

NEW YORK STATE BAR ASSOCIATION

**Committee on Professional Ethics**

Opinion 705 - 5/26/98 (43-97)

Topic: Aiding unauthorized practice of law; fee splitting with non-attorney; acceptance of cases from non-attorney tax reduction company.

Clarifies N.Y. 371 (1975)

Digest: Whether it is improper for an attorney to accept cases from a non attorney tax reduction company that has agreed to engage counsel to conduct judicial proceedings in the event the company is unsuccessful in securing a reduction of property taxes in administrative proceedings depends on the specific circumstances; the attorney may agree to work for a percentage of the tax reduction company's fee, which itself is a percentage of the amount by which property taxes are reduced.

Code: DR 2-103, DR 3-101(A), DR 3-102(A); EC 7-7, EC 7-9.

**QUESTIONS**

1. May an attorney accept an engagement by a non-attorney tax reduction company to represent a property owner in Supreme Court proceedings?
2. If so, may the attorney agree to work for a percentage of the tax reduction company's fee, which is one-third of any amounts by which taxes are reduced?

**FACTS**

An attorney renders legal services relating to tax certiorari proceedings. A non-

attorney tax reduction company has sought to engage the inquirer's services to bring a tax proceeding under Real Property Tax Law ("RPTL") § 706 on behalf of a property owner. The company was previously engaged to bring the grievance portion of the case and the grievance was subsequently denied. The company's written agreement with the property owner provides that where, as in this case, a grievance is denied, the company is authorized to "engage counsel to make, file and verify Article 7 petitions and represent property owner in Supreme Court proceedings." The company's commission agreement with the property owner provides for a fee of one-third of any amounts by which taxes are reduced. The lawyer would enter into a fee agreement with the company (not the property owner) to represent the property owner either for an hourly fee or for a percentage of the company's fee.

## OPINION

### 1. Accepting an engagement from a tax reduction company

For the following reasons, we conclude that the attorney is not necessarily barred from accepting an engagement by the tax reduction company to represent a property owner in Supreme Court proceedings where the property owner has authorized the company to engage counsel to represent it.

To begin with, our decision in N.Y. State 371 (1975) establishes the principle that a non-attorney, acting as an agent for the client, may engage a lawyer to represent the client. In that opinion, we determined that "an attorney may properly accept . . . cases from a collection agency which has selected him if the agency has received authorization from the client to make the selection and the attorney is aware of such authorization." In that situation, we noted, "[t]he collection agency would be acting as agent for the client and the attorney would be responsible to the client with whom [the attorney] would clearly have a lawyer-client relationship." *Accord* ABA Informal Op. C-735 (1964).

Based on this principle, as a general matter, a lawyer may undertake to represent a property owner in tax certiorari proceedings upon engagement by a company that is authorized by the property owner to select counsel. Certain limitations apply, however. In this situation, it is important to bear in mind that the client is the property owner, not the tax reduction company. Because the lawyer's loyalty is owed to the property owner, not the company that acts as his or her agent, the lawyer may not accept the representation if the company imposes conditions on the representation that would require compromising the exercise of professional judgment on behalf of the property owner. See DR 5-107(B) (lawyer may not permit third parties to affect lawyer's professional judgment). For example, it may be improper to agree that, as a condition of being engaged, the lawyer will retain particular expert witnesses recommended by the company. See N.Y. State 698 (1998). Further, it is ultimately for the client--namely, the property owner--to make "decisions affecting the merits of the cause" such as whether to settle the action, EC 7-7, and it is for the lawyer, not the company acting as the property owner's agent, to make "those decisions which are for [the lawyer's]

determination in the handling of a legal matter.” EC 7-9.

Further, accepting the engagement would be improper if the arrangement with the non-attorney tax reduction company involves improper solicitation and fee-splitting in violation of DRs 2-103 and 3-102(A). This would likely be the case if the work of the non-attorney tax reduction company involved nothing more than “signing up clients and passing them on to lawyers, with a fee skimmed off the top.” Kenneth L. Gartner, “Acceptance of Referrals From Non-Attorney Firms,” 217 N.Y.L.J., 1, 4 (Mar. 25, 1997) (citing *Chicago Bar Association v. Clausen*, 1 Ill. App. 2d 140, 117 N.E.2d 321 (1953) and Illinois Op. 705 (1981)). Based on the facts presented, however, this does not appear to be the case, because the company provides assistance in administrative proceedings at which the grievance may be resolved without any need of a lawyer’s representation.

Accepting the engagement would also be improper if doing so violates DR 3-101(A), which provides that “a lawyer shall not aid a non-lawyer in the unauthorized practice of law.” Two prior bar association ethics opinions in New York State have addressed the propriety of accepting referrals to represent taxpayers in light of the possibility that the company making the referrals is engaged in the unauthorized practice of law.<sup>1</sup> In Nassau Op. 92-26 (1992), the committee, relying on N.Y. State 371, concluded that a lawyer may accept referrals from a non-lawyer property tax assessment and reduction firm, subject to the following limitation:

Finally, this Committee observes that while it cannot opine on the propriety of the underlying enterprise of the assessment reduction firm in the instant situation, it is necessary that such an evaluation be undertaken by an attorney prior to accepting such referrals since DR 3-101(A) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law.

In Suffolk Op. 96-2 (1996), the committee opined that, even if the non-lawyer tax reduction firm lawfully represents non-residential taxpayers in board of assessment review proceedings under RPTL § 524(3), a law firm could not accept referrals from the firm to represent taxpayers in tax certiorari proceedings. It reasoned: “Since the institution of the tax certiorari action constitutes a judicial proceeding, any promise to initiate the action would constitute the unauthorized practice of law. ... An attorney may not aid a non-lawyer in the unauthorized practice of law.”

The question of whether the tax reduction company described in the inquiry is engaged in the unauthorized practice of law insofar as it acts as a designated representative of the taxpayer in administrative proceedings is a question of law which this Committee may not answer, since we are authorized only to interpret the Code of

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<sup>1</sup> For commentary on this question, see Kenneth L. Gartner, “Acceptance of Referrals From Non-Attorney Firms,” N.Y.L.J., Mar. 25, 1997, p. 1.

Professional Responsibility.<sup>2</sup> If the tax reduction company is *not* engaged in the unauthorized practice of law, then, of course, a law firm would not be violating DR 3-101(A) by accepting referrals from the company. Assuming for the sake of argument that prior activities of the company constitute the unauthorized practice of law, we do not believe that agreeing to provide legal services for the property owner who authorized the company to engage counsel would in every circumstance necessarily be “aiding” in the unauthorized practice of law.<sup>3</sup>

It is clear that a non-lawyer, acting as the taxpayer’s agent, may “engage counsel to make, file and verify Article 7 petitions and represent the property owner in Supreme Court proceedings.” Insofar as the non-lawyer serves in this type of agency role, the non-lawyer is not engaged in the practice of law, as Opinion 371 implicitly recognized. Whether or not the tax reduction company acted improperly in acting on behalf of a taxpayer in an administrative context, it does not act improperly in seeking to engage counsel on behalf of the taxpayer after the grievance is denied. It is unclear whether Suffolk Op. 96-2 reaches a contrary conclusion, since that opinion apparently dealt with a company that promised to “initiate” tax certiorari actions on behalf of taxpayers, whereas the company described in this inquiry agrees simply, in an agency capacity, to

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<sup>2</sup> We note that two Appellate Division decisions have addressed the question of what services a non-attorney tax reduction company may lawfully provide. In the first decision, *Matter of Property Valuation Analysts, Inc. v. Williams*, 164 A.D.2d 131, 563 N.Y.S.2d 545 (3d Dep’t 1990), the court expressed the view that “a corporation which is duly authorized in writing may represent an individual before the Board [of Assessment Review]” pursuant to RPTL § 524, but that “the corporation may not promise to pursue judicial relief in contesting the assessment for that is a service which impinges on the practice of law.” *Id.* at 134, 563 N.Y.S.2d at 547. Further, the court noted, “[b]ecause the retainer agreement in this case permitted petitioner ‘to initiate and cause to be prosecuted claims for any resulting tax refund ... by administrative proceedings and judicial review’ ..., they are void.” In *Matter of Cipollone v. City of White Plains*, 181 A.D.2d 887, 581 N.Y.S.2d 421 (2d Dep’t 1992), the court held that non-attorneys may represent taxpayers in proceedings to review real estate property assessments pursuant to the Small Claims Assessment Review procedure in RPTL, article 7, title 1-A. The court specifically declined to follow the dicta of *Matter of Property Valuation Analysts, Inc. v. Williams* to the extent that it was inconsistent with this holding.

<sup>3</sup> Nassau Op. 92-26 is ambiguous insofar as it directs the inquirer to examine “the propriety of the underlying enterprise of the assessment reduction firm.” We believe that insofar as the “enterprise” involves, in the role as an agent for the taxpayer, engaging a law firm to represent the taxpayer, the enterprise does not comprise the practice of law. We express no view on whether the tax reduction company is engaged in the unauthorized practice of law when it serves as the designated representative of the taxpayer in administrative proceedings prior to the time that it seeks to engage counsel to represent the taxpayer. We acknowledge authority suggesting that this is a lawful service, but believe that even if it is not, this service is in at least some circumstances separable from the service of engaging counsel to represent the taxpayer in judicial proceedings. Agreeing to represent the taxpayer in Supreme Court proceedings does not necessarily “aid” the company’s prior misconduct (if any) within the meaning of DR 3-101(A), except as discussed in the text.

“engage counsel.” However, insofar as Suffolk Op. 96-2 implies that a lawyer may never be engaged by a non-lawyer company to represent a taxpayer, we reject the implication.

In some circumstances, however, the law firm may be “aid[ing] a non-lawyer in the unauthorized practice of law” if the company’s prior activities are improper. For example, in some cases, a law firm’s willingness to accept referrals from a tax reduction company on a regular basis may “aid” the company’s business by giving it assurance that, if a grievance is denied, the company will be able to engage counsel to represent the property owner in Supreme Court proceedings. Such assurances may be integral to the company’s ability to solicit clients or otherwise to do business. Thus, while DR 3-101(A) would not forbid a law firm from accepting a referral from a non-lawyer tax referral company where the acceptance would not aid the underlying activities of the non-lawyer, this rule *would* forbid a law firm from entering into an understanding or agreement to accept future, ongoing referrals from such a company if, in doing so, the law firm would be assisting the company in activities comprising the unauthorized practice of law.

## 2. The fee arrangement

The lawyer may agree to work for an hourly fee or for a percentage of the tax reduction company’s fee. We note that N.Y. State 371 concluded that:

It would not be proper for the attorney to receive his legal fee out of the agency’s collection fee since DR 3-102(A) provides that ‘a lawyer or law firm shall not share legal fees with a non-attorney.’ ... However, it is not improper for an attorney to receive his fee out of the money paid by the client to the agency if the compensation to the said agency for its services is separate and distinguishable from the payment for the lawyer’s services.

We believe it clear from this observation that the lawyer may enter into an agreement to represent the property owner for a fee that is paid by the agency from funds obtained from the client if the lawyer’s fee is allocable to the lawyer’s services. For example, the lawyer may undertake the representation for an hourly fee, for a flat fee, or for a contingent fee (*e.g.*, a percentage of the amount by which the taxes are reduced). We believe it follows that, if the lawyer may receive a fee contingent on the amount by which taxes are reduced, the lawyer may receive a fee that is a percentage of the tax reduction company’s fee, where that fee is itself a percentage of the amount by which taxes are reduced. Insofar as Opinion 371 implies otherwise, we believe the implication was unintended and, in any event, we reject it.

## **CONCLUSION**

It is not necessarily improper for an attorney to accept cases from a non-attorney tax reduction company that has agreed to engage counsel to conduct judicial

proceedings after the company failed to secure a reduction of property taxes in administrative proceedings, although the attorney may not do so if the business of the tax reduction company constitutes the unauthorized practice of law and the attorney's acceptance of repeated referrals assists that improper conduct. The attorney may agree to work for a flat fee or a percentage of the tax reduction company's fee, which itself is a percentage of the amount by which property taxes are reduced.

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