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Notes from the Secretary

Dicta Editorial Board

Notes From The Secretary

Frequently members are wondering why we don't publicize more widely the work of the various committees of the association. The suggestion to do so is an admirable one and we do hope that in the near future we will be able to publish the functions of the various committees and the work they are carrying on. Some of the committees are extremely active and many members give countless hours of their time in advancing the legal profession. Needless to say, during the years when the Legislature is in session one of the most active committees of the Bar Association is the Legislative Committee.

In this issue of DICTA are reports from the chairmen of the Legislative Committees of the respective associations. I am sure you will find their articles most enlightening.

A few months ago, Don Lesher, a member of the Denver Bar Legislative Committee, reported to President Lou Isaacson on one of the bills before the Legislature that caught their attention. His letter is found on page 202.

. . . . .

As mentioned in the last issue of DICTA we intend to publish one or more of the Canons of Ethics in each issue so that more attorneys will become more cognizant of the standards of conduct which govern their profession. Along with the Canons we will publish pertinent opinions of the A.B.A. Committee, whenever the subject matter of the particular Canon warrants it. The following Canons need no further explanation.

CANON 2. THE SELECTION OF JUDGES.

> It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

CANON 3. ATTEMPTS TO EXERT PERSONAL INFLUENCE ON THE COURT.

> Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyear to misconstructions of motive and should be avoided.

> A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

. . . . .

Another matter of timely interest is the following report from the Committee on Professional Relations of the American Bar Association. It is "must" reading.

EXPLANATORY STATEMENT BY THE CHAIRMAN OF THE AMERICAN BAR ASSOCIATION COMMITTEE ON PROFESSIONAL RELATIONS

The report of the Committee on Professional Relations to the House of Delegates at the mid-year meeting, which appeared in the April Journal, referred to an answer to "Helping the Taxpayer," a booklet published by the American Institute of Accountants. This answer follows, and appended thereto is a copy of the Statement of Principles approved by the American Institute of Accountants and the American Bar Association in 1951. It is recognized that this statement did not attempt to define what constitutes the practice of law or the practice of accounting. For the "guidance of the members of each profession" it set forth "a statement of principles relating to practice in the field of federal income taxation." It deals with the functions of both lawyers and accountants in this field, and recognizes that "the principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public."

Since the mid-year meeting of the House of Delegates, representatives of the A.I.A. and A.B.A. have held another meeting, but thus far have been unable to reach an agreement. The negotiations have been conducted with mutual good will and good faith. The discussions have resulted in a clearer understanding of the position and problems of both organizations.

It is apparent that a mutually satisfactory agreement would be possible except for one issue, i.e., the proposal of the Institute to amend Treasury Circular 230 with respect to the scope of tax practice of enrolled agents before the Treasury Department.

Section 10.2(b) relating to the scope of tax practice before the Department reads as follows:

> Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the

> Treasury Department relative to such interests. Unless otherwise stated the term "Treasury Department" as used in this paragraph and elsewhere in this part includes any division, branch, bureau, office, or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office, or unit.

Section 10.2(f) relating to the rights and duties of agents, reads:

> An agent enrolled before the Treasury Department shall have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney: Provided, that an enrolled agent shall not have the privilege of drafting or preparing any written instrument by which title to real or personal property may be conveyed or transferred for the purpose of affecting Federal taxes, nor shall such enrolled agent advise a client as to the legal sufficiency of such an instrument or its legal effect upon the Federal taxes of such client: And provided further, That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.

The House of Delegates is on record as opposing the elimination of the last clause of Section 10.2(f). It is the position of the Association that the amendment of Section 10.2(b), proposed by the American Institute of Accountants, would have the effect of nullifying this clause. Thus far, the negotiating committees have been unable to agree upon any other language which would satisfy the Institute's position that the scope of practice under 10.2(b) should be unlimited and the Association's position that the force of 10.2(f) should not be diluted. The Association of course is firm in its view that the practice of law must be regulated by the several states.

Both organizations agree that differences should be resolved by agreement and conference rather than by litigation. The Association representatives have expressed a willingness to cooperate in establishing a permanent joint conference to formulate rules and standards to render more specific the general terms of the Statement of Principles and in recommending and encouraging the establishment of local joint conferences in all states and principal cities. The Institute feels that such cooperative machinery would not prevent litigation in state courts, unless Section 10.2(b) is amended in accordance with its proposal. It presently takes the position that such an amendment of Treasury Circular 230 is a condition precedent to effective cooperative action.

It is the position of representatives of the Association that effective machinery can and should be established at the national, state and local levels and that any amendment to Treasury Cir-

cular 230 is unnecessary. On the other hand, we are not adamant against revision of Section 10.2(b) to delineate more clearly the authority of enrolled agents in tax practice before the Treasury Department provided any such revision does not have the effect of nullifying the last clause of Section 10.2(f).

The foregoing is a brief summary of the present status of the negotiations. I have not attempted to review the other points which can easily be resolved if a solution can be found for this issue. I am sure the members of our committee will appreciate suggestions and comments from members of the Association.

Whether or not we arrive at a definitive agreement, the Committee on Professional Relations recognizes the importance of maintaining a cordial relationship with the American Institute of Accountants and its chapters, and is anxious to promote cooperative action between the two organizations.

W. J. JAMESON, Chairman.

LAWYERS AND ACCOUNTANTS IN TAX PRACTICE

A STATEMENT BY THE COMMITTEE ON PROFESSIONAL RELATIONS OF THE AMERICAN BAR ASSOCIATION

A booklet entitled "Helping the Taxpayer" has recently been published and distributed by the national organization of certified public accountants. This published material incorrectly states the position of the legal profession concerning the proper activities of lawyers and accountants in tax practice. In addition, it fails to state correctly the nature of federal tax problems and the procedures involved in the disposition of tax controversies.

It is regrettable that the booklet and other material published by the American Institute of Accountants fail to inform the public and the members of the Institute as well, of the agreement which was entered into in 1951 between the American Bar Association and the Institute as to the proper roles of lawyers and accountants in advising and representing taxpayers. This failure, which is difficult to understand, creates "confusion" where none exists. The public is asked to form a judgment on an incomplete statement of the facts.

The purpose of the present statement is to set the record straight as to the true nature of federal tax problems and the remedies available to taxpayers. It is also intended to state the position of the American Bar Association as to the respective roles of lawyers and accountants in advising and representing clients with respect to tax matters.

Tax practice covers many different types of federal, state and local taxes, including income, estate, inheritance, gift, franchise, sales, excise and real estate taxes—to name but some. The comments herein made will be directed toward federal income taxation since the problems arising therefrom are of the most general interest. However, much of what is said about assisting taxpayers with respect to federal income tax matters will have equal application to the other types of taxes.

THE FUNCTIONS OF THE LAWYER AND THE ACCOUNTANT

Tax matters may involve questions of law, questions of accounting, or both. The American Bar Association and the American Institute of Accountants in 1951, after long consideration, entered into a Statement of Principles defining the proper roles and functions of lawyers and certified public accountants in the field of federal income taxation. A copy of this Statement of Principles is appended hereto and attention is invited to its provisions. This Statement of Principles defines the respective roles of the lawyer and the accountant in tax practice, not from any selfish standpoint of the respective professions, but from the standpoint of which profession can best serve the taxpayer in a given situation. It is difficult to see how a claim of "current confusion" in the matter of tax practice can be made by the Institute, since the answer as to the proper role of lawyers and accountants in almost any area of tax practice can be found in the Statement.

The Statement of Principles clearly recognizes that in certain areas of tax practice the interests of the client are best served by the professional skills of the accountant. However, when the client's problem involves the application of *legal principles,* the client will be best served by a lawyer. In some situations, the nature of the problem is such that the skills of both professions are required. The taxpayer, of course, is interested only in having the best possible professional assistance in resolving his tax problem, and this objective was what the two professions had in mind at the time they promulgated the Statement of Principles.

Advocacy Versus Fact-Finding

The lawyer's role is to advise his client with respect to the legal principles—whether contained in statutes or administrative regulations or developed through court decisions—applicable to the client's cause, and to defend or espouse that cause by argument. The defending or presenting of a client's case by argument is known as the art of advocacy. To prepare for it, the lawyer must meet high standards of legal education and training. The term "practice of law" embraces not merely the conduct of litigation, but the furnishing of advice or service requiring the use of legal knowledge or skill.

The role of the accountant, on the other hand, is that of an impartial expert fact-finder, who reports and certifies accounting facts and figures, and counsels on accounting methods, procedures and principles. "It is the peculiar obligation of the certified public accountant, which no other profession has to impose on its members, to maintain a wholly objective and impartial attitude toward the affairs of the client whose financial statements he certifies." (Carey: "Professional Ethics of Public Accounting," p. 13.) In this role, the certified public accountant has rightly attained a respected position in the business world.

It boils down to this—a lawyer should not perform accounting work for the client because he does not have the necessary

training to give the client the best assistance in this field. By the same token, the accountant should not undertake to do legal work for the client, whether in advising as to the possible tax effects of transactions, in connection with the preparation of the tax return, or after the return is filed, because the accountant does not have the technical training or experience to do the work of the lawyer.

WHAT IS TAX LAW

The material published by the American Institute of Accountants is misleading in that it seeks to give the impression that the determination of the taxable income of most businesses and many individuals is usually only "a matter of complex accounting judgments" which can in most instances be resolved by informal discussions with representatives of the Internal Revenue Service. The taxpaying public is *not well served by this failure to recognize* the many legal problems which may be involved.

The fallacy in the Institute's suggestion that the preparation of tax returns, as well as the advising and representing of clients in tax matters generally involves nothing more than accounting problems, is that the Internal Revenue Code is a law enacted by Congress like any other federal law, and that the questions arising under many of its provisions are questions of law and not questions of accounting.

The Interrelationship of "Tax Law" and General Law

The term "tax law" may be applied somewhat loosely to that body of law which is concerned with the tax effects of transactions and activities engaged in by the taxpaying public. "Tax law" is not a field of law separate and apart from the general body of law. It is not a unique or isolated subject enclosed by four walls labeled "The Internal Revenue Code," "Treasury Department Regulations," "Treasury Rulings" and "Accounting Principles." It cuts across virtually all branches of law and weaves in their principles. A thorough knowledge and understanding of basic legal concepts, legal processes and the interrelation of law in all its parts is essential to the practice of law in any of its branches, including the broad area sometimes referred to as tax law.

The general law of the 48 States is interwoven in the body of federal tax law. The laws of the respective states with respect to corporations, partnerships, trusts, wills and estates, gifts, agency, real and personal property and even divorce, to name but some fields of law, must ofttimes be applied in getting the answer to a federal tax question. Likewise, even though a transaction may have a nice and tidy result from a federal tax standpoint, consideration must often be given to the impact of state law on the transaction or the obligations incurred thereunder. This fact is all too often overlooked by those who would carve out an area of so-called tax law and seek the answers to all questions in the Internal Revenue Code or the Treasury Department regulations and rulings.

WHEN SHOULD LEGAL ADVICE BE SOUGHT?

In discussing the preparation of income tax returns and the settlement procedures available for the disposition of disputed items by agreement with the Internal Revenue Service, "Helping the Taxpayer" seeks to leave the impression that there is no occasion to consult a lawyer until attempts at administrative settlement have failed and the taxpayer decides to resort to court action; in short, the argument runs that "law and precedents" are unimportant considerations prior to the filing of suit, and that administrative settlement negotiations are mere "consent proceedings" where the parties engage in horse-trading—seeking a settlement on a dollar figure that bears no relation to legal issues.

On the contrary, the facts are:

Preparation of Returns

The assembling and certification of the facts dealing with the income producing activities of the taxpayer, which include the marshalling of data previously recorded in the taxpayer's books and records, and their proper reflection in the income tax returns of taxpayer, are by the very nature of the services and skills involved generally in the field of acounting. In many cases the statutory requirements are clear and no legal skill is necessary to understand and comply with them.

However, there are many other cases when the determination of tax liability from the assembled facts involves a substantial legal question. Here the skills and services called for are those of the lawyer. The difficulty arises when the accountant takes on the function of the lawyer in such cases.

Typical of instances where substantial legal questions may be involved in such a determination, and which obviously call for legal skills rather than "complex accounting judgments," are the following:

(1) May minor children be treated as members of a partnership for federal tax purposes?
(2) Under what circumstances are payments by a divorced man to his former wife deductible in the computation of his taxable income?
(3) Does the forgiveness of a debt result in taxable income to the debtor?
(4) Is a given corporate instrument a debt instrument or an equity instrument?
(5) Should the capital gains of a trust be taxed to the life tenant or to the remaindermen?
(6) Does a merger or consolidation qualify as a reorganization under which an exchange of securities is tax-free?

Numerous illustrations like the foregoing could be given. These are cited merely as examples of situations where the preparation of a return may involve a substantial legal question.

If a tax return presents questions of law, it is to the tax-

payer's interest that the advice of a lawyer, trained in statutory interpretation and in all the fields of law which might bear on the problem, be obtained before the return is finally prepared and filed. It is just as important to the taxpayer that the correct answer be found at this stage as it is to have proper legal advice and representation at the time when he "takes his case to court." This is recognized in the Statement of Principles.

If proper legal advice is not obtained in such a case before the return is filed, the penalties may be substantial. Tax deficiencies carry the high interest rate of 6%. If the error results in an overpayment of tax, the Treasury Department is apt to be quite reluctant to make a refund and the taxpayer may have to initiate costly court proceedings to recover the excess.

Treasury Negotiations

When the Internal Revenue agent indicates that in his judgment additional tax is due and owing, that determination will usually be based upon a rule of law. The agent does not pull a proposed tax deficiency out of the air. That issue of law must be met at the outset with the agent and, if he is not convinced, at every step of the succeeding administrative negotiations. Far from being "consent procedings," where the parties are seeking a "fair" guess as to the proper dollar amount of tax liability, the taxpayer must meet the issue raised by the examining agent and persuade the reviewing officials that the agent has applied an erroneous rule of law. Whether the Treasury representatives are accountants or lawyers, the proper and best presentation of the client's case to the Treasury Department representatives requires the use of the lawyer's skill in the art of advocacy just as much as does any court proceeding. The informality of the Treasury Department proceeding should not mislead anyone as to the true nature of the proceeding. Whether the taxpayer's case is being considered by the Treasury Department or by a court, the fundamental issue is the same, namely, what is the correct tax liability?

Of course, if a problem of accounting methods or application is involved, the services of an accountant should be obtained so as to insure the proper development of the facts and accounting theories involved. The legal and accounting professions in the Statement of Principles have recognized the proper roles of the lawyer and the accountant in settlement negotiations with the Trasury Department and the members of each profession have an obligation to advise the client as to the type of representation which a particular situation may require.

In short, the *nature* of the issue should determine which technician is best equipped to meet it. But the issue itself must be met. The Internal Revenue Service is not authorized to settle these controversies on some vague concept of fairness and equity, and it will not do so. The taxpayer must convince the Government representatives that, as a matter of law or of sound accounting, he is right. The final outcome of the controversy may well depend

not only upon the nature of the issue, but the way in which it is met at the outset.

The rules of practice before the Appellate Division of the Internal Revenue Service provide that "The Conferee, in his conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction." The administrative officials of the Internal Revenue Service do not operate independently of legal advice. There is a large staff of lawyers in the office of the Chief Counsel, many of whom are stationed at local regional offices of the Service. Many matters are referred to these Government lawyers for legal review and advice before final action by the administrative officials who are dealing with the taxpayer.

Another element in the presentation of a taxpayer's case which must be considered is the necessity of marshalling and proving *all* of the material facts. Before entering into settlement negotiations with the Treasury Department, the taxpayer's representative should analyze all of the law bearing on the case. This involves analyzing the Internal Revenue Code as well as other pertinent federal laws and the state laws. In doing this, it will be necessary to read the court opinions which have interpreted these statutory provisions. Treasury Department regulations or rulings will also be considered in this analysis. This background of law guides the taxpayer's representative in determining the facts which must be developed in order to bring about the proper disposition of the taxpayer's case. In presenting the case to the administrative officials the taxpayer's representative must necessarily proceed in much the same manner as in presenting a case to a court or jury. The difference between presenting a case to the Treasury Department and to a court or jury is merely a difference in technique; it is not a difference in substance.

A vital consideration in deciding whether a settlement should be made is that the determination of the administrative officials will be presumed to be correct and the taxpayer, in court, will have the burden of overcoming that presumption. In making that decision, a lawyer is qualified by training and experience to recognize what evidence will be admissible in court, in the event of litigation.

The Disposition of Tax Controversies by Court Action

If the Internal Revenue Service will not settle a controversy on a basis satisfactory to the taxpayer, the taxpayer has a choice of alternatives in submitting the dispute to judicial determination:

The Tax Court. Where the taxpayer desires to defer the payment of any additional tax demanded by the Treasury Department until after the matter has been passed upon by a court, he can appeal to the Tax Court of the United States. The pamphlet "Helping the Taxpayer" incorrectly reflects the character and function of the Tax Court. It suggests that the Tax Court is not really a

court, but a "referee," with authority to render any decision it considers fair. This is an inaccurate picture.

The Tax Court, while technically a part of the executive branch of the Government, is a court in every sense of the word. Its powers are wholly judicial in character. It is bound by the same rules of evidence and of judicial due process as are other federal courts; it may decide only the issues which are formally presented to it in the pleadings filed; and its decisions are reviewable, just like decisions of the United States District Courts, by the United States Courts of Appeals and the Supreme Court. The preparation of a petition to the Tax Court requires the same skill as does the preparation of a pleading in any other court. The trial of a case before it may be safely entrusted only to a lawyer, who is trained in the art of pleading, in the rules of evidence, and in the proper marshalling and presentation of the evidence pertinent to the issues. In this connection it is important to note that the decisions of the Tax Court are reviewed by the Courts of Appeals and the Supreme Court only on the record made, that is, facts proved, before the Tax Court; the appellate courts will not hear or consider new and different evidence than was considered by the Tax Court. It is important that the taxpayer's case not be thrown away at the Tax Court level by a failure to allege or prove vital facts.

Suit for Refund. The alternative to appealing the controversy to the Tax Court is to pay the tax, file a claim for refund properly presenting the issues involved, and then sue for refund in a United States District Court or the Court of Claims, where the same rules of law apply as in the Tax Court. Appeals from the District Courts lie to the same United States Courts of Appeals, but decisions of the Court of Claims may be reviewed only by the Supreme Court.

The choice of the forum, as between the Tax Court, on the one hand, and a District Court or the Court of Claims on the other, rests with the taxpayer. The exercise of his election as between the two courses open to him may be of critical importance.

Because this choice involves an analysis and appraisal of the decisions on the same or closely related issues by each of these courts, and because, once the election is made, it may not be changed, it is essential that a lawyer's advice be obtained before the choice is made. It is too late to make the choice after the case has been started in the Tax Court by the filing of a petition.

What the Certified Public Accountants Seek

The campaign launched by the American Institute of Accountants has been on two fronts.

The major offensive has taken the form of urging the Treasury Department to change its long standing rule of not interfering with the regulation of law practice by the States. Specifically, the Institute has asked the Treasury to delete from its rules governing the practice of non-lawyers before the Department the fol-

lowing *proviso,* which has been a part of the rules for over a quarter of a century:

> . . . *provided further,* That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.

The Association's opposition to the deletion of this provision was set forth at length in a statement to the Secretary of the Treasury on September 28, 1954. That statement was published in the American Bar Association Journal of November, 1954, and will not be repeated here, except to reiterate the Association's view that the public interest requires that only lawyers be permitted to engage in the practice of law, and that the Treasury should continue to recognize the primary obligation of the States to regulate law practice.

The second offensive launched by the Institute is in Congress, where it has secured the introduction of bills which would have the effect of granting to non-lawyers a federal license to practice law in the tax field. This obviously has the same objective as the campaign for getting the Treasury to change its rules.

The reason advanced by the Institute for sponsoring this drastic change in the existing rules is that certain state court decisions in recent years, it is alleged, have created "confusion" as to the proper role of the certified public accountant in the federal tax field. In the pamphlet "Helping the Taxpayer," reference is made to five state court decisions. Four of them are not named (though they are readily identifiable), and there is no statement of the relevant facts in any of these cases. The cases in question are as follows:

> The Massachusetts Case: *Lowell Bar Association v. Loeb,* 315 Mass. 176, 53 N. E. (2d) 27 (1943).
>
> The New York Case: *Application of New York County Lawyers Ass'n, In re Bercu,* 273 App. Div. 524, 78 N.Y.S. (2d) 209 (1948), affirmed *per curiam,* 299 N.Y. 728, 87 N.E. (2d) 451 (1949).
>
> The Minnesota Case: *Gardner v. Conway,* 234 Minn. 468, 48 N.W. (2d) 788 (1951).
>
> The Florida Case: *Petition of Kearney,* 63 So. (2d) 630 (1953).
>
> The California Case: *Agran v. Shapiro,* (Appellate Dept., Superior Court, County of Los Angeles) 127 A.C.A. Supp. 129 (1954).

It is apparent that the first three cases were fully known to the accountants before they signed the Statement of Principles. The Florida case involved practice by a lawyer, not by an accountant. The remaining case (*Agan v. Shapiro, supra*) specifically recognized the right of an accountant to prepare tax returns, but denied him the right to brief and argue what he admitted was a difficult question of law, involving many days of legal research.

None of these cases held that the preparation of a tax return or a claim for refund, or the representation of a taxpayer before the Treasury Department, in and of itself, constituted the practice of law. As the California court pointed out, the Statement of Principles recognizes the propriety of such activities except where the problem is one involving a legal question.

THE POSITION OF THE AMERICAN BAR ASSOCIATION

The pamphlet "Helping the Taxpayer" asserts that the lawyers are seeking to deprive taxpayers of the services of accountants, and editorials in the Institute's official organ have charged the American Bar Association with taking the position that the "entire field of Federal tax practice should be exclusively reserved for lawyers."

These statements are incorrect. They are refuted by the facts presented herein.

The position of the American Bar Association is that set forth in the Statement of Principles referred to earlier. "Helping the Taxpayer" ignores the existence of this Statement of Principles, as do all of the editorial comments on the subject in the Journal of Accountancy. Yet this Statement, immediately after its adoption by the two professional organizations, was announced in the Journal of Accountancy in June, 1951, with the following editorial comment:

> Lawyers and CPAs moved a step closer to eliminating their differences over tax practice this month when (the) Council of the American Institute of Accountants approved a statement of principles defining the *proper areas* of practice in federal tax matters by members of the two professions. The Board of Governors and House of Delegates of the American Bar Association had previously approved it. (Italics supplied.)

From an examination of the Statement of Principles hereto annexed, it is apparent that the two professions, after prolonged and careful discussion, agreed some four years ago that the question of whether it is proper for an accountant to (a) prepare an income tax return, (b) advise a taxpayer on the probable income tax effects of business transactions, (c) represent a taxpayer before the Treasury Department, or (d) prepare a claim for refund of income taxes paid, is to be answered by an examination of the *nature* of the problem; that questions of law should be passed upon, in *each* of these situations, by lawyers, and questions of accounting by accountants; that the skills of each are essential to the protection of the varied interests of taxpayers; and that neither has, or should have, a monopoly in the field of advising or representing people in connection with tax problems.

This is still the position of the American Bar Association.

FORM OF THIRD-PARTY SUMMONS MODIFIED BY COLORADO SUPREME COURT

On May 2, 1955, the Supreme Court of Colorado entered the Order printed below which directs a modification in the form of third-party summons now printed as Exhibit A to Form 18, Appendix A, to the Colorado Rules of Civil Procedure, Colorado Revised Statutes 1953, Vol. 1, page 136.

It will be noted that the Clerk of the Supreme Court is directed to mail a copy of the Order to the Clerk of each district court in Colorado. Inasmuch as the Rules of Civil Procedure apply to all courts of record (Rule 1, Colorado Rules of Civil Procedure), conforming modifications in the form of third-party summons now in use should be made promptly not only by the district courts, but also by all other courts of record, including the county, superior, and juvenile courts.

It seems obvious that the changes approved by the Supreme Court cannot afford grounds for attacking the validity of service of a third-party summons, otherwise properly served, which conforms either to the old or to the new form. Both require the third-party defendant to file an answer to the third-party complaint. Unlike the old form, however, the new form approved by the Order follows the provisions of Rule 14 (a), Colorado Rules of Civil Procedure, as amended, effective May 17, 1951, which make an answer by the third-party defendant to the plaintiff's complaint permissive rather than mandatory.

The Order of the Supreme Court follows:

IN RE: FORM OF THIRD PARTY SUMMONS
ORDER

It having been called to the attention of the Court that since, under Rule 14 (a) R.C.P., Colo., as amended May 17, 1951, answer by a third-party defendant to the complaint of plaintiff is no longer required but is permissive, the form of third-party summons set forth under 18, Appendix A, is inaccurate and misleading; NOW, THEREFORE,

IT IS ORDERED, that said form of summons be, and it hereby is, amended to read as follows:

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO
CIVIL ACTION NO. ..... DIV. .....

A. B.,
Plaintiff,
vs.
C. D.,
Defendant and Third-party Plaintiff,
vs.
E. F.,
Third-party Defendant.

SUMMONS

THE PEOPLE OF THE STATE OF COLORADO:

To the above-named third-party defendant, GREETING:

You are hereby summoned and required to file with the clerk an answer to the third-party complaint, a copy of which is herewith served upon you, within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the third-party complaint.

If service upon you is made outside the State of Colorado, you are required to file your answer to said third-party complaint within 30 days after service of this summons upon you.*

There is also served upon you herewith a copy of the complaint of the plaintiff which you may answer.

Dated....., 19.....

....
Clerk of the ..... Court Attorney for Third-Party Plaintiff

Address.....

*If body execution is sought the summons must state the claim set out in said third-party complaint is "founded upon tort."

IT IS FURTHER ORDERED, that a copy hereof be prepared and transmitted by the Clerk of this Court to the Clerk of each District Court within the State of Colorado for their governance.

The foregoing communication was received by DICTA from the Rules Committee of the Supreme Court of Colorado, composed of the following members: Joseph G. Hodges, Robert E. Holland, Viggo H. Johnson, Thomas Keely (Chairman), Percy S. Morris.
