

Recent New York State Bar Association Ethics Opinions

BY ROY SIMON

In late May, the New York State Bar Association Committee on Professional Ethics issued six new ethics opinions on a variety of matters. The full text of the opinions may be found at www.nysba.org (then click Ethics). Following are summaries of these important opinions:

Unauthorized Receipt Of Confidential Information About Opposing Party

N.Y. State Op. 700: A government lawyer prosecuting an administrative proceeding received an unsolicited telephone call from a non-lawyer who was formerly employed by the opposing law firm. The caller said that certain of the opponent's key records- had been materially- -altered- before they were given to the government agency. The lawyer immediately broke off the conversation.

May the attorney seek further information from the opposing firm's former employee regarding the allegedly altered documents? *No.*

The lawyer "may not seek to cause the former employee of his adversary's counsel to reveal the confidences or secrets of the former employer's client" and "may not exploit the willingness of the former employee to undermine the confidentiality rule." Doing so would "violate the letter and spirit" of DR 1-102(A)(4)-(5) (prohibiting "dishonesty, fraud, deceit, or misrepresentation" and "conduct that is prejudicial to the administration of justice").

Must the attorney inform the administrative hearing officer or the opposing law firm about the former employee's call? *Yes.*

If true, the information "would constitute fraud that must be revealed to the tribunal under DR 7 - 102(B)(2). It would be appropriate for the attorney, on notice to opposing counsel, to notify the hearing officer presiding over the proceeding of the allegation." If the lawyer feels that it would not be appropriate to notify opposing counsel, then he may "bring the allegation of document alteration to the attention of another court or other appropriate authority (such as a law enforcement agency or disciplinary authority) on an ex parte basis."

Co-Counsel To Part-Time Judge

N.Y. State Op. 701: A lawyer serves as co-counsel to a part-time judge in many cases. Presently, none of the cases is in the judge's court. In matters where the part-time judge is not co-counsel, may the lawyer ethically appear before other judges in the court where the part-time judge sits? *It depends.*

If the relationship is that of "partner" or "associate" as those terms are used in the Code of Judicial Conduct's Canon 6B(3), or if the lawyer and the judge are "connected in the law business" for purposes of Judiciary Law §471, then the judge must not permit the lawyer to appear before any judge in the court

where the part-time judge serves. The lawyer may not appear because if the conduct is if legal, it is also unethical under the Code.

Practice Of Criminal Law By Lawyer-Legislator

N.Y. State Op. 702: May a lawyer on a county legislature practice criminal law if he abstains from votes on the district attorney's budget and publicly discloses his intention to abstain? In N.Y. State Op. 692 (1997), the Committee found it improper for a lawyer-legislator to "take on a matter that will require the lawyer to cross-examine a police officer from a police department over which the legislature exercises budgetary or appointment authority, or to be adverse to a prosecutor whose office is similarly affected by the legislature."

Abstaining from final votes would not suffice to permit the lawyer to practice criminal law in the county courts. A legislator's influence on the legislature's deliberations, not merely a final vote on the district attorney's budget, "might induce a private client to retain the lawyer-legislator as criminal defense counsel 'in the hope of gaining some improper advantage.' . . . [T]he fact that the lawyer-legislator abstains from voting on the budget would not prevent suspicion that the client may be gaining some improper advantage by retaining" the lawyer. Thus, "DR 1-102(A)(5) and ECs 8-8 and 9-6 compel the same result here as they did in N.Y. State 692," so the lawyer-legislator may not practice criminal law.

Judicial Conflicts Of Interest

N.Y. State op. 703: Must a judge on a multi-judge court recuse himself when his uncle's step-daughter acts as a lawyer or associates at her firm act as lawyers in a matter before him? and (2) if he must recuse himself, may he accept remittal if offered by the parties without his participation?

A judge is required to recuse himself pursuant to Canon 3E(1)(e) of the Code of Judicial Conduct when a relative within the fourth degree is acting as a lawyer in the proceeding. That would include his uncle's step-daughter. When such a relative's associates act as lawyers in a matter before the judge, recusal is mandatory only if "the judge's impartiality might reasonably be questioned," Canon 3E(1). This depends on many factors, including "the nature of the attorney (public vs. private attorney), the nature of the fee (contingent vs. hourly fee), the size of the law firm, and the size of the community," and "no one factor is determinative." Nevertheless, if recusal is mandatory but the judge discloses on the record the basis for the disqualification and the parties and their lawyers agree — without the judge's participation — that the judge should not be disqualified, the judge may continue to sit in the proceeding.

Letterhead Of Multistate Law Firms

N.Y. State Op. 704: An out-of-state firm plans a New York office staffed by attorneys admitted to practice law in New York. The firm asks seven questions about letterheads and business cards, all of which may be answered by DR 2-101 and DR 2-102: (1) "May it use a general letterhead that contains only the firm name, without the names of individual attorneys?" Yes. But any non-lawyer using this general letterhead should clearly indicate that he is a not a lawyer. (2) "Must the name of the 'supervising' or 'resident' partner for the New York office appear on the firm's letterhead?" *No*.

(3) "May each lawyer have a personal letterhead showing both the firm name and the lawyer's name and phone number?" Yes. (4) "How should the letterhead identify lawyers admitted to practice in other states but not New York?" Under DR 2-104(D), the letterhead must show jurisdictional limitations on each

lawyer. Listing the New York and out-of-state office addresses on the letterhead implies that each lawyer on the letterhead is admitted wherever offices are listed. If this is not true, then the firm must use clarifying language such as “Not Admitted in New York” or “Admitted Only In New Jersey” after each name on the letterhead.

(5) “May the firm’s letterhead list its Internet web site address?” Yes. (6) “If attorneys not admitted to practice in New York get business cards from the New York office, must this practice limitation be shown on their business cards?” *No*.

But the Committee does not address the ways in which a lawyer not admitted in New York “could appropriately use such a business card under New York’s statute governing the unauthorized practice of law.” (7) Must each attorney’s personal letterhead and business card indicate whether the attorney is an associate, of counsel, or partner? *No*.

Accepting Cases From Non-Attorney Tax Reduction Firm

N.Y. State Op. 705: A non-attorney tax appeal company asks a tax certiorari attorney to bring a grievance under §706 of the Real Property Tax Law (“RPTL”) on behalf of a property owner who hired the non-attorney firm. The tax appeal company’s agreement provides that if the grievance is denied, it may “engage counsel to make, file and verify Article 7 petitions and represent property owner in Supreme Court proceedings.” The tax attorney asks two questions: (1) “May the attorney accept the engagement?” *Yes*.

[A]s 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” — but certain limitations apply.

First, “the client is the property owner, not the tax reduction company.” Under DR5-107(B), “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.”

Second, the attorney may not accept the engagement “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 non-attorney tax reduction company does “nothing more than ‘signing up clients and passing them on to lawyers, with a fee skimmed off the top.” Third, the attorney may not accept the engagement “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.’ Anon-lawyer, acting as the taxpayer’s agent, clearly may “engage counsel to...represent the property owner in Supreme Court proceedings.” (“[I]nsofar 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.”) But DR 3-101(A) prohibits a lawyer “from entering into an understanding or agreement to accept future, ongoing referrals from such a company” if doing so would assist the company in the unauthorized practice of law.

(2) The non-attorney’s commission agreement with the property owner provides for a fee of one-third of any amounts by which taxes are reduced. May the lawyer ethically enter into a fee agreement with the company (not the property owner) to represent the property owner on a contingent fee? *Yes*. The lawyer

may ethically agree to represent the property owner for a contingent fee, and the agency may pay the lawyer's fee out of the funds it obtains from the client "if the lawyer's fee is allocable to the lawyer's services." Thus, "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."

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