



Committee on Professional Ethics

Opinion 885 (11/14/11)

Topic: Business relationship with non-attorney.

Digest: An attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions; an attorney may not be retained by a non-lawyer company to provide legal services to a client.

Rules: 5.4, 5.5, 5.8, 7.1, 7.3, and 8.4.

FACTS

1. The inquirer handles tax certiorari proceedings in Supreme Court for the reduction of property assessments and is paid on a contingency basis, ordinarily receiving one-third of any tax refund clients receive. The inquirer has been approached by a non-attorney who owns a company that represents residential homeowners in Small Claims Assessment Review proceedings and who, in exchange for a referral fee, would refer commercial clients to the attorney. The non-lawyer would perform some services for the clients, including a preliminary valuation of the property.

QUESTIONS

2. Is it ethically permissible for an attorney who receives referrals of potential clients from a non-lawyer to reduce the attorney's customary contingency fee, refunding the balance to the client with the understanding that the client would owe an amount to the non-attorney?

3. Alternatively, may the attorney be retained by the non-attorney's company, billing the company an hourly fee and returning any tax refund directly to the client?

4. May the attorney accept referrals of clients from the non-lawyer if the inquirer knows that the non-lawyer seeks new clients via direct solicitation?

OPINION

5. Is it ethically permissible for an attorney who receives referrals of potential clients from a non-lawyer to reduce the attorney's customary contingency fee, refunding the balance to the client with the understanding that the client would owe an amount to the non-attorney?

6. Under the facts presented, the lawyer cannot agree to the arrangement with the non-lawyer company as the lawyer either would be impermissibly splitting fees with a non-attorney or entering into a cooperative business arrangement with a non-lawyer who is not a member of one of the professions with which attorneys can create such partnerships.

7. The New York Rules of Professional Conduct provide that an attorney may enter into a cooperative business arrangement with a non-lawyer only where the profession of the non-legal professional is included in a list jointly maintained by the Appellate Divisions. Rule 5.8(a). Tax reduction services are not such a profession. See N.Y. Admin. Code, tit. 22, § § 1205.3, 1205.5 (non-legal professions eligible to form cooperative business arrangements with lawyers).

8. Rule 5.4 provides that lawyers may not share legal fees with non-lawyers except in limited circumstances. Rule 5.4(b) prohibits lawyers from forming partnerships with non-lawyers "if any of the activities of the partnership consist of the practice of law." Rule 5.5 prohibits lawyers from aiding a non-lawyer in the unauthorized practice of law. See Suffolk County Op. 96-2 (1996) (opining that a referral arrangement between an attorney and a non-lawyer tax reduction firm was unethical because it involved the attorney in aiding a non-lawyer in the unauthorized practice of law). The attorney seeks to reduce the attorney's own fee, knowing that the amount of the reduction would be owed to the non-attorney company. Although the non-attorney company would perform some unspecified services (including perhaps a preliminary valuation of the property), there appears to be no relation between the funds to be received by the non-lawyer company and the value of the services actually performed for the client. In essence, the non-attorney company would find the clients and refer them to the lawyer, taking a fee from the tax reduction. See N.Y. State 705 (1997), at 3. The proposed arrangement would involve improper fee-splitting.

9. May an attorney be retained by the non-attorney's company, billing the company an hourly fee and returning any tax refund directly to the client?

10. The lawyer may not be retained by the non-attorney company to provide services to the property owner, as the furnishing of counsel and the rendering of legal services by non-attorneys is prohibited by statute. N.Y. Judic. L. § 495(d).¹

11. May the attorney accept referrals of clients from the non-lawyer if the inquirer knows that the non-lawyer seeks new clients via direct solicitation?

12. Assuming that a referral from the non-attorney company is permissible and does not involve the splitting of fees or the payment of a referral fee, see Rule 7.2, a separate concern arises in that the company seeks new clients via direct solicitation.

13. An attorney may not solicit a client in person, by telephone, or by real-time computer interaction. Rule 7.3(a). While an attorney may solicit clients via advertising, there are restrictions on such advertising. Rule 7.1. “Solicitation means any advertisement initiated by or on behalf of a lawyer or law firm ... the primary purpose of which is the retention of the lawyer or law firm, and significant motive for which is pecuniary gain.” Rule 7.3(b).

14. Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the non-lawyer’s communications. See Rule 8.4(a) (“A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or *do so through the acts of another...*” (Emphasis added.)) For example, if the lawyer had control over the non-attorney or control over the solicitation or advertising, the lawyer might be said to be accomplishing through indirect means what the lawyer could not accomplish directly. The level of control the attorney

¹ New York Judiciary Law §495 (“Corporations and voluntary associations not to practice law”) provides, in relevant part, that:

1. No corporation or voluntary association shall (a) practice or appear as an attorney-at-law for any person in any court in this state or before any judicial body, nor
 - (b) make it a business to practice as an attorney-at-law, for any person, in any of said courts, nor
 - (c) hold itself out to the public as being entitled to practice law, or to render legal services or advice, nor
 - (d) furnish attorneys or counsel, nor
 - (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor
 - (f) assume in any other manner to be entitled to practice law, nor
 - (g) assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law or to furnish legal advice, services or counsel, nor
 - (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

has depends on many factors, including the amount of business the attorney conducts with the non-attorney and any other connections between the two.

CONCLUSION

15. An attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions. The lawyer may not be retained by the non-attorney company to provide services to the property owner as the furnishing of counsel and the rendering of legal services by non-attorneys is prohibited by statute. If the relationship were permitted, the advertising (including direct solicitation) made by the non-lawyer would not be attributable to the attorney unless the attorney uses the non-lawyer to circumvent applicable rules on advertising (including the rules governing solicitation).

(44-10)