-3-25 as the word corporation does not even appear in the text of the statute. The legislature simply authorized applicants to appear by an agent but did not lift the restriction that a corporation may not practice law and must appear by an attorney in all legal matters.

Finally, even if the Legislature had intended to permit a layperson to appear on behalf of a corporation pursuant to the language of W.Va. Code § 11-3-25, such permission would have been an unconstitutional grant of power by the Legislature. Article V, Section I of the West Virginia Constitution provides that the legislative, executive and judicial departments of this State shall be separate and distinct so that neither shall exercise the powers properly belonging to either of the others. Article VIII, Section I of the West Virginia Constitution provides that the judicial power of the state shall be vested solely in the Supreme Court of Appeals and in circuit court and in such other intermediate appellate courts and magistrate courts as shall hereafter be established. This court has held that implicit in the grant of judicial power to the courts is the ability to exclusively regulate, supervise, and control the practice of law and only the judicial branch may control the practice of law. “The judicial department of the government has the inherent power to define, supervise, regulate and control the practice of law and *the legislature can not* restrict or impair this power of the court or *permit or authorize laymen to engage in the practice of law*. Syl. Pt. 7, *West Virginia State Bar v. Earley*, 144 W.Va. 504, 109 S.E. 2d 420 (1959) (emphasis added). Accordingly, the Legislature may not permit a layman to practice law through a statutory grant as the regulation of the practice of law is exclusively within the jurisdiction of the judiciary. Therefore, because the judiciary prescribes rules for the practice of law, Mr. Tabb is prohibited from representing the Petitioner even if the Legislature had condoned the appearance of a lay person on behalf of a corporation in proceedings conducted pursuant to W.Va. Code § 11-3-25.

The Petitioner also makes the argument that by not objecting to Mr. Tabb’s appearance on behalf of the Petitioner, the Assessor waived the objection to the corporation’s representation by a lay person, citing caselaw from Washington State. Presumably, the Petitioner

relies upon a transcript from a separate case that was pending before the Jefferson County Circuit Court in 2008 to conclude that the opposing party waived the issue in this case. However, the opposing party did not make an appearance in this case because the Circuit Court entered an order prohibiting the Petitioner from appearing through a *pro se* agent. Accordingly, the actions in the case *sub judice* cannot be considered a waiver and the Petitioner cannot rely upon facts from a case pending three years before this case was instituted. “The Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.” Syl. Pt. 2, *Trent v. Cook*, 198 W.Va. 601, 482 S.E. 2d 218 (1996). The record created before the Circuit Court in this case consists of the Petitioner’s petition for administrative appeal, the motion to disqualify and accompanying documents, and the Court’s order dismissing the case. The Petitioner cannot rely upon statements made in a 2008 case.

Even if the Assessor did waive the appearance of the Petitioner by a person not licensed to practice law, another party cannot consent to the unauthorized practice of law. Because it is the judiciary which is responsible for prohibiting the unauthorized practice of law, an attorney cannot waive those rules on behalf of the judiciary to permit the practice of law where it is not condoned in the rules. Certainly if the legislature cannot impinge upon the rules created by the judiciary governing the practice of law, a licensed attorney may not do so either. Accordingly, the Petitioner’s argument of waiver is without merit as only the judiciary may control the practice of law.

## **B. THE CIRCUIT COURT DID NOT VIOLATE THE PETITIONER'S DUE PROCESS**

The Petitioner, through its *pro se* agent, cites several cases, which it believes indicates that the failure of the Circuit Court to hear an appeal amounts to a due process of law violation. However, every case cited by Petitioner addresses due process violations which occur before the Board of Review and Equalization, not in the appellate phase before the circuit court. For example, Petitioner relies upon *In re Tax Assessments Against Pocahontas Land Co.* 172 W.Va. 53, 303 S.E.2d 691 (1983), which case addressed procedural defects including notice before the Board of Review and Equalization. In addition, the Court, in that case, found that the principles of due process are satisfied when a taxpayer is given the opportunity to present a case before a competent tribunal. “There is no constitutional command that notice of the assessment of taxes and opportunity to contest it must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before the exaction of the tax and before the command of the state to pay it becomes final and irrevocable.” *In re Tax Assessment Against Pocahontas Land Co.*, 172 W.Va. 53 at 59 quoting *Wells, Fargo & Co. v. Nevada*, 248 U.S. 165. Additionally, the court cited *Frye v. Haas*, 182 Neb. 73, 152 N.W.2d 121 (1967), a Nebraska State Supreme Court case, which case indicated that lack of judicial review did not constitute a denial of due process. “The power to levy a general tax is inherent in the sovereign, is purely legislative in character, and due process does not require that the property subject to the tax or the amount to be levied should be subjected to judicial inquiry.” *Frye v. Haas* at Syl. Pt. 2.

Similarly, the other case relied upon by the Petitioner that the refusal of the circuit court to hear an appeal is violation of due process also addresses the process before the Board of Review and Equalization. In *In re Assessment of Eastern Associated Coal Corp.*, 157 W.Va. 749, 204 S.E.2d 71 (1974), the County Commission acting as Board of Review and Equalization refused to allow the taxpayer to present evidence and cross examine witnesses at the hearing before the Board of Review and Equalization. The Court ruled that the corporation had a right to be heard before the Board of Review and Equalization and the refusal of the *county court* to consider evidence was an unconstitutional application of an otherwise constitutional statute. *Id.* at 75. Accordingly, this Court has ruled that due process of law requires that the applicant be given the opportunity to present evidence before a tribunal, the Board of Review and Equalization, before the tax is imposed.

The role of the circuit court in a tax appeal is also instructive here. The proceeding before the Circuit Court is merely an appeal of the decision issued by the Board of Review and Equalization. “Judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act. In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by the Court.” *In re Tax Assessment Against American Bituminous Power Partners*, 208 W.Va. 250, 254, 539 S.E.2d 757, 761 (2000). Thus, the hearing at which due process must be afforded an applicant is the one provided by the Board of Review and Equalization, while the Trial Court performs a simple appellate function. The denial of an appeal is not the equivalent of a denial of due process.

The Petitioner received a full hearing before the Board of Review and Equalization, during which hearing it had the opportunity presented evidence. Accordingly, because the case before the Circuit Court is simply an appeal of the Board of Review and Equalization, and the Petitioner has already received a full hearing on the merits before the Board of Review and Equalization, a refusal by the Circuit Court to consider the appeal, would not result in a due process violation as due process was satisfied by the hearing before the Board of Review and Equalization.

Finally, the Circuit Court was preventing the unauthorized practice of law by refusing to further consider the appeal until such time as the Petitioner hired an attorney to represent the corporation's interest. This Court has held that the judiciary has the exclusive power to regulate the practice of law. "The judicial department of the government has the inherent power, independent of any statute, to inquire into the conduct of a natural person, a lay agency, or a corporation to determine whether he or it is usurping the function of an officer of a court and illegally engaging in the practice of law and to put an end to such unauthorized practice where it is found to exist." Syl. Pt. 8, *West Virginia State Bar v. Earley*, 144 W.Va. 504, 109 S.E.2d 420 (1959). In addition, this Court has also held that courts have the power to supervise and prevent the unauthorized practice of law. "In the exercise of their inherent power, the courts may supervise, regulate, and control the practice of law by duly authorized attorneys and prevent the unauthorized practice of law by any person agency or corporation." *Id.* at Syllabus Pt. 10. The Circuit Court indicated that the Petitioner could continue to file pleadings and motions before the Court as long as it was represented by an attorney as required by law. Accordingly, when the Circuit Court required that the Petitioner hire an attorney before it could bring an appeal before the Court, it was preventing the unauthorized practice of law as it has

been given the power and authority to do and as such, did not violate the Petitioner's right to due process.

**C. THE CIRCUIT COURT HAD AUTHORITY TO ENTER THE ORDER OF MARCH 23, 2011 BECAUSE THE COURT HAS THE DUTY TO PREVENT THE UNAUTHORIZED PRACTICE OF LAW**

As argued above, the judiciary has the inherent power to control the practice of law and prevent the unauthorized practice wherever it is found to exist. Although the Petitioner, through its Agent, David Tabb, filed a Motion to Disqualify with this Court, that motion was denied as the Court did not find evidence to warrant the disqualification of the Honorable David Sanders. Although, the circuit court entered the order while the Motion to Disqualify was pending, because this Court found that no bias was found to exist and denied the motion, the Court's order dismissing the case should stand. It is reasonable to assume that had Judge Sanders waited to hear from the Court, he would have entered the same order as his order of March 13, 2011, which order prevents a layperson from engaging in the unauthorized practice of law. Furthermore, the Courts have a duty to prevent the unauthorized practice of law whenever it is apparent. The Circuit Court lawfully entered the order prohibiting such unauthorized practice.

**IV. CONCLUSION**

The Petitioner was clearly engaged in the unauthorized practice of law when he attempted to represent a corporation before the Jefferson County Circuit Court. Furthermore, this Court has ruled that a corporation may only appear in legal proceedings by a duly licensed attorney. Accordingly, the Circuit Court did not commit error when it prohibited the Petitioner from appearing, *pro se* to represent the corporation, Shenandoah Sales and Services, Inc.,

WHEREFORE, for the foregoing reasons, the Respondent, Angie Banks,  
Assessor of Jefferson County requests that this Court deny the relief sought in this appeal, and  
that this Honorable Court uphold the Order of the Circuit Court of Jefferson County.

Respectfully Submitted,

Angela Banks, Assessor  
Of Jefferson County

By Counsel:

A handwritten signature in cursive script, reading "Stephanie F. Grove", is written over a horizontal line.

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**Petitioner,**

**v.**

**Supreme Court Docket No. 11-0701**

**ANGIE BANKS, ASSESSOR  
OF JEFFERSON COUNTY**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Stephanie F. Grove, do hereby certify that on this 2<sup>nd</sup> day of September, 2011, I served a true copy of the foregoing BRIEF OF RESPONDENT upon the following counsel by first class United States Mail addressed as follows:

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