ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 5.4(a) and (b), 5.5(a), 7.2, and 7.3. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 94-8
September, 1994

Topic: Professional independence; fee splitting; solicitation; unauthorized practice of law

Digest: It is professionally improper for a lawyer to participate in an arrangement with a non-lawyer whereby the latter engages in conduct which constitutes the unauthorized practice of law and where the lawyer obtains referrals in return for the payment of "marketing" or "consultation" fees and other things of value by the lawyer to the non-lawyer.

Ref.: Illinois Rules of Professional Conduct, Rules 5.4(a) & (b), 5.5, 7.2, 7.3
In re Yamaguchi, (1987) 118 Ill.2d 417, 515 N.E.2d 1235, 113 Ill.Dec. 928
Chicago Bar Association v. Friedlander, (1st Dist. 1960), 24 Ill.App. 2d 130
ISBA Policy on Real Estate Taxation Practices, April 3, 1992

FACTS

Multiple questions are presented by this inquiry, all having to do with an ill-defined relationship between a lawyer and a non-lawyer "tax representative" who refers property assessment matters to the lawyer, usually after performing preliminary work on behalf of the property owner relative to the assessment reduction process. The "tax representative" is at times characterized as an

"employee" of the lawyer, but the thrust of the inquiry suggests that he is in fact an independent contractor functioning as a "property owner representative."

The arrangement described calls for the non-lawyer to perform certain "spade work" with respect to the assessment reduction process (including the completion and filing of assessment reduction complaints) and later (where a hearing is required) to turn the matter over to the lawyer. It is also indicated that the non-lawyer distributes business cards and other "information" about himself along with cards and "information" concerning the lawyer and the lawyer's availability to perform legal services if needed "beyond the assessing official level."

INQUIRY

Is it professionally improper for a lawyer to participate in an arrangement with a non-lawyer wherein the non-lawyer engages in conduct which may be the unauthorized practice of law?

May an attorney obtains referrals in return for the payment of "marketing" or "consultation" fees from the non-lawyer who may be engaged in the unauthorized practice of law.

OPINION

The Committee is of the opinion that the relationship described violates several provisions of the Rules of Professional Conduct, including prohibitions against fee-splitting with non-lawyers, the formation of partnerships with non-lawyers, assisting in the unauthorized practice of law, and improper solicitation.

Although a myriad of questions are presented, a common theme runs through the inquiry: the non-lawyer performs on behalf of a property owner certain services relative to the assessment reduction process and then refers the cases to the lawyer and his firm in return for the payment of compensation and other benefits candidly described as including "below market or non-existent rent." All of the questions may be answered by reference to well-established principles embodied in the Rules of Professional Conduct and to Illinois case law dealing directly with the factual scenario described.

Applicable Rules

A lawyer or law firm is not permitted to share legal fees with a non-lawyer, and may not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. (Rule 5.4(a), (b)). Furthermore, a lawyer may not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Rule 5.5).

With respect to solicitation, a lawyer is prohibited from giving anything of value to a person for recommending or for having recommended the lawyer's services, except for payment of reasonable costs of advertising or written communications sanctioned by the Rules of Professional Conduct. (Rule 7.2(b)).

The "advertising" permitted under the Rules is restricted to "public media, such as telephone directories, legal directories, newspapers or other periodicals, billboards, radio or television, or

through written communication not involving solicitation as defined in Rule 7.3...." (Rule 7.2).

Rule 7.3, in turn, provides that a lawyer, except as otherwise specifically permitted, "shall not, directly or through a representative, solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain." (Rule 7.3).

Discussion

The inquiry describes what can only be regarded as an ongoing "feeder" operation from the "taxpayer representative" to the lawyer or law firm, in return for payments euphemistically described as "marketing" or "consulting" fees.

In addition, the activities of the non-lawyer with respect to completion of valuation complaints on behalf of the taxpayer have been found to constitute the practice of law. In, In re Yamaguchi, (1987) 118 Ill.2d 417, 515 N.E.2d 1235, 113 Ill.Dec. 928, the Illinois Supreme court held that a lawyer who "condoned and furthered" activities of a lay person strikingly similar to those described in this inquiry merited suspension under former Rule 3-101(a) of the 1980 Illinois Code of Professional Responsibility (the predecessor to current Rule 5.5), which prohibited a lawyer from aiding a non-lawyer in the unauthorized practice of law. The court said (113 Ill.Dec,. 928, at 932):

> Although we have previously permitted, in Chicago Bar Association v. Quinlan & Tyson, Inc., (1966), 34 Ill.2d 116, 214 N.E.2d 771, a real estate broker to fill in factual data on certain form contracts, the completion of a valuation complaint is quite unlike the completion of a form contract. The insertions which [the broker] was making on the form valuation complaints did not involve mere factual data. Rather, [the broker] without the supervision of an attorney, was setting forth on the valuation complaints the results of his legal analysis of the facts which he deemed justified a tax re-evaluation. Further, after [the broker] or his secretary filed those valuation complaints, [the broker] was appearing for oral argument before the tax board. Both the unsupervised completion of the complaint and the appearance before the administrative tribunal constituted the unauthorized practice of law."

In Chicago Bar Association v. Friedlander (1st Dist. 1960), 24 Ill.App.2d 130, an injunction against a group of non-lawyers doing business as a "property owners association" and a realty company was affirmed. The business of the non-lawyers consisted in part of representing property owners in proceedings related to valuation of real estate for tax purposes. The Appellate Court, affirming the decree of injunction, pointed out that practices by law persons covering real estate and allied transactions have been held to be the practice of law. The court stated (24 Ill.App.2d 130 at 133):

> Defendants have emphasized that their services relate to questions of valuation only, are confined to preparatory work and that they do not appear in court. Certainly the practice of law is not confined to the courtroom. Nor can defendants take refuge in the fact that their work may be said to be preparatory in nature. The fact is that all of their operations were in connection with matters that ultimately lead to court proceedings or proceedings before an administrative body.

Previous opinions of this Committee have dealt with conduct of an attorney deemed to constitute the unauthorized practice of law.

In Opinion No. 91-18, we pointed out that an attorney may represent members of a "property management committee" of an association of real estate agents provided that appropriate steps were taken to insure that the association had the authority to employ counsel to act on the clients' behalf; that there was no fee-splitting with the association or the member agents; and that the association did not engage in improper solicitation or in the unauthorized practice of law.

In Opinion No. 91-3, we held that a lawyer could represent creditor/clients at the request of a collection agency acting as their agent, but only upon satisfying himself that the agency was authorized by the creditor/client to do so; that the lawyer must insure that the agency did not engage in improper solicitation for legal services or engage in the unauthorized practice of law in the marketing or performance of its services. See also Opinion No. 91-10.

The general subject of real estate taxation practices in Illinois led to the formation of a joint committee of the Illinois State and Chicago Bar Associations. That committee investigated practices in the real estate tax assessment process, including the representation of property taxpayers by lay persons before supervisors of assessment, county assessors, and county boards of review or appeal. The committee concluded that the completion of tax evaluation complaints by real estate agents before a board of appeals constitutes the unauthorized practice of law; that appearance of a non-lawyer for oral argument before a board of appeals constitutes the unauthorized practice of law; and that a person not licensed or authorized to practice law in Illinois may not represent another in negotiations regarding property evaluation, in the execution of documents with respect to property evaluations, or in advising another with respect to his rights of protest and review. The report of the committee was adopted by the Board of Governors of the Illinois State Bar Association (ISBA Policy on Real Estate Taxation Practices, April 3, 1992).

The inquiry before us suggests that local assessing officials, including township assessors, supervisors of assessment, and county assessors do not prohibit non-lawyers from representing property taxpayers for compensation by filing assessment complaints before those officials. In this respect, In re Yamaguchi (1987) 118 Ill.2d 417, 515 N.E.2d 1235, 113 Ill.Dec. 928, discussed earlier, is also instructive. There, it was contended on behalf of the lawyer respondent in the disciplinary proceeding that the conduct of permitting non-lawyers to complete valuation complaints and to appear before the tax board was "widely adopted by realty brokers and acquiesced in by the tax board." The court, quoting from its earlier Quinlan & Tyson opinion, said (113 Ill.Dec. 928, 932):

> As we stated in Chicago Bar Association v. Quinlan & Tyson, Inc., (1966), 34 Ill.2d 116, 120, 214 N.E.2d 771, if by their nature acts require a lawyer's training for their proper performance, it does not matter that there may have been widespread disregard of the requirement or that considerations of business expediency would be better served by a different rule.

Of further interest in the Yamaguchi opinion is the fact that a rule of the local tax board required that valuation complaints be signed by an attorney or by the property owner himself; and that the valuation complaint form contained a portion for an attorney's appearance and affidavit of compliance. While the formulation of rules for local taxing bodies and the enforcement of such rules is beyond the province of this committee, the demonstrated existence of such rules, at least in the Yamaguchi case, fortifies our position that the activities described in the inquiry constitute the unauthorized practice of law and that the lawyer who knowingly participates in such activities assists in the unauthorized practice of law. The committee therefore concludes that the practices described in the inquiry are professionally improper.

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