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Legal Ethics—Fee Splitting

P, an attorney, together, with *A*, an accountant, entered into a contract with *D* to perform services involving a federal income tax matter. The agreement provided that *P* and *A* were to receive a contingent fee of one-third of the difference between the amount of the deficiency claim and that amount ultimately determined to be due by the Internal Revenue Service. After the final settlement, *D* refused to honor the agreement and *P* sued both in his own right and as assignee of *A*'s claim. *P* alleged two causes of action, one upon the agreement and the other upon quantum meruit. The court below dismissed the cause of action on the retainer agreement, holding that legal services by a layman had been contemplated and that the agreement constituted illegal fee splitting between a lawyer and a layman. *Held*, reversed. The court regarded the agreement as not on its face contemplating the rendition of legal services by a layman. So long as *A* was to perform, and did perform, services of a non-legal nature, and the legal matters were handled solely by *P*, the agreement was not rendered invalid by the fact that the retainer was effected by a single agreement or that it specified compensation in a lump sum contingency percentage. *Blumenberg v. Neubecker*, 12 N.Y.2d 456, 191 N.E.2d 269 (1963).

Fee splitting and related practices have traditionally been condemned not only in the legal profession, but in other professions as well. *Lieberman v. Connecticut Bd. of Examiners*, 130 Conn. 344, 34 A.2d 213 (1943). The dissenting opinion in the principal case pointed to specific canons of the canons of professional ethics directed toward undesirable practices such as were asserted to have existed in the principal case. For example, Canon 33 prohibits formation of a partnership between an attorney and a layman, when any part of the partnership's work involves the practice of law. Canon 34 inhibits splitting of fees for legal services by an attorney with anyone except another attorney, a practice permitted only when based on division of services and responsibility. Canon 35 singles out as objectionable the intervention of any lay agency between a lawyer and his client. Under Canon 47 a lawyer may not allow his professional services or name to aid the unauthorized practice of law.

Many cases involving the division of fees concern actions brought against the attorney by the party with whom the fee was to have been split, as distinguished from the principal case in which the client was sued on the agreement. In *Marcussen v. Greenwood*, 54 Wash.2d

136, 338 P.2d 133 (1959), *D* attorney employed *P* to perform services for him and for other persons as co-counsel in a case involving federal income tax liability. *P* brought an action against *D* to recover for legal services rendered, and *D* defended on several grounds, one of which was that *P* could not recover for services rendered in the tax court and before the Treasury Department because *P* was not licensed to practice before these bodies. The court held that *D* was liable to *P*, regardless of whether *P* was licensed to perform the services independently. The court further stated that the defense of lack of license in a suit for legal services was available only to the client who was being sued, and not to the lawyer being sued by his assistant.

Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 (1933), factually approaches the principal case a little more closely. *P* sued to recover compensation for services rendered by him as law clerk in the office of an attorney who had since died. One defense raised by *D* was that the services were such as only a duly authorized attorney could render, and that *P* was not such an attorney. *P* argued that the agreement did not, upon its face, contemplate any acts which were illegal. The court found that the services rendered by *P* included acts involving "practice of law" and that this was available to the client as a defense, although it would not have been available as a defense to another attorney who was sued for compensation for services rendered. It should be pointed out that these situations are to be distinguished from the principal case in that in these cases *Ps'* services did include some unauthorized practice of law.

Cain v. Burns, 131 Cal. App. 2d 439, 280 P.2d 888 (1955), illustrates a somewhat typical fee splitting situation. *D* attorney and *P*, an investigator, entered into an oral contract, part of which provided that *P* was to receive a fixed percentage of the net attorney's fees received by *D* in cases in which *P* had performed services. *P* sued to recover from *D* the specified share of the fees. The court held that the contract was illegal on its face as violative of the statute prohibiting fee splitting. The practice was held to involve fee splitting, even though *D* was to pay *P*, not directly out of the amounts received from clients, but rather out of *D's* "general fund." Because *P* was working on a percentage basis, irrespective of the type or difficulty of the work done or time spent, the device of paying *D* out of a fund was regarded as a mere subterfuge. However, the court held that *D* could not raise the defense of illegality and that *P* was

entitled to recover on the contract. The court pointed out that because the contract was intended only to prevent the attorney himself from engaging in fee splitting, the parties were not in *pari delicto*.

But a different decision was reached in *S. Stern, Henry & Co. v. McDermott*, 236 N.Y.S.2d 778 (1962). *P*, a customhouse broker, and *D*, an attorney, entered into an agreement whereby *D* was to divide equally with *P* his contingent fee for services to be rendered to *A*, an importer. Such arrangements were shown to be a standard practice in the import business and to have been employed, apparently without major objection, for many years. *P* sued to recover for amounts supposedly owing under the agreement, alleging that it had fulfilled its part of the contract by referring the importer to *D*. The court held that under the newly adopted New York Penal Law only an attorney could recover on an agreement to split fees. The court found also that the agreement violated Canons 34 and 35 of the *Canons of Professional Ethics*. Significant also was *P*'s contention that the agreement was but a method of compensating *P* for services it had rendered to *A*, to which the court replied that compensation for services rendered to *A* should come from *A*, and not from *D*. In the principal case, it should be noted that the layman's compensation did come from the client, and not from the attorney.

A case involving an even more patent violation of a provision against fee splitting is *Van Bergh v. Simons*, 286 F.2d 325 (2d. Cir. 1961), where an attorney had agreed to pay a layman twenty five per cent of all fees received from a client procured by the layman. In holding the contract void and unenforceable as a violation of the laws and public policy of the state, the court held that, even if the parties contemplated that the layman was to contribute consultative services, which were in no way separable, the agreement would still be void.

In OPINION 614, OPINIONS ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK p. 350-51 (1942), circumstances were presented which appear to be very nearly like those existing in the principal case. An attorney and an accountant were independently retained by a client to work on a tax case. The client was informed of the basis of the fee in advance, and the agreement was set to cover the fees of both attorney and accountant. When the fee became payable, they sent a joint bill and divided the total fees between them in proportion to the value

of their respective services. The agreement was made and carried out in good faith. The opinion concluded that Canons 12, 33, 34, 35, and 47 of the *Canons of Professional Ethics* had been violated by the agreement. However, it appears that here the agreement was brought about by the accountant's having solicited both for himself and for the attorney and that it contemplated the performance of legal services by the accountant. These latter two factors would distinguish this agreement from that found in the principal case.

It seems clear that a lawyer may employ a layman on any agreed basis to supply advice or assistance to the lawyer, so long as the service does not constitute the practice of law by the layman. 5 AM. JUR. *Attorneys at Law* § 156 (1936); DRINKER, *LEGAL ETHICS* 179 (1954).

In 3 MARTINDALE-HUBBELL, *LAW DIRECTORY* 139A (1963), will be found the Statement of Principles with Respect to the Practice of Law Formulated by Representatives of the American Bar Association and Various Business and Professional Groups. This includes the statement that it is in the best public interest that lawyers and certified public accountants co-operate in federal income tax matters, and that a lawyer, when faced with accounting aspects of an income tax case, should advise his client to enlist the assistance of a certified public accountant.

Among the rules governing the practice of attorneys before the Internal Revenue Service, it is provided that an attorney shall not enter into a wholly contingent fee arrangement with clients, unless it is shown that the client will otherwise not be able to pay a reasonable fee. Treas. Cir. 230 § 10.37(b) (1958).

No cases squarely in point with the principal case have been discovered, although, as has been pointed out, the practice of fee splitting has been encountered in many different forms. There are several factors present in the principal case which would seem to avoid the taint of "fee splitting" and to justify the result reached by the court. The agreement, as entered into by the parties, was approached and executed in good faith, and the client was apparently completely aware of the nature of the agreement and his liability thereunder. There was not the usual splitting of fees which has traditionally been condemned, since each party was separately provided for, and the total fee did not come into the attorney's hands to be split with the layman. A fatal flaw was avoided by the fact

that the agreement did not on its face contemplate the rendition of legal services by the layman, and by the fact that no legal services were found to have been rendered by him. The agreement was held valid despite the fact that their compensation was specified in a lump sum percentage, because the accountant's portion was for accounting services rendered. A compelling consideration was the apparent effectiveness of the attorney-accountant relationship in the tax field. The court regarded the arrangement as nearly "ideal."

John Ralph Lukens

Taxation—Transfer for Public, Religious, and Charitable Uses

P, the administrator of the deceased's estate, filed for a refund of estate taxes. The deceased died intestate and without heirs under the Pennsylvania laws of descent. *P* contends that the escheating of property to the state is a transfer by operation of law and that the estate is entitled to a charitable deduction under INT. REV. CODE of 1954, § 2055. The district court denied the deduction. *P* appealed. *Held*, affirmed. The descent of property to a state under its intestacy laws is not a "transfer" within the meaning of section 2055. There was absent here the ingredient of a testamentary disposition of the property. A deduction may be allowed only for "transfers" to public, charitable, or religious organizations if the transfer is made by decedent during his lifetime or by will. *Senft v. United States*, 319 F.2d 642 (3d Cir. 1963).

The instant case raises the question as to what constitutes a transfer under section 2055. Although this is a case of first impression, the courts in other factual situations have laid down definite rules for the determination of a charitable deduction. These cases must be consulted to determine the requisites of a transfer.

The Internal Revenue Code of 1954 provides for a deduction from the gross estate for tax purposes for all bequests, legacies, or transfers for public, religious, or charitable uses. INT. REV. CODE of 1954, § 2055(a). The beginning of section 2055 was the Revenue Act of 1918, in which the word "gift" was used instead of the word "transfer." However, in the Revenue Act of 1921, the word "gift" was changed to "transfer." The purpose of the change was to make it clear that gifts made during the decedent's lifetime could not be