Splitting Fee With a Nonlawyer

Avoiding Liability

By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.

Rule 5.4 of the Pennsylvania Rules of Professional Conduct provides that, subject to certain exceptions, "[a] lawyer or law firm shall not share legal fees with a nonlawyer." But is a fee splitting agreement between and lawyer and a nonlawyer legally enforceable, notwithstanding that it violates the Rules of Professional Conduct? The Superior Court had visited this issue back in 2002 in *Wishnefsky v. Riley & Fanelli, P.C.,* 799 A.2d 827 (PA Super. 2002), in which the court held that an unethical fee sharing agreement between a lawyer and nonlawyer is unenforceable, regardless of the circumstances, because it violates public policy. Recently, the Pennsylvania Supreme Court visited this issue and, although the majority of the justices could not agree on the reasoning, a majority did implicitly reject the reasoning in *Wishnefsky* and held that the circumstances of each individual case determine the enforceability of such a fee agreement.

In *SCF Consulting, LLC v. Barrack, Rodos & Bacine,* 2017 WL 6492686, ---A.3d---(Pa. 2017), plaintiff alleged that "it had maintained a longstanding oral consulting agreement with [defendant] law firm, which the firm purportedly breached." Plaintiff contended that it was to receive a percentage of the fee generated by the defendant law firm in return for plaintiff's successful "solicitation of institutional investors to participate in securities class actions" or in which it "provided substantial work." Defendant denied the existence of such an agreement. But moreover, it contended that such an agreement is unenforceable as contrary to public policy because such an agreement violates Rule 5.4. In response, plaintiff contended that such an agreement, per Rule 5.4(a)(3), "qualified as an express exception to the anti-fee-splitting rule for an employee 'compensation' or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." In the alternative, plaintiff characterized the defense as an "audacious defense, which, if credited, would perversely reward the law firm by allowing it to profit from its own unethical conduct" resulting in "a windfall."

The law firm filed preliminary objections to the complaint, contesting the existence of such an agreement and questioning its unenforceability as a matter of law, should the court find that it does exist. The trial court granted the law firm's preliminary objections and dismissed the complaint. In so doing, the trial court accepted the argument that the fee agreement, if one existed, was unenforceable as a matter of law and rejected plaintiff's contention that the Rule 5.4(a)(3) exception applies.

The Superior Court affirmed on the limited basis that "the Rule 5.4(a) prohibition against fee-splitting applied on its terms and there was no applicable exception." In so doing, the Superior Court declined to consider whether a theory of unjust enrichment may apply, contending that appellant "did not pursue that theory in its appellate brief."

The Supreme Court granted plaintiff's petition for allowance of appeal "to consider whether, or under what circumstances, the professional conduct rules may be invoked as a defense by a law firm breaching its own ethical obligations by entering into an impermissible fee-splitting arrangement."

A majority of four justices agreed that the trial court should not have dismissed the complaint, but they were not in complete agreement as to why not. In the opinion announcing the judgment of the court, written by Chief Justice Saylor and joined in by Justice Dougherty, although he also wrote a concurring opinion, noted that a majority of jurisdictions refuse to enforce such fee-splitting agreements no matter what the circumstances may be. Chief Justice Saylor also noted that "a minority of courts decline to accord substantive effect to such rules, at least where to do so would result in a windfall to offending attorneys." Chief Justice Saylor also considered the amicus brief submitted by the PBA that "[i]t is unreasonable for our courts to be placed in a circumstance where they may be perceived as aiding in attorney misconduct." Chief Justice Saylor also considered the PBA's view that this approach should be tempered "by permitting quasi-contractual remedies, recovery under the theory of unjust enrichment or a disgorgement practice implemented through the Disciplinary Board" pursuant to Pa.R.D.E. 204(b).

Notwithstanding, these justices found that a breach of contract action would not be "per se barred," but the conduct of the nonlawyer must be considered. If he is at equal fault, such as he knew that such an agreement was contrary to the conduct rules, then the agreement would be unenforceable. But, for example, if he did not know that such an agreement was contrary to the conduct rules, then the agreement could be enforceable. These two justices refused to "interpose" the Rules of Professional Conduct "into substantive law when nonregulated parties bear no (or substantially lesser) responsibility relative to the material ethical violations."

Justice Dougherty wrote a concurring opinion to "articulate" what he considers "an additional danger of a bright-line per se rule" that all such fee-splitting agreements not subject to one of the exceptions under the rule should be deemed unenforceable. His concern with a bright-line per se rule is that it "might have the effect of emboldening unscrupulous attorneys — who are often in a superior negotiating posture as compared with their nonattorney contracting counterparts — to enter into illusory fee-splitting agreements with full knowledge the agreement may never be enforced." In his view, "allowing a case-by-case determination of the validity of a given fee-splitting agreement via a breach of contract action will not undermine or conflict with any additional potential consequences an attorney may face in disciplinary proceedings for running afoul of the Rules of Professional Conduct."

Justice Baer wrote a concurring and dissenting opinion, joined in by Justice Todd. In their view, the Rules of Professional Conduct should not be applied as substantive law as a means to render fee-splitting agreements as unenforceable. In their view, the court should refer an offending lawyer to the Disciplinary Board for prosecution. Notwithstanding, they would render such fee agreements as enforceable based upon the premise that the defendant lawyer should be deemed "estopped from invoking their own ethical violations as a defense to payment under fee-sharing contracts entered into in violation of RPC 5.4."

Justice Wecht, joined by Justice Donohue, dissented. They viewed the opinion announcing the judgment of the court as promoting or at least allowing "idiosyncratic, inconsistent and unduly subjective outcomes" in disputes involving fee splitting with non-lawyers. Instead, their view is to apply a bright-line rule disallowing fee-splitting agreements as unenforceable, "but allowing nonlawyers to seek judicial relief in equity." By this approach, a claim would lie where the nonlawyer entered into the agreement with "clean hands," and he could show "unjust enrichment, unclean hands, or other elements" with respect to the lawyer's conduct to invoke an equitable remedy.

continued on page 7

Court Summaries *continued from page 6*

REAL ESTATE TAXATION

COMMONWEALTH COURT

UPSET SALE — LACK OF TIMELY RULE 1925(B) STATEMENT — DELAY IN TRANSCRIPT — FAILURE TO SEEK ENLARGEMENT OF TIME PERIOD — WAIVER — opportunity for owner to pay/cure required — offer to make payment before sale — order setting aside sale affirmed

Jenkins v. Fayette Cty. Tax Cl. Bur., No. 71 C.D. 2017 (Jan. 3, 2018) — When untimely 1925(B) statement filed, party waived all issues on appeal, though party alleged lack of transcript provided good reason for failing to file but failed to request enlargement of time period.

STANDING — LESSEE — marina — private use — limited public access — gated — for profit — membership only — no public purpose — exemption — Third Class City Port Authority Act — 55 P.S. 571 *et seq.* — substantial interest — determination of exempt portions required — summary judgment for county reversed in part

Bay Harbor Marina v. Erie Cty. Bd. of Assess. App., No. 1377 C.D. 2016 (Jan. 10, 2018) — Lessees at private marina have substantial interest in outcome of appeal seeking tax immunity since leases required payment of taxes by lessee. Parcels used for recreational marina are not immune from taxation under Third Class City Port Authority Act. No public purpose found in gated, for profit, membership restricted to recreational marina that leases boat slips.

RIGHT-TO-KNOW LAW

COMMONWEALTH COURT

ATTORNEY-WORK-PRODUCT DOCTRINE — email and correspondence — amicus status — nonparty — some correspondence drafted by counsel for third party — lack of notice — waiver — common-interest doctrine — exclusive regulatory authority — Article V, Section 10(c) — determination vacated — matter remanded

P.U.C. v. Sunrise Energy, No. 503 C.D. 2017 (Jan. 12, 2018) — Order providing access to information under RTKL vacated when correspondence, consisting of emails and correspondence between attorneys of commission and private entity, showed private entity attorney was not notified of disclosure hence had not participated in proceedings, especially when some of correspondence constituted work product of that private entity.

SEARCH AND SEIZURE

SUPERIOR COURT

WARRANTLESS SEARCH — COMPUTER TAKEN FOR SERVICE — images discovered by computer technician — Article I, Section 8 — abandonment of privacy interests — Sodomsky case controls — judgment of sentence affirmed

Com. v. Shaffer, 2017 PA Super. 404 (Dec. 21, 2017) — Judgment of sentence for possession of child pornography and criminal use of communication facility affirmed; warrantless search of computer does not violate Article I, Section 8, or Fourth Amendment when computer taken for service and technician discovered child pornography while attempting to save files from hard drive or laptop that was failing and contacted police.

COMMON PLEAS

WARRANTLESS ARREST — ALLEGED VIOLATION OF ORDINANCE — solicitation without permit — homeless person — identification certain — no outstanding arrest warrants — Fourth Amendment — Article I, Section 8 — search of pocket — defendant handcuffed — motion to suppress evidence granted

Com. v. Butt, 110 Berks 85 (Dec. 8, 2017) — Motion to suppress evidence found in clothing of person stopped and handcuffed for allegedly violating city ordinance by soliciting without permit granted since warrantless arrest for ordinance violation improper after person had been identified and no outstanding warrants were found.

WIRETAPPING

SUPERIOR COURT

SUFFICIENCY OF EVIDENCE — HEARING RECORDED BY PARTY — standard of review — Section 5703 — Crimes Code — 18 Pa.C.S. 5703 — IGNORANCE OF THE LAW — judgment of sentence affirmed

Com. v. Cline, 2017 Pa.C.S. 417 (Dec. 29, 2017) — Judgment of sentence for intercepting and disclosing electronic communication in violation of 18 Pa.C.S. 5703 affirmed when defendant secretly taped hearing in court, despite assertion he did not know he was not allowed to do so.

WORKERS' COMPENSATION

COMMONWEALTH COURT

MODIFICATION — LABOR MARKET SURVEY — earning power — employer burden of proof — interviews — substantial evidence of availability — positions actually open and available at time of survey — en banc court — order affirming granted modification petition affirmed

Smith v. W.C.A.B., No. 796 C.D. 2016 (Jan. 5, 2018) — Employer bears burden of proving all facts entitling it to modification of benefits, including continued availability of jobs identified as proof of earning power; evidence claimant was interviewed for some identified positions constitutes substantial evidence those positions remained open and available.

LOSS OF EARNING POWER — work-related injury — prior determination — injury not cause of loss of earning power — no basis for reinstatement — order dismissing reinstatement petition affirmed

Durvilis v. W.C.A.B., No. 397 C.D. 2017 (Jan. 5, 2017) — Previously terminated claimant sustained work injury, but not one that caused loss of earning power and was not entitled to disability compensation, therefore there is no basis to reinstate benefits.

ATTORNEY DISCIPLINARY / ETHICS MATTERS

STATEWIDE PENNSYLVANIA MATTERS
NO CHARGE FOR INITIAL CONSULTATION

Representation, consultation and expert testimony in disciplinary matters and matters involving ethical issues, bar admissions and the Rules of Professional Conduct

James C. Schwartzman, Esq.

- Chairman, Judicial Conduct Board of Pennsylvania
- Former Chairman, Disciplinary Board of the Supreme Court of Pennsylvania
- Former Chairman, Continuing Legal Education Board of the Supreme Court of Pennsylvania
- Former Chairman, Supreme Court of PA Interest on Lawyers Trust Account Board
- Former Federal Prosecutor
- Selected by his peers as one of the top 100 Super Lawyers in Pennsylvania and the top 100 Super Lawyers in Philadelphia
- Named by his peers as *Best Lawyers in America* 2015 Philadelphia Ethics and Professional Responsibility Law "Lawyer of the Year," and in Plaintiffs and Defendants Legal Malpractice Law

(215) 751-2863

Splitting Fee With a Nonlawyer

continued from page 4

The case was remanded to the trial court without any clear direction as to which approach it should apply when determining whether the nonlawyer is entitled to a remedy in its claims against the lawyer in a contest involving a fee-splitting dispute. What is clear in *SCF Consulting,* however, is that the lawyer can no longer defend in a fee-splitting dispute on the basis that it is unenforceable because it violates the Rules of Professional Conduct