NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 662 – 2/15/94 (59-93)

Topic: Unauthorized practice of law; conduct that constitutes the practice of law; obligation to disclose lawyer's status as lawyer.

Digest: A lawyer may not affiliate with a nonlawyer in the representation of clients in a litigation context; a lawyer's failure to disclose his or her status as a lawyer in a litigation context is deceptive conduct.

Code: DR 1-102(A)(4); 3-101(A); 3-102(A); 3-103(A).

QUESTION

May a lawyer affiliate with a nonlawyer to represent homeowners in small claims proceedings to reduce real estate taxes, so long as the lawyer refrains from holding himself or herself out as an attorney?

OPINION

A lawyer proposes to affiliate with a real estate broker in representing homeowners in proceedings to obtain review of real estate taxes. The lawyer advises that state law provides that such proceedings are to be conducted informally and does not require that homeowners be represented by counsel. Any person with knowledge of the facts may present the petition for review. RPTL §730(6).

This Committee has recognized that there are a number of services that can be performed appropriately by both lawyers and nonlawyers. *See, e.g.*, N.Y. State 557 (1984)(tax return preparation); N.Y. State 633 (financial planning). Nonetheless, "[w]hile there are many services that may properly be undertaken by lawyers and nonlawyers alike … when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984);

ABA 297 (1961). While lawyers are permitted to employ nonlawyers to assist them in rendering legal services for client, the Lawyer's Code of Professional Responsibility prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law, DR 3-101(A), and from forming "a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." DR 3-103(A).

Thus, lawyers generally may not engage in such services in conjunction with nonlawyers without violating DR 3-101(A) or DR 3-103(A) where the affiliation between the lawyer and the nonlawyers is such that the lawyer does not supervise or assume responsibility for the work of the nonlawyers. *See, e.g.*, N.Y. State 557 (1984)(lawyer may not associate with accountant); N.Y. State 633 (1992)(law firm may not associate with financial planning company).

We have no difficulty in concluding that the activity proposed here – a lawyer representing homeowners in judicial or administrative proceedings challenging real estate taxes – constitutes the practice of law. When a lawyer represents a client in a litigation or quasi-litigation proceeding, the lawyer is practicing law whether or not a nonlawyer is legally permitted to perform the same function. See ABA 57 (1932)("It is difficult to conceive how a lawyer could conduct … a bureau for securing income tax refunds … without practicing law"); *see also* ABA 328 (1972).

It therefore follows that a lawyer may not affiliate with a nonlawyer real estate broker in prosecuting small claims petitions to reduce real property taxes if the lawyer holds himself or herself out as a lawyer in doing so. In addition, it is likely that such an arrangement would also violate DR 3-102(A), which prohibits sharing of legal fees with a nonlawyer. See N.Y. State 644 (1992)(lawyer may not form corporation with nonlawyers to assist homeowners in obtaining real estate property tax reductions because of violation of state judiciary law and violation of DR 3-102[A]).

The pending inquiry raises the question whether a lawyer may avoid violation of the various requirements of Canon 3 by the expedient of refraining from holding himself or herself out as a lawyer in the activities conducted with the nonlawyer. This device would satisfy the literal language of N.Y. State 557, which includes the attorney holding himself or herself out as an attorney as one factor that led to the conclusion that the lawyer's role in the enterprise constituted the practice of law. Moreover, the principal objective we have articulated for the prohibition is to prevent the lawyer from "enabling the nonlawyer to hold himself or herself out as offering legal services." N.Y. State 633 (1992); *accord*, N.Y. State 557 (1984). Where the lawyer refrains from acknowledging his or her membership in the legal profession in connection with the joint activity, this objective conceivably is justified.

Nevertheless, we conclude that, at least in the context of a litigation or litigation-like proceeding, a lawyer does not resolve the ethical objections to the joint provision of services with a nonlawyer simply by concealing his or her status as an attorney. This proposed means to avoid the prohibition of Canon 3 would itself violate other ethical requirements. The Code prohibits the lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." DR 1-102(A)(4). We have held that a lawyer who assists a pro se litigant in preparing pleadings must take steps to assure that the lawyer's participation has been disclosed to the court and opposing counsel. N.Y. State 613 (1990). Other committees have reached a similar conclusion. N.Y. City 1987-2; ABA Inf. 1414 (1978)("extensive undisclosed participation by a lawyer … that permits the litigant falsely to appear as being without substantial professional assistance is improper"). Similarly, both the adjudicating tribunal and the opposing party in the proceedings challenging homeowners' real estate taxes are entitled to know that the homeowner's representative is a member of the bar, rather than a person untrained in legal proceedings.

CONCLUSION

Accordingly, we answer the question presented in the negative.