**FORMAL APPEAL OF THE INTERNAL REVENUE SERVICE EXAMINER'S RECLASSIFICATION OF CITY ATTORNEY OF HENDERSON, TEXAS, FROM CONTRACT WORKER TO EMPLOYEE**

The City of Henderson, Texas, hereby appeals to the Internal Revenue Service Appeals Office the Internal Revenue Service Findings concerning the reclassification of the City Attorney from Contract Worker to employee. The tax years involved are 2004 and 2005. The City of Henderson disagrees with the Examiner's reclassification of the City Attorney, who is in private practice and represents numerous clients, including a couple of cities as two of those clients, from independent contractor to employee.

Before beginning an examination of the reasons why the City disagrees with the Examiner's findings, one observation needs to be noted. It appears from reading everything that was written by the Examiner for the Internal Revenue Service and from a visit with her that her whole intent in this case was to try to find a way to reclassify the City Attorney as an employee rather than a contract worker. A fair reading of what has been written would show that it was not an objective attempt to determine whether or not the person performing the duties of City Attorney of this specific city was an employee or an independent contractor but rather trying to find any way possible to prove that he was an employee. This is not meant as an affront to the Examiner, but merely as an objective evaluation, which it is felt should be noted in considering this case on appeal.

## Factual Background of City Attorney Practice in Small Towns

### Description of Private Practice of Law

In order to properly evaluate whether the services rendered in this case and this specific situation are as an employee or an independent contractor, one needs to understand the nature of the practice of law and how many cities obtain the services of their City Attorneys. As a lawyer in private practice, one has numerous clients who have contracted with him (or as is sometimes said, "employ" him) to represent them in various and sundry matters, whether it be advising them, preparing documents for them, representing them in Court, or in some other manner that a lawyer performs services for his clients. David P. Brown, the attorney involved in this case, has been a lawyer in private practice for the past 24 years (35 years of practicing law) and is his own boss since he is self-employed. He began representing the City of Henderson as a lawyer who was then, and still is, in private practice, and has changed nothing about his practice or law firm other than adding the City of Henderson as one more of his clients. As is the case with many lawyers, since 1990 he has been in a partnership with another lawyer in which all fees earned by both lawyers are deposited into the partnership account (whether the checks are made out to the partnership or one of the lawyers, who is the partner who happens to be representing that client). Then all expenses of the law firm are paid out of those gross earnings and the net profits are divided between the partners at the end of each month. These two attorneys changed their partnership into a Professional Limited Liability Company, known as Minton & Brown, P.L.L.C., prior to the City of Henderson

asking Mr. Brown to represent it as a City Attorney. As stated above, nothing changed in the Professional Limited Liability Company other than it having added a new client whom Mr. Brown represented. During all of the period during which said lawyers had been in a partnership and then in a Professional Limited Liability Company, they have filed Federal Income Tax Partnership Returns, individually received Forms K-1 from the partnership, and paid taxes on their net income on their Individual Income Tax Returns, all in accordance with Federal Law.

**What Is a Retainer and What Is Its Significance**

Over the course of the practice of law together by Mr. Minton and Mr. Brown, as is the case with most lawyers in private practice and in law firms, they have had various clients who wanted to engage their services on a continuing basis so that those clients would know that Mr. Minton or Mr. Brown (whichever they retained) and their law firm would always be available for them and would not represent some other party adverse to them. In order to do this, these clients pay what is called a retainer on a monthly or annual basis. This is not an employment agreement but merely a reservation of services and expectation that such lawyer would perform routine and regular matters for that client without charging the client extra for those services because the retainer was adequate consideration for such services. For other additional services, these lawyers, as do other lawyers, would charge an additional fee on some basis such as an hourly basis. This is exactly what has been done by the City of Henderson because it cannot afford to hire a full-time person as City Attorney (and does not need such a person), cannot afford to provide office space or secretarial help for such a person, but wants to have someone available, and on-call, for all of its regular matters. That is what the contract spells out, so that each side will know what those regular matters are, and that anything above and beyond that, will be charged in addition to the retainer, on an hourly basis. In case it is not clear from what has been stated above, just because there is a retainer does not mean that the client can look to any lawyer in the firm for those services, because any contract for services is made with one of the lawyers in the firm, but all of the retainer and other fees from such representation are deposited in the firm bank account and reported on the Partnership Income Tax Return.

This arrangement is exactly what has been done by the City of Henderson with David Brown, as a representative of Minton & Brown, P.L.L.C. His retainer with the City of Henderson is stated as an annual cash payment (paid monthly), health insurance coverage for himself and his family (which health insurance policies always include term life insurance) with the proviso that the cost of such insurance for Mr. Brown and his family shall not exceed the cost that the City pays for such insurance for city employees, and the expense for annual attendance at the Texas City Attorney's Conference and Seminar. A portion of the insurance for his family is deducted monthly from his retainer. It should be noted that he does not receive his retainer on the same interval as City employees are paid, which is bi-weekly. The cash payment, part of the retainer could have been a higher amount, but it was decided in negotiations between Mr. Brown and the City Council that the City would pay a lower cash payment and he would receive the insurance and once-a-year seminar expense (as had been done with the previous City

Attorney) since all City Council members and the Mayor (who are not full time employees) are eligible for the same. The health club dues or fitness club that the Examiner refers to are merely a very small discount on dues at a workout room like is offered to about everybody in Henderson in one form or another to get them to workout at that place of business. None of the dues are paid by the City. It merely promotes wellness and is a far cry from a health or fitness club. This retainer is no different than any other retainer that he might have from a client whom he represents on a contract basis and not as an employee, but just includes some payments that are made in kind rather than in cash. It does not seem that this should make any difference. This is the way that lawyers have practiced law for years and years (in other words it's a standard of the industry) and does not seem to warrant a change at this time. This situation is entirely different from the situation where an attorney is housed in government offices, provided government secretaries, utilities are paid by the government, etc., and merely allowed to practice law on the side. In that situation, he would clearly be an employee of the government entity such as an Assistant District or County Attorney, who is allowed to practice law from his courthouse office when he is not performing the regular duties of his job. It should also be noted that Mr. Brown does not have all of the benefits provided to City employees. For one, he does not participate in the State of Texas Retirement System for Municipal Employees like all City employees because he is not an employee. This is unlike in-house lawyers such as Assistant County and District Attorneys who can participate in similar State of Texas retirement. Also, Mr. Brown is not provided vacation pay or sick pay. Contrary to what the examiner said, he does not have all of the benefits of an employee of the City of Henderson. It should also be pointed out that the City of Henderson does not consider Mr. Brown as an employee or he would have had a 3% pay raise on October 1, 2005. The City gave all City employees a 3% raise on that date, but there was never any thought of including that in Mr. Brown's retainer, because it is a retainer and he is not an employee. Any change in the retainer is a matter that is negotiated between Mr. Brown and the City Council on an irregular basis, and then a new contract prepared.

**Operation of Office for Private Practice of Law**

There are numerous expenses of a lawyer which must be paid for out of what he earns from his clients and are rightfully subtracted (as provided for by Federal Income Tax laws) from what he receives from his clients (such as the City of Henderson) for representing them, in determining taxable income. A lawyer in private practice, as Mr. Brown is, must pay for secretarial salaries, rental of his office space, for equipment rental and purchases (such as desks, chairs, bookcases, computers, file cabinets, law books and online legal services, fax machines, copiers, publications, paper, file folders, pens, envelopes, ledgers, etc.), for his legal dues to State and Federal Courts for practicing in such courts, for his advertising, for insurance (liability, property, and Worker's Compensation), for preparation of Partnership Income Tax Returns and other tax returns, for Social Security and Medicare taxes on employees, for unemployment insurance on employees, for postage, for printing and reproduction expenses, for repairs to property and equipment, for property taxes (to the city, school district, and county), for utilities, for fifteen hours of required Continuing Legal Education annually, etc. These expenses

all have to be taken out of all of the retainers and other fees (gross income) which are received by a law firm for it to operate. Minton & Brown, P.L.L.C., is no different and has all of these expenses, which represent a considerable expense which must be paid each month whether or not any fees are earned, especially with an office administrator, two secretaries, office rental, investment in equipment and furniture, and a legal library. The City of Henderson does not pay any of these expenses for Minton & Brown, P.L.L.C., but these expenses have to come out of the retainer and other fees which the City of Henderson pays for Mr. Brown's representation of the City as City Attorney, as well as out of all other fees and retainers Minton & Brown, P.L.L.C. receives from all of its clients. In proper accounting, these expenses must come out of all retainers and fees and not just some of them. These expenses and this relationship are entirely consistent with the practice of law and have been recognized by the Internal Revenue Service and approved for years and years. Why it is sought in this opinion to change a practice that has worked for years, which is recognized by the Internal Revenue Service, and in which the Federal Government has received all Federal Taxes rightfully assessed and paid, it is unknown. Perhaps it is lack of understanding how the legal business is conducted, which it is hoped this explanation clarifies.

**Double "Unfair" Taxation- "Boston Tea Party"**

As I hope can be seen, if the City is required to consider Mr. Brown as an employee and calculate taxes based upon the full amount of his retainer, he will be paying taxes twice, at the City and then when the partnership reports on income and expenses (net income) to him. This is not only double taxation but taxing him on expenses which the Federal Income Tax laws recognize are entirely deductible before calculating taxes because they are legitimate business expenses. Although it is stated in the Examiner's opinion that a "public office is not a trade or business," a law practice is a trade or business, and that is what should be looked at. Mr. Brown is engaged in the practice of law, which is a trade or business for Income Tax law purposes, and merely represents the City of Henderson as one of his clients. As such he is called City Attorney, the same as he might be called the attorney for 'such and such bank' or 'such and such corporation' but not be one of their employees. Not only would taxation of Mr. Brown at the City Hall, as well as at his law firm, be double taxation, but it would also be taxing him at the City Hall on the expenses which the Federal Income Tax laws recognize are entirely deductible before calculating taxes. As can be seen by looking at these expenses, it would be entirely impossible to apportion them out as to the amount that applies to each client. All retainers and fees (including those from the City) are, and have always been, reported to Minton & Brown, P.L.L.C., under its Federal Tax ID Number as it was always the intent that those fees should go into the law firm. Retainers and fees for legal services from any of the clients of this law firm are sometimes received made payable to the law firm, and sometimes to the individual lawyer, but always deposited into the law firm account, as is provided for by the agreement of the partners. That is why that Tax ID Number was provided to the City. All of the retainer and fees are reported, after the corrected Forms 1099 were prepared, and all taxes are properly paid, which is all that the Federal Income Tax laws require. If the City provided Mr. Brown an office, a secretary, and paid all of the other expenses enumerated above, as well as paying

for his retirement (instead of his having to purchase his own individual retirement accounts) and providing him with vacation and sick leave benefits, it could be understood that he would be classified as an employee, but the City doesn't do these things.

**City Attorney in Small Cities**

The "position" of City Attorney needs to also be understood. In larger cities, where there is enough workload, City Attorneys (and frequently Assistant City Attorneys) are hired to full time positions by the cities and given office space, secretarial staff, furniture, law library, supplies, etc. This is not the situation in Henderson which, like other small cities, just retains the services of the lawyer who is in private practice to handle City Attorney matters when the need arises and to have him reserved when he is needed. This situation in Henderson as like other towns within Rusk County, Texas, or within an approximately 40-mile radius, such as Overton, New London, Tatum, Mount Enterprise, Kilgore, Carthage, Jacksonville, Whitehouse, Troup and perhaps some others that do not readily come to mind. None of those towns exceed 12,000 people and some only have several hundred people. In half or more of those towns, no lawyer even has an office. So those towns have to look to other towns to find a lawyer to serve as City Attorney while continuing his private practice of law. Therefore, there is much competition in hiring an attorney, unlike what the Examiner said in her opinion about the City of Henderson not having any competition. In fact, when Mr. Brown was retained by the City of Henderson, there were two other attorneys interested in performing those services.

## Additional Arguments of Examiner

**Section 218 Agreement**

Let us now examine some of the legal matters relied upon by the Examiner and factual statements which she made. First, she attempts to make the City Attorney an employee because the City of Henderson entered into a Section 218 agreement with the Social Security Administration to cover all employees. It is not disputed that it covers all employees, but the fact that that agreement was entered into does not make someone who is not an employee, an employee, as is implied. It only says that all persons who are employees would be covered by that agreement. Since it is submitted that the City Attorney is not an employee, but an independent contractor, that agreement would not cover or affect monies paid to him.

**Health Insurance Enrollment Form**

She also seems to rely on the fact that the enrollment form for health, life, and dental insurance coverage with the insurance company shows the "employer" as "City of Henderson", the "employee" as "David Brown", and the "date of employment" as "10/01". That is merely a pre-printed form which the City used to get the names, dates, etc., to be able to enroll someone. The City of Henderson is a self insurer up to $40,000.00. That nomenclature has nothing to do with whether David Brown or the City

of Henderson considers him as an employee or in employment relationship, but had to be filled in to show who was subscribing for the insurance and who was to receive its benefits. The date of employment was merely for pre-existing condition reasons. She states that a person is eligible for employee coverage from the first day that he or she is a full time active employee. The "fulltime employee" provision only applies to the reinsurance contract which is for sickness expenses above $40,000.00. The self insurance has no such provision. In fact, there are others that are also eligible for coverage and are not full time, i.e., the City Council and Mayor. Furthermore, that is not even the insurance company or insurance policy that was in effect when David Brown was first covered under a City policy. This again appears to be merely an effort, as stated at the beginning of this opinion, to try to find some way to make David Brown an employee, rather than determine whether he is an independent contractor, or an employee.

**Employee Benefits**

The Examiner also states that "per the records examined David Brown enjoys all of the benefits of being an employee of the City of Henderson." This is not correct and apparently shows a failure to thoroughly examine all records in an effort to make him an employee. As stated above, David Brown is not eligible, and does not have, City retirement because he is not an employee. Also, he does not have sick leave or vacation benefits.

## DISCUSSION AND APPLICATION OF THE LAW AND ARGUMENT

### Public Official?

**Relevant Code and Regulation Sections**

The Examiner's opinion states in its conclusion that "we gave great weight to the Supreme Court and Appellate cases defining the term 'public official' and holding public officials to be employees." Apparently that is the crux of what she relies on in attempting to make David Brown an employee of the City of Henderson. She cites Internal Revenue Code Section 3401(c) defining an "employee" and Section 31.3401(c)-1(a) of the IRC Regulations in support of her position. She fails to note, however, that Subsection (b) of Section 31.3401(c)-1 provides that "in general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods of accomplishing the result, he is not an employee." The City certainly does not have any control over the "means and methods" used by David Brown in his law firm. He entirely controls that as well as when and where he will work on problems of the City. Furthermore, Subsection (c) of that Section provides that "generally…lawyers…and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees."

Then in discussing FICA taxes, the Examiner relies on Internal Revenue Code Section 3121(d). Again she relies on a Subsection of that Section which makes an

individual who performs services that are included under a Section 218 Agreement as subject to FICA tax withholding. Again, one must be an employee before they are subject to that agreement. Since the City Attorney is not an employee, he would not fall under that agreement. It must first be proven that he is an employee before that agreement would apply to him. That proof has not been made but only assumed. The Examiner is apparently saying that because all employees are covered under a Section 218 Agreement, then the City Attorney must be an employee. As to the common law rules, IRC Regulation Section 31.3121(d)-1(c)(2) states that "in general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as…lawyers…engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." This is exactly the situation which David Brown is in as shown herein above by the description of his law practice and the fact that he operates in the trade, business, or profession of Minton & Brown, P.L.L.C., where all income (such as this retainer and fees from the City of Henderson) are properly accounted for as are all expenses and all taxes properly paid. The City of Henderson does not in any manner direct the means or methods of David Brown accomplishing his work, does not determine when he will work on each client's work and how he will do it and at what time, and, in his own law firm, he and Mr. Minton set their own holidays, vacation, etc. He engages in the pursuit of an independent profession and merely has the City of Henderson as one of his clients who chooses to call him "City Attorney".

**Case Law**

Again, as stated above, the Examiner relies very heavily on trying to make David Brown, as City Attorney, an employee of the City of Henderson by attempting to prove that he is a "public official." She cites three cases in quoting verbatim from Letter Ruling 200146006. Lets look at what those cases really say when they are read and examined. The case of Buckley v. Valeo 424 U.S. 1 (1975), is a case challenging the Constitutionality of the Federal Election Campaign Act and is not about distinguishing between an employee and an independent contractor. Where it does talk about officers, it is talking about officers of the United States. The matters cited in that case have nothing to do with what is being considered here, but even if it did, the City Attorney does not administer or enforce any public law, but merely offers advice, prepares instruments and appears in court for a client.

The case of Metcalf and Eddy v. Mitchell, 269 U.S. 514 (1926), dealt with a situation in the period of time when there were legal questions as to whether the Federal Government could impose an Income Tax on income received from a state. Although it is a case dealing with a different question and period of time, it does support the position that the City Attorney of Henderson is an independent contractor. In the Metcalf case, Metcalf and Eddy were consulting engineers who, either individually or as partners, were "professionally employed" to advise states or subdivisions of states with reference to

proposed water supply and sewage disposal systems. The fees which they received for performing those services were paid over to the firm (as is the case with David Brown and his law firm) and became a part of its gross income. The Supreme Court ruled that they did not occupy any official position because of these duties. It stated that they took no oath of office, they were free to accept any other concurrent employment, and their duties were prescribed by their contracts. Those factors are entirely consistent with the City of Henderson and his retainer as City Attorney. The Court went on to rule that the facts did not establish Metcalf or Eddy as being "employees" within the meaning of the statute, but that they were rather independent contractors. It stated that "in each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor" (page 521). That is certainly the case with the City Attorney of Henderson for he is called upon to advise the City and tell it when something that it might want to do is illegal and recommend against. It is his job to merely advise it and try to keep it out of trouble, as is the case with any other client that he might represent. He is not controlled by it in how he advises it or how he represents it. Nor does he administer any part of City Government. He is merely a person whom the City contracts with to provide them with independent advise on the law, to prepare documents in a way that he knows how to as a lawyer, and use his own knowledge and skills that he learned long before becoming City Attorney to represent the City of Henderson.

The other case that the Examiner relied on was Pope v. Commissioner 138 F.2d 1006 (6th Cir. 1943). That case also dealt with the same question as the Metcalf case as to whether or not net monies paid by a state were subject to Federal Income taxation. The case turned on whether or not his appointment by the governor caused him to be a public official. That case was different from the present situation because the act set out the manner in which an investigation should be conducted, gave the investigator authority to appoint assistants and aides, provided that he should take an oath, authorized him to issue subpoenas for witnesses and to administer oaths, to compel the attendance of witnesses, and to issue attachments for witnesses, and also to make appointments of Sergeant-At-Arms. The investigator opened a "government" office and employed the necessary assistants as provided for under the Act. During this period of time, the investigator (an attorney) maintained a separate and private law office and completed unfinished cases, as legal ethics require, but took no new ones until after his contract with the state expired. The Court then enunciated the principles which are found in the Examiner's opinion and found that in that situation, the investigator was a public officer as differentiated from the Metcalf case which it discussed. The Court stated as follows:

> "The case at bar is to be differentiated from those precedents where one possessing professional skill is employed (underlining by author) by the Government or a subdivision…and which leave the person thus employed to devote a part of his time to the practice of his profession. In this group the principal of independent contractor is controlling."

The Court then refers to a situation similar to that of David Brown where it states that a civil engineer employed by several cities to supervise from time to time particular work was an independent contractor. This is exactly like the situation with David Brown where he has more than one City as a client and does work for each from time to time, when needed, as well as working for his other clients when they need him. It might be pointed out that, if a City Attorney was a public official in these situations like Henderson, then those who are in private practice and represent more than one City as its City Attorney would be in violation of Texas Constitution Article XVI, Section 40, which forbids dual office holding of public officials. There is no such ruling since representing more than one city while a lawyer is in private practice is entirely permissible and does not make him a public official.

As one can see from a careful examination of the cases and regulations relied on by the Examiner, the situation which the City Attorney of Henderson is in is not a public official as defined by the law and is not an employee, but an independent contractor. Even if he were a public official, Letter Ruling 200146006 states in footnote number 1 in interpreting Section 1402(c)(1) of the Internal Revenue Code: "These provisions do not state that every public official is an employee, but only that a public official is not self-employed.

**Section 530 Exceptions**

The Examiner's opinion then discusses Section 530 of the Revenue Act of 1978 and states that the only argument available to the City to prove that the City Attorney is an independent contractor would be industry practice or reasonable basis, and then concludes without any discussion of the facts that the City is not entitled to relief under Section 530. The facts as presented above show that it has been a long standing practice for many small cities to merely engage the services of an attorney in private practice who continues his practice in the same way and only treats the City as a client. This is the only way that small towns and cities can afford to have a City Attorney that they can readily look to for legal advice and representation. This Examiner is trying to change a practice which has been accepted for years and years.

She then goes on to conclude that the City Attorney is a public official because an officer administers and enforces the public law. The City Attorney has no such duties as stated above. She then makes some broad statements that the City Attorney of Henderson fulfils most of the conditions set forth in Metcalf and Pope by merely reciting some conclusions on several of the points; however, as shown above, the Metcalf case supports the argument of the City on the facts that the City Attorney is an independent contractor and the Pope case is easily differentiated on the facts. Therefore, we do not see how it can be concluded that the City Attorney is a public official. Anyway, the IRS Letter Opinion referenced above states that all public officials are not necessarily employees.

The Examiner then again makes a conclusion that the City Attorney performs functions of a public official and therefore is not a trade or business; however, Minton & Brown, P.L.L.C. and the attorneys in such firm are a trade or business and that is what is central in the issue. In fact, in Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987), the Court stated that, in applying the United States v. Silk factors in determining whether or not one is an employee or an independent contractor, "Courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry…" (page 1054).

## Common Law Rules

### Behavioral Control

The Examiner then goes to Internal Revenue Section 3121(d)(2) and says the City is an employee under common law rules, but fails to refer to the regulations under such section where it clearly states that (as quoted above) "individuals such as…lawyers…are independent contractors and not employees." Then she reaches the conclusion that the City and the City Council have the right to control the way in which the City Attorney performs his duties under the law and does not operate with the freedom of control characteristic of an independent contractor because the City Charter provides that the City Council shall appoint him, he shall be paid, he may be removed by the City Council, and he represents the City in all legal matters. She also cites the employment contract with the City which states that he shall serve at the pleasure of the City Council and lists certain routine tasks which he shall do without charging additional fees above the retainer. Then, she jumps to the conclusion that the Council has the right to control his behavior because of these items. Those things which she lists have nothing to do with behavior, but merely state how the City engages his services and what he has contracted as an independent contractor to do for the City. This has nothing to do with controlling and directing the City Attorney. This does not show that the City Council can control the results to be accomplished, much less the details and means by which they're accomplished, which is necessary to establish the employee-employer relationship. This is merely the same way that anybody engages an attorney's services as a client when he is in private practice. This is much like a corporation would engages his services as an outside counsel. The only thing that the City can do if it does not like what the City Attorney is doing is engage the services of another "City" Attorney. That is not control of how one performs the services of City Attorney, but merely what is meant by "serving at their pleasure." Nobody from the City supervises the City Attorney in any way nor has any right to come into his office and law firm and determine the details and means by which results are accomplished. David Brown has in fact at times told the City that they should not do something because it could be a violation of the law and it might get sued, but it is up to the City Council whether to follow his advice. As stated above, the City does not have any right to direct or control how the City Attorney performs these tasks or when he works for each client, including the City. That is strictly a matter that is determined by David Brown in his private law practice. She states that the City Attorney is constrained by the power of law. This applies to any attorney or any professional who is regulated by the State, as are attorneys. This does not make the City Attorney a public

official. She stated that the City Attorney represents himself to the public as an agent of the City. This is not correct. As an example, the City Attorney does not use the City stationery nor is his name listed anywhere on City stationery. He uses his law firm business cards only. When he corresponds on behalf of the City, he uses the stationery with the letterhead of his firm, places firm postage on the letter, and uses a return address at the law firm's post office box or street address, which is nowhere near the City Hall. We submit that there is no sufficient evidence to establish that the City has any right to exercise enough behavioral control over the City Attorney to create an employer-employee relationship.

**Financial Control**

As the Examiner states, David Brown has a considerable amount of financial independence. He has a genuine risk of profit or loss. The retainer which he receives from the City of Henderson is certainly not enough to give him any possible measure of financial independence. If he lost a considerable number of his clients and could not replace them, there would certainly be a very strong potential for a loss, especially with the expenses of the law firm as enumerated herein above. He could lose the City of Henderson or any of his other numerous clients that he is contracted to provide services for at any time. This would be a severe blow and could result in a loss. There is no assurance at any time of keeping the City of Henderson or any of his other clients since they could cease to use his services at any time. The Examiner stated that the City could be held liable for the City Attorney's malfeasance, but David Brown and the law firm have their own professional liability insurance.

As one additional matter, not mentioned by the Examiner, the fact that the contract with the City was signed by only one of the members of Minton & Brown, P.L.L.C., should have no significance. All representation contracts which Minton & Brown has with any of its clients are only signed by one of the attorneys in the law firm because each attorney has the power to bind the law firm. That is merely what was done with this contract with the City, and he signed the contract because he is a member of the law firm whom the City would look to for the provision of services when needed.

## Conclusion

Let me revisit the issue that is central to this whole matter and should be of great weight in the determination of whether or not this City Attorney is an employee or an independent contractor. If it is determined that he is an employee, he will have to pay Income Taxes twice which no citizen is required to do. First, Income Taxes and FICA taxes will be deducted on the gross amount paid by the City for his services as City Attorney. Then after it has been deposited in the law firm bank account to help pay for the overhead expenses of the firm, he will have to pay on the net amount when he receives his Form K-1 from the partnership. In fact, not only will he have to pay on his income twice, but he will have to pay Income Taxes on the expenses of his business which is not required by law. Because he has so many clients, it would be impossible to apportion these numerous expenses out to each client and their respective work. He

should not be required to pay double plus taxes since the law does not require that, and no other citizen is required to bear such liability. All taxes are being properly paid now, by virtue of the amended Forms 1099.

Therefore, we request that you properly find that the retainer and other fees paid for serving as City Attorney of Henderson be considered as payment to an independent contractor and reported on Forms 1099. Both the City of Henderson and David P. Brown are entirely in agreement on this request.

**Publication 15-A**

In summing up why it should be found in this situation that David Brown, as a member of the law firm of Minton & Brown, P.L.L.C., who has the City of Henderson as a client, and as such serves as City Attorney, should be found to be in an independent contractor relationship with the City, helpful guidance can be found in Internal Revenue Service Publication 15-A (Rev. January 2006), entitled Employer's Supplemental Tax Guide, wherein Independent Contractors and employees are distinguished. It states that "people such as lawyers…who follow an independent trade, business, or profession in which they offer their services to the public, are generally not employees," (page 4). As has previously been discussed, it states that the general rule is that an individual is an independent contractor if the person for whom the services are performed has the right to control or direct only the result of the work and not the means and methods of accomplishing that result. In discussing common-law employees, it states that anyone who performs services is an employee if one has the right to control "what will be done and how it will be done." It states that the "right to control means the "**details**" of how the services are performed. There is no way that the City controls the details of how David Brown performs his services. He does not work at the City Hall, does not have a supervisor, and as a professional, controls his own details.

**Type of Relationship**

Certain common-law rules are discussed as previously referenced in this opinion. It is stated that "in any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered." It states that facts that provide evidence of the degree of control and independence consist of three categories: behavioral control, financial control, and the type of relationship of the parties. As to the type of relationship of the parties, it mentions four factors: written contracts, employee-type benefits, permanency of the relationship, and extent to which services performed by the worker are a key aspect of the regular business of the company. There is a contract which states that the City is a client of David Brown. The word employment is used, but, as stated above, it is not uncommon for a client to say that he "employs" an attorney when he really is not that attorney's employer, since he is merely one of the clients of the attorney and the attorney is working in private practice and paying the operating expenses of his own business of the practice of law. As stated above, there are some employment-type benefits which are a part of the contract, but there are just as many employee-type benefits provided by the City that are

not provided to David Brown. The ones provided to David Brown are merely part of his retainer, rather than a higher cash figure being paid to him for the retainer. Although the contract is not for just a specific project, there are many days when David Brown does not have any contact from the City or with the City and does not work on any City matters. Most of his work on City matters is only done when a specific problem is referred to him. He is working for others of his numerous clients most of the time. Certainly, the practice of law is not the key aspect of the regular business of the City, for its regular business is governing the City and providing services to the citizens.

**Financial Control**

As to financial control, the matters which are looked at to determine whether he is an employee or an independent contractor are the extent to which the worker has unreimbursed business expenses, the extent of the worker's investment, the extent to which the worker makes his or her services available to the relevant market, and how the business pays the worker. David Brown has to pay for all of his business expenses as is stated above through Minton & Brown, P.L.L.C., such as hiring all of its personnel, withholding and paying the proper withholding and FICA taxes to the Federal Government, providing office space, providing furniture, etc. As stated above, these are fixed ongoing costs incurred regardless of whether work is currently being performed. The investment of Mr. Brown and Mr. Minton in the facilities for their law firm is considerable. Furthermore, he is free to offer his services to the relevant market and does so as is evidenced by his numerous clients, besides the City of Henderson. The retainer which he receives from the City plus any additional hourly fees are the traditional way in which attorneys are engaged by clients who want to keep them engaged on a continuing basis, but is not one of their employees. His retainer is not a matter that is set by ordinance or law. Furthermore, the contract between the City of Henderson and David Brown engaging his services to represent the City in legal matters was a matter of negotiation between him and the City Council. It is a matter that is subject to renegotiation from time-to-time whenever the City Council and David Brown feel the need to renegotiate. This is reflected by the fact that Mr. Brown's first contract was negotiated in 2001. It was renegotiated in 2003. Mr. Brown and the City Council have talked about negotiating it again but decided to wait until after this appeal has been disposed of.

**Behavioral Control**

As to behavioral control, what is determinative is whether a business gives the worker instructions on when, where, and how to work, and any training that the business gives to the worker. The City gave no training to David Brown as he was well-trained and experienced before taking on the City of Henderson as a client. Some examples of types of instructions about how to do work are when or where to do the work, what tools or equipment to use, what workers to hire, where to purchase supplies and services, what work must be performed by a specific individual, and what order of sequence to follow. None of those apply in this situation. Nobody from the City tells David Brown when and where to do the work because they do not provide a place for him to work and he chooses

in what order to put work from each of his clients based upon on relative priorities. The City does not tell him what tools or equipment to use because he provides his own. The City does not tell him who to hire as his workers. The City does not tell him where to purchase supplies or services as that is done entirely by the law firm. The City does not tell him what work must be performed by a specific individual, he makes that determination. The City certainly does not tell him in what order or sequence to follow, as he makes that determination as stated above.

From an examination of all of these factors and as stated elsewhere in the opinion, these factors seem to weigh much more heavily in favor of finding David Brown's relationship with the City of Henderson being that of an independent contractor rather than an employee. He is in the private practice of law and not a City employee. The City merely has him on retainer, as is the situation with other clients, which retainer is paid both in cash and in kind, in addition to paying him by the hour for additional work. This is a long-standing recognized practice of a segment of the industry (law practice) in which he is engaged. He is not a public official in the manner defined in the Code, Regulations, or case law, and even if so, all public officials are not employees. There is certainly not the control by the City required by common law. To consider otherwise than an independent contractor would result in double taxation.

## Exhibits Attached

1. Contract between the City of Henderson and David P. Brown, at time of Internal Revenue Service Audit.

2. City of Henderson Charter provisions relative to City Attorney

3. Opinion of Internal Revenue Service Examiner

4. Letter "Opinion" from Internal Revenue Service Appeals Officer's Manager "overruling" Opinion of Examiner

5. Letter from Appeals Officer who heard the Appeal and orally announced that the City of Henderson could continue to treat its City Attorney as an "independent contractor". He orally stated, at the conclusion of the hearing in June 2007, that he would draft an Opinion for approval which the City should receive in several weeks, but these two letters are what the City has received.

6. Suggested contract between City and its City Attorney who is in private practice to help preserve independent contractor status.