Contingent Attorney Fees in The Post-*Banks* Era

To the Editor:

I'm writing to applaud Prof. Stephen Cohen's article ''Misassigning Income: The Supreme Court and Attorney Fees,'' *Tax Notes*, Jan. 23, 2006, p. 355. Although many readers are familiar with the basics of these issues, Cohen does a superlative job of describing the problem and the way in which the Supreme Court addressed it via the assignment of income authorities. Moreover, he makes a convincing case (to me at least) that the Supreme Court is technically (quite apart from equitably) wrong.

It will be some time before the exceptions are clarified to the general rule that plaintiffs must report the amount of contingent fees paid to their lawyer as gross income. The Supreme Court expressly noted that it was not considering various legal theories that, in its view, were raised too late in the proceedings, and several of these are important.

However, as Prof. Cohen puts it, one would have thought the Supreme Court would address statutory fee-shifting claims, since Banks's employment discrimination claim was brought under federal and state laws that provided for fee shifting. In any case, the Supreme Court left the door open for future decisions involving statutory fee shifting. It said it did not need to address statutory fee shifting because in *Banks* there was no court-ordered fee award, or any indication that the contingency fee Banks's attorney received was ''in lieu of'' statutory fees that Banks might otherwise have been entitled to recover.

I am more mollified by that statement than Prof. Cohen is, though I do agree with his analysis that the Supreme Court is probably kidding itself when it says that there was nothing in *Banks* to suggest that the contingent fees were in lieu of statutory fees. True, the engagement letter and settlement agreement didn't expressly say that, but Banks's complaint did ask for attorney fees under a fee-shifting statute.

What I consider to be the best and most persuasive part of Prof. Cohen's analysis is his argument about the partnership theory as applied to lawyer and client (which the Supreme Court does not confront). I think that will be a fruitful avenue for future discussion, particularly since Prof. Cohen lays out situations in which there may be no explicit partnership (and certainly no subchapter K partnership) but the parties effectively behave as coventurers and each separately reports its profits. Notwithstanding the recent *Vincent* case, *Doc 2005-9343, 2005 TNT 85-6* (which took a dim view of what is left post-*Banks*), I believe the partnership theory still has some legs.

Very truly yours,
Robert W. Wood
Robert W. Wood PC
San Francisco
January 27, 2006