

New York State Bar Association

Committee on Professional Ethics

Opinion 809 – 2/12/07

Topic: Aiding the unauthorized practice of law

Digest: A lawyer who continues to represent a client in a transaction in which the counter-party has chosen to be represented by a non-lawyer is not thereby aiding the unauthorized practice of law.

Code: DR 3-101(A); DR 7-101(A)(3)
EC 3-8

QUESTION

1. Is a lawyer aiding the unauthorized practice of law where the lawyer, in order to carry out the representation of a client in a transaction, communicates and deals with a non-lawyer who has been engaged by the client's counter-party and may be engaged in the unauthorized practice of law?

OPINION

Underlying Situation

2. There are many situations in which a lawyer, representing a client in a transactional matter, may find that the client's counter-party has chosen to be represented and advised by a non-lawyer. Some examples include:

The lawyer represents a lender in a refinancing transaction involving assignment of the client's mortgage to a new lender. Various counter-parties to the transaction, such as mortgage brokers, bankers, or the new lender, have chosen to have their part of the transaction managed by non-lawyer entities, sometimes known as "settlement" companies. The settlement companies undertake various tasks, such as reviewing notes for proper endorsements and closing the new loan. None of the counter-parties is represented by a lawyer in the transaction.

The lawyer represents a seller in a real estate transaction. The buyer is not represented by a lawyer, but instead has engaged a real estate agent to handle the transaction. The lawyer observes the real estate agent advising the buyer on the legal meaning of terms in the transactional documents and preparing for the buyer's signature further instruments affecting the title of the subject real estate.

The lawyer represents the groom in negotiation of a pre-nuptial agreement. The bride is represented by a person the lawyer knows to be a suspended or disbarred lawyer.

3. In all of these and many similar transactional situations,¹ the lawyer may suspect or may actually know that the counter-party's representative is engaged in the unauthorized practice of law. DR 3-101(A) provides: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." If the lawyer continues to represent his or her own client and therefore necessarily communicates and deals with the non-lawyer representative, has the lawyer violated DR 3-101(A)?

4. Whether a particular action constitutes the unauthorized practice of law (UPL) is a question of law on which this Committee does not opine. See N.Y. State 705 (1998). Furthermore, it is a question which can sometimes be quite vexing and without a clear answer. In situations where a lawyer merely suspects that the non-lawyer may be engaged in UPL, the lawyer is under no duty to inquire further. If the situation is unclear, the lawyer may properly proceed with the transaction in the normal manner, dealing with the non-lawyer as necessary to conclude the transaction. In other situations, it may be quite clear to the lawyer that the non-lawyer is engaging in UPL, as where a suspended lawyer is representing and advising a counter-party on a legal matter. In those situations, what is the lawyer's proper course of action?

Meaning of "aid" in DR 3-101(A)

5. We believe that "aid" as used in DR 3-101(A) requires an intention to *substantially* assist or cause another to commit an act that constitutes the unauthorized practice of law, as opposed to doing something for one's own purposes that *incidentally* permits the other person to commit that act.

6. For example, in this Committee's prior opinions concerning DR 3-101(A), we have often concluded that certain acts by a lawyer could constitute aiding UPL. In all of those opinions, the common thread was that the lawyer was

¹ This opinion is limited to transactional situations and does not encompass situations involving litigation, in which there may be, for example, special duties to the court. As stated below, while the third of these examples appears clear, we express no opinion whether in these examples the non-lawyer representative is in fact engaging in the unauthorized practice of law.

engaging in an affirmative act that substantially enabled the non-lawyer to practice law and was done with the purpose and intent of doing so.²

7. The situation before us is quite different. Here we have a lawyer who is representing his or her client in a transaction. Through no fault and no act by, and no encouragement from, the lawyer (or the client), the lawyer finds that the counter-party has chosen to engage a non-lawyer to carry out the transaction. This situation was not caused by the lawyer in any way. Further, the lawyer's actions in continuing with the transaction are intended to serve the lawyer's client, not to facilitate the non-lawyer in UPL. The lawyer is not substantially enabling the non-lawyer's engaging in UPL nor is that incidental result intended by the lawyer. Of course, the lawyer must not encourage the non-lawyer to engage in UPL (see EC 3-8) and must not steer business to the non-lawyer.

8. We do not believe that merely continuing to represent one's own client—in a transaction into which a third party, not under the lawyer's (or client's) control, has chosen to introduce a non-lawyer who is engaging in UPL— is aiding that non-lawyer in UPL. Absent any affirmative intent or desire to substantially assist the non-lawyer in UPL, or some direct financial or other benefit to the lawyer from the non-lawyer's engaging in UPL (other than the ordinary benefit arising from completing the transaction for which the lawyer was engaged), the lawyer is not aiding UPL. All the lawyer is doing is representing a client; the incidental effect of that proper act is that the non-lawyer is able to engage in UPL.³

9. We find affirmative support for this conclusion in DR 7-101(A)(3), which prohibits the lawyer from intentionally prejudicing or damaging the client during the course of the professional relationship. We note that reaching the opposite

² N.Y. State 801 (2006) (lawyer may not partner with out-of-state attorney where that attorney would be engaging in UPL); N.Y. State 705 (1998) (explaining when lawyer may accept referrals from non-attorney tax reduction company); N.Y. State 662 (1994) (lawyer may not affiliate with non-lawyer to represent homeowners in small claims proceeding to reduce real estate taxes); N.Y. State 644 (1993) (lawyer may not form corporation with non-lawyer to assist homeowners in obtaining real estate tax reductions); N.Y. State 633 (1992) (lawyer may not enter into contractual arrangement with non-lawyer corporation to provide debt consolidation service to debtors); N.Y. State 618 (1991) (salaried lawyer may not remit legal fees to corporate employer); N.Y. State 557 (1984) (lawyer may not form firm with non-lawyer accountant for purpose of providing legal services); N.Y. State 423 (1975) lawyer may not merge with a non-lawyer collection agency corporation); N.Y. State 343 (1974) (lawyer may not delegate supervision of execution of will to paralegal); N.Y. State 334 (1974) (lawyer may not continue to use suspended lawyer's name in firm name); N.Y. State 304 (1973) (lawyer may not delegate taking of deposition to non-lawyer employee).

³ By way of a more extreme example, imagine that the lawyer owns an office building; the lawyer rents a suite of offices to Attorney X for a period of years. During that time, X is suspended from the practice of law. The lawyer knows of the suspension and knows that X is continuing to practice law in the rented office. We do not think it would be seriously contended that continuing to comply with the obligations of the lease is aiding UPL.

conclusion—that merely continuing to represent one’s own client is aiding UPL—would come at the expense of the client. The lawyer’s refusal to deal with the non-lawyer might well mean that the client is forced to forgo the services and advice of his or her own lawyer or to abandon a favorable transaction that the client wants to consummate. Assuming that the client wants to go forward with the transaction, a rule that required the lawyer to refuse to deal with the non-lawyer would allow the counter-party effectively to deny the client the right to have representation by a lawyer.

10. We are aware of some contrary authority. Arizona Opinion 99-07 concluded that it would be improper for an Arizona lawyer to negotiate with a nonlawyer insurance adjuster representing the opposing party.⁴ That opinion arose in the particular context of a statute that the Arizona ethics committee concluded would permit adjusters to engage in the “unauthorized” practice of law. Two published dissents disagreed with the majority opinion. One concluded that it was not at all clear that the statutorily authorized adjusters were practicing law. The other dissent followed much the same path we do in this opinion. The dissent noted:

The ordinary meaning of the word ‘assist’ is not so broad. Ordinarily the word connotes cooperation or affirmative aid of some kind. . . . The Committee majority’s conclusion has immense implications. If negotiating an agreement for another party is “the practice of law”, then real estate brokers, sports agents, and accountants (to name only a few of the most obvious examples) are “practicing law”. The Committee majority’s opinion would prevent a lawyer from negotiating on behalf of a client with any of these professionals.

11. We agree with the Arizona dissent. We conclude that the majority’s interpretation of the word “assist” in the Arizona version of DR 3-101(A) failed to balance properly the client’s right to zealous representation by counsel against the policy of discouraging the unauthorized practice of law.

⁴ See also ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 21:8205 (“If the nonlawyer is engaged in unauthorized practice, the lawyer may be subjected to discipline for negotiating or otherwise dealing with the nonlawyer in a way that facilitates the nonlawyer’s unauthorized practice of law.”); Geoffrey C. Hazard, Jr. and W. William Hodes, THE LAW OF LAWYERING § 5.5:203 (2d Ed. 1993 Supp.) (a lawyer who negotiates with a lawyer not admitted in the state “has assisted this violation, and has violated both Rule 5.5(b) [defining unauthorized practice] and Rule 8.4(a) [prohibiting a lawyer from ‘knowingly assist[ing] or induc[ing] another to violate the Rules of Professional Conduct’]”). The only directly supporting authority cited by the ABA/BNA MANUAL is the Arizona opinion discussed in the text. The only directly supporting authority cited by the Arizona opinion is the Hazard and Hodes treatise.

CONCLUSION

12. For the reasons given, the question is answered in the negative.

(5-06)
