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J. Lyn Entrikin

University of Arkansas at Little Rock William H. Bowen School of Law, jlentrikin@ualr.edu

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TAX FERRETS, TAX CONSULTANTS, BOUNTY HUNTERS, AND HIRED GUNS: THE PROPERTY TAX NETHERWORLD FUELED BY CONTINGENCY FEES AND CHAMPERTOUS AGREEMENTS

J. LYN ENTRIKIN*

[T]he assessment process (and the property taxation dependent on it) is widely vulnerable to corruption and inequity.¹

It is suggested that the tax ferrets are sources of annoyance and disturbance, and their powers should not be extended. There is, no doubt, a certain class of citizens who view the tax ferret from the same standpoint that those who honestly list their property for taxation view the tax dodger; but the existence of the latter has created the necessity of the former. About all which is appropriate to say is that, had we never had the tax dodger, we would have had no necessity for the tax ferret.²

INTRODUCTION

The property tax is by far the single most important source of revenue for local governments in the United States.³ For the four quarters ending on March 31, 2013, state and local governments collected an estimated \$477.773 billion in property taxes, representing slightly more than one third of all state and local government revenue for that time period.⁴ Annual property tax collections by state and local governments exceed combined

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1. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2070 (1985).

2. *Osage & Okla. Cnty. v. Millard*, 145 P. 797, 801 (Okla. 1915) (Riddle, J., dissenting).

3. Over the last thirty years, property taxes have consistently represented approximately three-fourths of total annual local tax revenues. See Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 755 (2000); URBAN INSTITUTE & BROOKINGS INSTITUTION TAX POLICY CENTER, LOCAL PROPERTY TAXES AS A PERCENTAGE OF TOTAL LOCAL TAX REVENUE, SELECTED YEARS 1977-2010 (2013), available at http://www.taxpolicycenter.org/taxfacts/Content/PDF/dqs_table_84.pdf.

4. U.S. CENSUS BUREAU, QUARTERLY SUMMARY OF STATE & LOCAL TAX REVENUE (2013), available at <http://www.census.gov/govs/qtax/>.

individual and corporate state income taxes by well more than \$100 billion.⁵

Because property owners annually transfer substantial tax dollars to state and local governments, a financial incentive exists for opportunists to step in. Taxpayers and local governments alike are vulnerable to largely unregulated agents whose livelihoods depend on a share of the annual cash transfer of property tax dollars from property owners to local government coffers. Third parties magnify the problem when they enter into contracts with local officials and taxpayers for services in return for contingency fees.⁶ As a result, a substantial portion of the revenue that could be generated by the property tax base to finance public services is effectively diverted to private third parties, to the detriment of taxpayers and local governments alike.

Because budgeted local government expenditures require financing regardless of the allocation of the property tax burden among property owners, the diversion of a substantial share of potential property tax revenue to private third parties effectively increases the tax burden for all owners of taxable property, including those who voluntarily pay their taxes without protest, dispute, or appeal. At the same time, the diversion of property tax dollars to private third parties to facilitate correction of over-assessments enhances the relative advantage already enjoyed by property owners whose assessed values are understated, and who therefore have no reason to appeal.

This article attempts to focus scholarly attention on this longstanding public policy challenge, as well as the efforts a few states have undertaken to mitigate the perverse financial incentives that have allowed these issues to persist.⁷ Surprisingly, legal scholars have not addressed most of these

5. *See id.*

6. *See* Katherine Barrett & Richard Greene, *New Revenue, New Concerns: Contingency Fee Contracts Are Becoming Hot, But Have Their Limits*, GOVERNING (Mar. 2013), <http://www.governing.com/columns/smart-mgmt/New-Revenue-New-Concerns.html>.

7. Only a few commentators have addressed the legal issues related to third-party contracts between local taxing jurisdictions and property tax auditors. *See* Billy Hamilton, *This Gun for Hire: The Emerging Fight over Contingent-Fee Auditing*, TAX ANALYSIS 533, 538 (Nov. 21, 2011) (referring to "Magic 8-Ball bounty hunters"); Jerrold F. Janata, *Dealing with Property Tax Audits and the Added Burden of Third-Party Examiners*, 6 J. MULTISTATE TAX'N & INCENTIVES 100 (July/August 1996); Eric S. Tresh, et al., *Hard Times and Hired Guns in Local Tax Audits*, STATE TAX NOTES 741 (Dec. 7, 2009). No legal scholarship has been located that addresses the consumer protection and public policy issues associated with the virtually ubiquitous practice of non-attorney property tax consultants who represent property owners for contingency fees. In contrast, the legitimacy of contingency fees paid to attorneys, a highly regulated profession, has been a frequent subject of scholarly attention. *See, e.g.*, Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995); Allison F. Aranson, Note, *The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective*, 27 TEX. INT'L L.J. 755 (1992).

complex issues, notwithstanding their proliferation over the past century in state courts, legislatures, and administrative tribunals. Property tax administration has always been an important public policy issue because when poorly administered, the tax loses legitimacy with taxpayers.⁸ And the property tax affects virtually everyone, whether as owners of taxable property or as beneficiaries of local services and public education primarily financed by the property tax. Moreover, the administration of the property tax, like any other state or federal tax, has important constitutional implications.⁹

Part I provides background on the advantages and disadvantages of the property tax as a revenue source for local government and offers a general overview of the state and local property assessment and appeal process. Part II addresses the ethical and legal issues associated with the practice of local governments contracting with private auditors, historically known as “tax ferrets,” to identify and assess escaped or undervalued taxable property. Part III addresses the legal, ethical, and consumer protection issues involving the virtually nationwide business of property tax consulting. Part IV addresses legal and ethical constraints on contingency fee compensation agreements with non-lawyers. Part V discusses selected states’ statutory and regulatory regimes for regulating property tax consultants, and demonstrates that even in the most progressive states, oversight of the property tax consulting business is lacking. Part VI concludes. Appendix A provides a state-by-state overview identifying those states that prohibit or restrict contracts between local taxing authorities and private auditors; states that regulate or restrict the practice of property tax consultants; and states that limit or prohibit contingency fee agreements with either tax ferrets, tax consultants, or both. Appendix B includes representative examples of form agreements by which property tax consultants contract with both business and residential property owners.

I. THE PROPERTY TAX AS A LOCAL FUNDING SOURCE

During economic recessions, property values are historically less vulnerable to significant fluctuations than individual and corporate income.¹⁰ For that reason, *ad valorem* property taxes offer a stabilizing influence on

8. HENRY J. AARON, WHO PAYS THE PROPERTY TAX? A NEW VIEW 94 (1975).

9. See, e.g., David C. Long, *The Property Tax and the Courts: School Finance After Rodriguez*, in PROPERTY TAX REFORM 85-105 (George E. Peterson ed., 1973).

10. See Edward A. Zelinsky, *The Once and Future Property Tax: A Dialog with My Younger Self*, 23 CARDOZO L. REV. 2199, 2202 (2002) (discussing the relative inelasticity of property taxes as compared to income taxes).

state and local government revenues.¹¹ On the other hand, ownership of taxable property in contemporary United States does not correlate nearly as well with personal wealth¹² as it once did in the agricultural and industrial economy that characterized the eighteenth and nineteenth centuries.¹³ Property taxes have historically evoked disdain and resistance from taxpayers as compared to state and federal income taxes,¹⁴ perhaps because of their salience as annually recurring compulsory government levies on the values of homes and businesses.¹⁵ Moreover, property owners infrequently realize the fair market value of their homes and businesses, so imposing an annual tax levy as a percentage of assessed value poses a particularly striking financial burden on property owners who lack a stable and recurring source of income.¹⁶

Despite the political controversies associated with the property tax and the recurring criticisms concerning its uneven administration,¹⁷ the property tax as a primary source of local government revenue is likely here to stay.¹⁸ In particular, public elementary and secondary education in the

11. *Id.* at 2208 & n.16; see ABA PROPERTY TAX DESKBOOK v (2012); *infra* note 29 (defining *ad valorem*).

12. AARON, *supra* note 8, at 1-2 (ownership of taxable real property is not closely correlated with other indicia of income and wealth, and property tax liability is a poor index of public services provided to residential and business taxpayers).

13. See Arthur D. Lynn, *The Institutional Context of Property Tax Administration*, in THE PROPERTY TAX AND ITS ADMINISTRATION 3, 7 (Arthur D. Lynn, ed., 1969) (ad valorem property tax developed “when agriculture was predominant, transportation and communication primitive, government decentralized, international commitments minimal, and the public sector relatively small”). Historically, the property tax focused on land and its production value. Richard Henry Carlson, *A Brief History of Property Tax*, FAIR & EQUITABLE 3 (Feb. 2005).

14. AARON, *supra* note 8, at 68 (“The property tax remains one of the most unpopular taxes in the United States”); GLENN W. FISHER, THE WORST TAX? 4 (1996). For a brief but scholarly overview of the history of the property tax including its ancient European antecedents, see Arthur D. Lynn, *Property Tax Development: Selected Historical Perspectives*, in PROP. TAX’N – USA 7-19 (Richard W. Lindholm ed., 1969).

15. In contrast, state and federal income taxes for individual taxpayers are primarily collected and remitted to the government by employers. Self-employed individuals, businesses, and corporations pay quarterly estimated taxes. The fact that state and local income taxes are rarely paid in an annual lump sum reduces the shock value of the annual tax burden. The same buffering effect occurs when homeowners escrow property taxes and the escrow agent pays them annually or semi-annually. See ABA PROPERTY TAX DESKBOOK vi (2012). But the property tax remains the most salient of taxes for most taxpayers.

16. Zelinsky, *supra* note 10, at 2201-01; see AARON, *supra* note 8, at 3 (“Because most real property is not sold each year but market values continually change, it is difficult to define fairness and equity in the administration of property tax, let alone apply them.”).

17. See Zelinsky, *supra* note 10, at 2200 n.2.

18. AARON, *supra* note 8, at 92, 95; Alexander, *supra* note 3, at 748; see Zelinsky, *supra* note 10, at 2200. “Today, even the most casual observer of local finance understands that the property tax continues to play a critical role [in] funding municipal services, particularly public education.” *Id.* (footnotes omitted); see also *id.* at 2201 (property tax remains viable because of its “distinct theoretical and practical advantages”). For a comprehensive state-by-state overview of the distribution of the state and

United States is the constitutional responsibility of state government, and it is largely financed by local property taxes.¹⁹ In order to displace reliance on the property tax as a major financing source for public education, states would have the ominous task of identifying alternative sources of significant revenue.²⁰ And for all its vices, the property tax has the major advantage of enforceability.²¹ In each of the fifty states, unpaid property taxes attach as a priority lien on the property, allowing the taxing jurisdiction to eventually foreclose, conduct a forced tax sale, and collect the back taxes.²² Moreover, property taxes have an administrative advantage because of the visibility of real estate and its fixed situs in each local taxing jurisdiction.²³ Finally, property taxes enhance political accountability because local elected officials annually determine the local tax rates necessary to finance budgeted expenditures required to provide local government services.²⁴

A. The Uniformity Principle

At least in theory, the underlying principle of property taxation administration is uniformity. Beginning in the early to mid-nineteenth century, state constitutions typically required assessment²⁵ of all taxable property at a uniform percentage of value, yielding the same effective tax rate.²⁶ Even

local tax burden, see SUSAN PACE HAMILL, *AS CERTAIN AS DEATH: A FIFTY-STATE SURVEY OF STATE AND LOCAL TAX LAWS* (2007).

19. Alexander, *supra* note 3, at 755; Zelinsky, *supra* note 10, at 2200. As one scholar noted, the relative importance of the property tax diminishes to the extent that states accept financial responsibility for an increasingly large share of financing for public elementary and secondary education. AARON, *supra* note 8, at 92.

20. DIANE B. PAUL, *THE POLITICS OF THE PROPERTY TAX* 3 (1975) ("To abolish, or even significantly reduce, the burden of the property tax some other tax or taxes would have to be substantially increased.").

21. FISHER, *supra* note 14, at 120; Zelinsky, *supra* note 10, at 2217. *But cf.* Alexander, *supra* note 3, at 748 (warning that tax collection is not for the faint-hearted).

22. See Alexander, *supra* note 3, at 761.

23. Zelinsky, *supra* note 10, at 2209 n.20, 2216-20 (highlighting the virtues of the property tax).

24. *Id.* at 2208.

25. "Assessment" is not limited to the valuation of property. "It includes the whole statutory mode of imposing the tax. It embraces all the proceedings for raising money by the exercise of the power of taxation from the inception to the conclusion of the proceedings." *Jackson Lumber Co. v. McCrimmon*, 164 F. 759, 763-64 (N.D. Fla. 1908); see Kenneth Back, *Potential for Organizational Improvement of Property Tax Administration*, in *THE PROPERTY TAX AND ITS ADMINISTRATION*, *supra* note 13, at 38-39 (summarizing major aspects of the assessment function, including defending assessments on appeal).

26. See AARON, *supra* note 8, at 57 ("In most taxing jurisdictions, the law requires all properties to be taxed at the same effective tax rate."); FISHER, *supra* note 14, at 56-61, tbl.4.3 (discussing origin and spread of uniformity principle and state constitutional uniformity provisions). Many jurisdictions assess property at a fixed percentage of its fair market value and then apply a nominal tax rate to the assessed value. See *BLACK'S LAW DICTIONARY* 1548 (7th ed. 1999). Because states vary widely as to their assessment ratios for different property classifications, a more representative measure of a proper-

those state constitutions that have since been amended to provide for different classifications such as residential, industrial, and agricultural property²⁷ require assessment within each class at a uniform rate.²⁸

In general, some defined measure of property value is the theoretical foundation for achieving the abstract goal of uniformity in assessment.²⁹ In most states, "fair market value," sometimes known as "full value," is the statutorily defined measure of taxable property value, calculated by estimating what the property would sell for in an arm's length transaction.³⁰ "Appraisal" is the process of determining the valuation of property within a local jurisdiction for tax assessment purposes.³¹ For economic, political, and many other reasons, local jurisdictions vary widely in terms of the accuracy of the appraisal process.³² For example, appraisal practice is highly dependent on the accuracy of local data regarding actual sales of real property.³³ Moreover, for jurisdictions that include personal property in the tax base, accurate reporting relies heavily on the cooperation of taxpay-

ty owner's tax burden is the effective tax rate, which is calculated by dividing the annual tax liability of the property by its fair market value.

27. See Zelinsky, *supra* note 10, at 2212-13 (classification schemes in prototypical form explicitly divide all taxed properties into different categories, each with its own effective tax rate). Classification is often a political solution to the historical tendency for residential and agricultural property to be substantially undervalued compared to commercial and industrial property. See generally FISHER, *supra* note 14, at 174-79 (describing background of 1989 Kansas constitutional amendment that substituted classification for uniform property taxation).

28. AARON, *supra* note 8, at 57; FISHER, *supra* note 14, at 188 ("Uniformity within classes is still required."); see also State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1042 (Ind. 1998).

29. Because property taxes are largely imposed as a fraction of the subject property's value, they are often known as *ad valorem* taxes. BLACK'S LAW DICTIONARY 53, 1469 (7th ed. 1999).

30. Columbus Sch. Dist. Bd. of Educ. v. Franklin Cnty. Bd. of Revision, 983 N.E.2d 1285, 1292-93 (Ohio 2012) (defining arm's length transaction for tax valuation purposes); AARON, *supra* note 8, at 14. In an "arm's-length" transaction, unrelated parties are presumed to have roughly equal bargaining power, with neither under duress to enter into the transaction. See BLACK'S LAW DICTIONARY 103 (7th ed. 1999).

31. See BLACK'S LAW DICTIONARY 97 (7th ed. 1999).

32. The coefficient of dispersion is a measure of accuracy of the appraisal process in any jurisdiction. See AARON, *supra* note 8, at 92; John D. Cole, *The Effect of Electronic Data Processing upon Property Tax Administration*, in THE PROPERTY TAX AND ITS ADMINISTRATION, *supra* note 13, at 45, 49; see also PAUL, *supra* note 20, at 5. For any tax year, calculating the coefficient of dispersion requires identifying all property within a taxing jurisdiction that is sold in arm's-length transactions, and then averaging the percentage deviation between each property's assessed value and its actual selling price.

33. "[A]ppraising much real property is time-consuming, fairly subjective and ultimately manipulable." Zelinsky, *supra* note 10, at 2219 (noting difficulty of determining fair market value absent actual sales). Because the accuracy of the assessment process depends largely on the analysis of property sales data, taxing jurisdictions with larger populations (and consequently more sales) tend to have substantially lower coefficients of dispersion. See AARON, *supra* note 8, at 16, tbl.2-4; Cole, *supra* note 32, at 49; see also Zelinsky, *supra* note 10, at 2203.

ers.³⁴ For these and other reasons, the *ad valorem* nature of the property tax, as a means of equalizing the tax burden among property owners, poses challenges for equitable implementation.³⁵

Even within the constraints of generally accepted appraisal practices, appraisal is as much art as science.³⁶ Much of the criticism leveled at the property tax focuses on the inaccuracy of the fair market value determination. Although a number of laudable efforts have been made to develop guidelines for appraising property,³⁷ professional judgment remains a significant factor.³⁸

B. The Property Tax Assessment and Appeal Process

Taxable property is generally assessed in the first instance by the local taxing jurisdiction.³⁹ Property owners receive a notice of assessment⁴⁰ each year on or before a statutorily specified date. The property owner generally has a relatively short timeframe, often thirty days, to initiate an informal appeal of the local assessor's valuation determination. Many assessment disputes are resolved informally at this initial step. While the appeals process varies widely from state to state,⁴¹ typically the property owner has an

34. See, e.g., *Tippecanoe Cnty. v. Ind. Mfr's Ass'n*, 784 N.E.2d 463, 464 (Ind. 2003) (Indiana businesses annually self-report taxable personal property, which represents a substantial portion of the tax base); see also Zelinsky, *supra* note 10, at 2218 (personal property tax poses challenges in enforcement because taxpayers can easily move personalty when the tax collector comes looking for it).

35. See Zelinsky, *supra* note 10, at 2203. "The determination of the fair market value of property subject to taxation is one of the most difficult, and most controversial, aspects of the administration of the real property tax." Alexander, *supra* note 3, at 752, n.11.

36. Cole, *supra* note 32, at 48 ("[A]ppraisals are now and always will be the opinions of men, and perhaps never will be truly scientific . . .").

37. See, e.g., APPRAISAL FOUNDATION, Bylaws art. III § 3.01 (Nov. 2012) (purpose of Foundation, among other things, is "[t]o establish and improve uniform appraisal standards by defining, issuing and promoting such standards"), available at <https://appraisalfoundation.sharefile.com/download.aspx?id=s0ff82f963e64035b>.

38. Brief for Institute of Property Taxation, as *Brief of Amicus Curiae on Petition for Certiorari*, *Philip Morris, Inc. v. Cabarrus Cnty.*, No. 93-1710, at 4; see CAL. STATE BD. OF EQUALIZATION, LOS ANGELES COUNTY ASSESSMENT PRACTICES SURVEY (June 2013) (referring to "inherently subjective nature of the assessment process"); PAUL, *supra* note 20, at 8 ("Assessing, like police work, is both discretionary and subjective, combining constant temptation with minimal likelihood of exposure.").

39. In many states, unusually complex property, such as public utilities and railroads, is assessed at the state level. See, e.g., WYO. STAT. ANN. § 39-13-102(m) (2013); see also *Osage & Okla. Co. v. Millard*, 145 P. 797, 799 (Okla. 1915) (authority of counties to hire tax ferrets to identify undervalued or omitted property did not extend to state-assessed properties).

40. The assessment is the assessor's determination of value multiplied by the assessment rate for that classification of property. See *supra* note 25 and accompanying text (defining "assessment"). Each state determines a "lien date," generally January 1 of the current tax year, which establishes a fixed date for the purpose of determining each property's taxable value.

41. See, e.g., *In re Burson*, 909 S.W.2d 768, 771-72 (Tenn. 1995) (summarizing Tennessee's *ad valorem* tax appeal process). See generally ABA PROPERTY TAX DESKBOOK v (2012) (briefly describing property tax valuation and appeal process in each state).

opportunity to appeal the local assessor's final valuation decision to a local board of equalization, which may be composed of local elected officials or their appointees.⁴² If the property owner elects to appeal from the decision of the local equalization board, the next step is to seek review by the state board of equalization, in some states known as a board of review or a tax commission. The state board of equalization may be organized as a division of the state department of revenue, a separate administrative board, or an administrative tax court.⁴³

If the property owner remains aggrieved by the assessment after exhausting these administrative avenues, the next step is to seek judicial review, generally by a district or circuit court.⁴⁴ As a general rule, judicial review is not *de novo*; instead, the court reviews the record of the tax proceeding before one of the administrative tribunals, usually the state board of equalization, including expert witness reports and testimony. In addition to the administrative record, reviewing courts consider written and oral arguments by the parties to the tax appeal.⁴⁵ Depending on state statutes, the state board of equalization may or may not be a party to the judicial appeal.

From the district or circuit court level, the property owner may pursue an appeal through the state court system. Relatively few assessment appeals reach the state appellate courts, in part because judicial standards of appellate review are highly deferential to the specialized fact finding process of administrative tax tribunals,⁴⁶ and often opinions of value come down to a battle of the experts. Moreover, the economic and political incentives are

42. While the assessment appeal process is primarily designed to ensure the accuracy of the valuation process, most taxpayers who initiate an appeal are less concerned with the accuracy of the valuation than they are with the "bottom line"—the amount of their annual property tax bill. Richard R. Almy, *Rationalizing the Assessment Process*, in PROPERTY TAX REFORM 175, 177 (George E. Peterson ed., 1973). Once all property is assessed, the governing body determines the tax rate, usually measured in mills, to apply to assessed property to generate the revenues required to finance local budgeted expenditures for the ensuing year. A mill is one dollar for each thousand dollars in assessed value, or put another way, one tenth of one percent of the property's assessed value.

43. For an excellent overview and critique of one state's administrative property tax assessment and appeal process, see Gage A. Rohlf, Note, *Kansas Property Tax Appeals: An Adversarial System Without Adversaries*, 49 WASHBURN L.J. 871 (2010). See also Robert R. Gunning, *Property Tax Litigation Before the Board of Assessment Appeals*, 35 COLO. LAW. 87 (Aug. 2006). Local and state boards of equalization, however denominated, are quasi-judicial administrative tribunals established by statute; they are not courts. *E.g.*, *Grand Partners Joint Venture I v. Realtax Res., Inc.*, 483 S.E.2d 922, 925 (Ga. Ct. App. 1997).

44. In some states, an appeal from the state board of equalization is taken to the intermediate court of appeals.

45. One exception is Alaska. Because no state administrative appeal tribunal exists, property owners whose valuation disputes are not resolved locally may thereafter seek judicial review. See ALASKA STAT. § 29.45.200(c) (2012).

46. *E.g.*, *Mich. Props., LLC v. Meridian Twp.*, 817 N.W.2d 548, 551 (Mich. 2012).

substantial for parties to reach a settlement, or more specifically a stipulated value, before the case reaches the courts.

C. Primary Players in the Property Tax System

Local Assessors. Appointed by elected county, township, or municipal government officials in some states and directly elected in others, local assessors have the arduous (and politically charged) responsibility of periodically appraising property for *ad valorem* tax purposes. While the frequency of the reappraisal process varies widely from state to state, the initial responsibility falls on the shoulders of local appraisers, usually salaried employees of the taxing jurisdiction.

Not surprisingly, the educational and professional credentials of local assessors vary widely based on a number of factors, including the population base of the local jurisdiction and the willingness of local officials to provide a reasonable salary and supporting staff for the assessor's office.⁴⁷ Over the last two decades, the development and refinement of mass appraisal techniques, which rely heavily on computer technology and property sales data, have greatly facilitated the accuracy and efficiency of the appraisal process.⁴⁸ Yet the ongoing responsibility to accurately appraise property for tax purposes remains a difficult task, made even more challenging by the inherently political context of local government.

One of the ongoing challenges for local assessors is identifying "escaped" or significantly undervalued property. For example, if a new industrial building has been constructed on a parcel of vacant land since the previous valuation, or if a parcel of agricultural land on the outskirts of a developing metropolitan area has been subdivided for residential development, the parcel's fair market value will have increased substantially relative to the values of other property in the taxing jurisdiction. If the assessor is unaware of these improvements and appraises the property at the same value as the prior tax year, the marginal increase in property value eludes or "escapes" taxation, and the increment of the property tax burden that should be shouldered by the newly developed property is unwittingly shifted to every other property owner in the same taxing jurisdiction. In addition, the mobility of personal property in states that tax it allows owners to

47. A few jurisdictions require minimum educational credentials for candidates for the elective office of municipal tax assessor. *E.g.*, *Alongi v. Schatzman*, 274 A.2d 33, 40-41 (N.J. 1971) (upholding N.J. STAT. ANN. § 54:1-35.25, requiring graduation from four-year educational institution).

48. *But see Zelinsky, supra* note 10, at 2209 n.20 (expressing skepticism that computer-assisted appraisal techniques remedy deficiencies in the appraisal process).

evade tax simply by moving or hiding the property, in addition to the problem of chronic underreporting.

Tax Ferrets. Over the last century, many local jurisdictions have periodically contracted with private parties to help identify escaped or undervalued property to ensure that all taxable property is accurately valued and assessed.⁴⁹ In modern parlance, local taxing officials have long engaged in “outsourcing” the process of identifying and appraising undervalued property.⁵⁰ Historically, private contractors who performed this service for local governments were known as tax “ferrets” because their task was to ferret out undervalued or escaped taxable property.⁵¹ The practice originated in Roman times in the form of “tax farming;”⁵² ancient governments sold the right to assess and collect taxes to third parties in exchange for cash, which had the benefit of advancing funds to the taxing jurisdiction without the related expense of administering the tax system.⁵³

In the late nineteenth and early twentieth centuries, contracts outsourcing tax appraisal work to private parties⁵⁴ typically provided for compensation based on a contingency fee, calculated as a percentage of the additional

49. JOHN K. BRINDLEY JR., *HISTORY OF TAXATION IN IOWA* 310-11 (1911); John L. Coalson & Kendall L. Houghton, *Do Multijurisdictional Contingent-Fee Audits Violate Due Process?*, 8 J. MULTISTATE TAX’N & INCENTIVES 220, 220 (1998). The Brindley treatise offers a fascinating account of the tax ferret system in Iowa over a century ago. BRINDLEY, *supra*, at 310 (referring to tax ferrets as “the storm center of much prejudice and controversy in recent years”). In the late nineteenth century, “the heyday of the institution known as tax ferreting[,] the reporting of personal property was farmed out to tax inquisitors on a commission contract. Generally, they left a trail of bitterness.” Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?*, in *THE PROPERTY TAX AND ITS ADMINISTRATION*, *supra* note 13, at 15, 21.

50. *E.g.*, *Fitzgerald v. Town of Magnolia*, 184 So. 59, 60 (Miss. 1938) (holding unenforceable a contract providing 50% contingency fee for appellant’s assistance in putting certain railroad property on local tax rolls).

51. Alexander, *supra* note 3, at 751, 759-60 (referring to practice of tax farming as “routinely condemned” (citing E.A. Angell, *The Tax Inquisitor System in Ohio*, 5 YALE L.J. 350, 369 (1897))); *see, e.g.*, *Tippecanoe Cnty. v. Ind. Mfr’s Ass’n*, 784 N.E.2d 463, 464 & n.2 (Ind. 2003); *Simpson v. Silver Bow Cnty.*, 285 P. 195, 198 (Mont. 1930). *See generally* 16 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 44.102, 44.133 (3d. rev. ed. 2003).

52. Carlson, *supra* note 13, at 4.

53. Alexander, *supra* note 3, at 751. One scholar attributed the development of the tax ferret system in Iowa to the “acknowledged failure of local assessment for certain classes of intangible property.” BRINDLEY, *supra* note 49, at 140. Brindley explained,

[F]or the most part those who secured contracts for this class of work were professional adventurers or “birds of passage” from other States, with no reputation to lose and perhaps one to gain. In many cases they were not placed under bond. In fact, no law required them to give bonds, the matter being entirely in the hands of county boards of supervisors. The commissions paid were in many cases exorbitant [as much as fifty percent of the amount recovered], and . . . it was quite common for tax inquisitors from other States to make their visits, “skim off the cream,” or, perhaps, “come to a mutual understanding” with some professional tax dodger, hurry across the border and later return to a different county, there to repeat the process.

Id. at 312.

54. *E.g.*, *Wilhelm v. Cedar Cnty.*, 50 Iowa 254, 255 (1878).

tax revenue recovered by the tax ferret.⁵⁵ The practice was condemned by some courts,⁵⁶ generally reasoning that if statutes specifically conferred the power and duty on local officials to identify escaped or undervalued property, the local governing body lacked power to contract with private parties to conduct those government services.⁵⁷ Other courts reasoned that local governments had the implied power to contract with tax ferrets, especially if no local official had specific statutory authority to discover escaped or undervalued taxable property.⁵⁸

Some states enacted statutes expressly or implicitly authorizing local jurisdictions to enter into contracts with tax ferrets,⁵⁹ while others imposed statutory constraints on the power of local jurisdictions to do so.⁶⁰

In *Murphy v. Swanson*,⁶¹ the North Dakota Supreme Court identified an independent basis for holding a tax ferret contract unenforceable, beyond the rationale that the county governing body acted beyond its legal powers. The court reasoned that the contract was contrary to public policy because it provided for a fixed proportion of additional taxes that might be collected by the local government to be paid instead as compensation to the tax ferret, effectively diverting public funds to a private party. The court announced that “contracts of this character are contrary to a sound public policy, and, unless expressly warranted by legislative authority, will not be upheld.”⁶²

55. *E.g.*, *Shinn v. Cunningham*, 94 N.W. 941, 941 (Iowa 1903) (citing IOWA CODE § 1374 (1897)); *Fawcett v. Woodbury Cnty.*, 7 N.W. 483, 483 (Iowa 1880) (citing IOWA CODE § 303(4) (1873)). For a comprehensive account of the tax ferret’s historical role in local taxation, see NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*, at 191-220 (2013).

56. *E.g.*, *Murphy v. Swanson*, 198 N.W. 116, 120 (N.D. 1924); *Pierson v. Minnehaha Cnty.*, 134 N.W. 212, 215 (S.D. 1912). *But see* *Fleener v. Litsey*, 66 N.E. 82, 84 (Ind. App. 1903) (upholding contingent fee agreements with tax ferrets as consistent with public policy favoring fair and equitable taxation).

57. *E.g.*, *City of Richmond v. Dickinson*, 58 N.E. 260, 261-62 (Ind. 1900); *State ex rel. Coleman v. Fry*, 95 P. 392, 393 (Kan. 1908); *Grannis v. Bd. of Comm’rs of Blue Earth Cnty.*, 83 N.W. 495, 496 (Minn. 1900); *see also* *Groves*, *supra* note 49, at 21 (“Farming out tax administration is an ancient expedient; the experience seems to demonstrate that the ethics of tax administration cannot be maintained except by public officials under oath to follow the law.”).

58. *See, e.g.*, *City of Richmond v. Clifford*, 103 N.E. 789, 791 (Ind. 1914); *Disbrow v. Bd. of Supervisors of Cass Cnty.*, 93 N.W. 585, 586 (Iowa 1903).

59. *E.g.*, *City of Richmond*, 58 N.E. at 262 (citing 1891 amendment prohibiting local officials from engaging assistants to identify omitted property); *Fawcett*, 7 N.W. at 483 (citing IOWA CODE § 303(4) (1873)).

60. *Ingram v. Chappell*, 260 P. 20, 21 (Okla. 1929) (Tax Ferret Act authorized appointment limited to 15% contingency fee); *cf.* *Decatur Cnty. v. Roberts*, 126 S.E. 460, 460 (Ga. 1925) (statute authorizing contracts for 10% contingency fee negated authority to contract for 25% fee).

61. 198 N.W. 116 (N.D. 1924).

62. *Id.* at 120 (citations omitted). *But see* *Simpson v. Silver Bow Cnty.*, 285 P. 195, 198 (Mont. 1930) (contingent fee contract not against public policy).

Tax Consultants. Just as local taxing authorities contract for services with private third parties for tax auditing services, many businesses regularly outsource tax-related responsibilities traditionally undertaken by in-house corporate property tax managers.⁶³ And owners of residential property, large and small, often seek assistance in disputing their assessed property values. Property tax consulting firms, sometimes holding themselves out as “tax detectives” or “tax representatives,” actively solicit property owners, often promoting their services at “no cost.” Some property tax consulting firms make their form agreements available for download from the firms’ websites.⁶⁴ These agreements generally provide for compensation based on a fixed percentage of the estimated “tax savings” achieved for the property owner.⁶⁵

While the percentage varies, contingency fees between 30 and 50 percent of the estimated property tax savings are typical. Property tax consulting firms range in size, organization, and available services.⁶⁶ While “seasoned ethical professionals” may be identified in all categories, one corporate property tax manager has cautioned that some firms engage in practices that “may be considered less than ethical.”⁶⁷ While reputable tax consulting firms no doubt perform diligent, professional service whether compensated on a fee-for-service, hourly, or contingent fee basis, contingent compensation agreements create incentives to engage in unethical behavior.⁶⁸

By all accounts, tax consultants operate in a “highly unregulated business.”⁶⁹ A few states require anyone who prepares an appraisal to be licensed as an appraiser and prohibit contingency fee appraisals.⁷⁰ But in most states, the services provided by property tax consultants do not qualify as “appraisals” as defined in statutes, and therefore those restrictions do not apply. In the absence of regulation and oversight, history reflects that

63. See Michael D. Clark, *The ABCs of Hiring a Property Tax Consultant*, J. PROP. TAX MGMT. 18, 19 (Winter 1998) (“As long as there have been property tax consulting firms, there has been outsourcing.”).

64. For selected examples of tax consultant contingency fee agreements, see Appendix B.

65. Because their contingency fees are calculated based on an estimate of the tax “savings,” property tax consultant contracts resemble agreements for “reverse contingency fees,” promoted by some practitioners as an alternative to the “billable hour.” E.g., Jim O. Stuckey, II, “Reverse Contingency Fees”: A Potentially Profitable and Professional Solution to the Billable Hour Trap, 16 PROF. LAW., no. 3, 2005, at 25, 28.

66. Clark, *supra* note 63, at 21.

67. *Id.* at 18.

68. *Id.* at 26.

69. See, e.g., *id.* at 29, 32.

70. *Id.* at 29.

some property tax firms have engaged in highly unethical and even criminal behavior.⁷¹

Several organizations have been established over the years to develop best practices in property appraisal, and to encourage professionalism and ethical conduct among property tax assessors and consultants.⁷² However, membership in professional organizations is largely voluntary, except in the very few states where membership is a prerequisite for representing a property owner.⁷³

II. THE ETHICAL AND LEGAL PROPRIETY OF CONTINGENCY FEE CONTRACTS BETWEEN TAX ASSESSORS AND PRIVATE AUDITORS

A. Background

The policy issues inherent in contingency fee agreements between government agencies and outside counsel are not new. During the mid-1990s, several state attorneys general settled claims against the tobacco industry that netted some fourteen billion dollars nationwide in legal fees, raising a number of ethical issues about the authority of governments to contract with private parties for a percentage of the net recovery.⁷⁴ Among other arguments, critics⁷⁵ have observed that the contingency fees paid in the wake of the multi-billion dollar settlement effectively diverted public funds to private attorneys.⁷⁶ Instead, the millions of dollars in contingency fees paid to private counsel could have been used to offset Medicaid costs

71. *Id.* at 28-29; *see, e.g.*, Agreed Final Judgment and Permanent Injunction at 17, *Texas v. Patrick O'Connor & Assoc., LP*, No. 2009-33833 (129th Dist. Tex. Oct. 14, 2010) (\$800,000 settlement of civil claims against property tax consulting firm alleging numerous deceptive business practices); *see also* Ronald B. Welch, *Property Taxation: Policy Potentials and Probabilities*, in *THE PROPERTY TAX AND ITS ADMINISTRATION*, *supra* note 13, at 203, 205-06 (referring to California property tax reforms in 1966 "after an assessment scandal had rocked the state"). *See generally* PAUL, *supra* note 20, at 91-114 (case study of California property tax scandal and subsequent reform efforts).

72. Among others, these include the International Association of Assessing Officers, the Appraisal Foundation, the Institute for Professionals in Taxation, and the International Property Tax Institute. Some have adopted Codes of Ethics to which their members subscribe. *E.g.*, APPRAISAL STANDARDS BOARD, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE p. U-7 (2012-13), available at <http://www.uspap.org/#/28/>.

73. *See* OHIO REV. CODE ANN. § 5715.19(A)(1)(f) (LexisNexis Supp. 2013).

74. *See* Carson R. Griffis, *Should States Ban Contingency Fee Agreements Between Attorneys General and Private Attorneys?*, 20 PROF. LAW. 22, 22-24 (2010) (while contingency fees paid by state government to private counsel may facilitate cronyism and political patronage, they may also serve legitimate public interests).

75. *See, e.g.*, Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 626 (2009).

76. A few states have enacted legislation designed to curb the authority of attorneys general to enter into contingency fee agreements with outside counsel. *E.g.*, FLA. STAT. ANN. § 16.0155 (West Supp. 2013); *see also* Griffis, *supra* note 74, at 23.

for cigarette smokers borne by state taxpayers over many years, or to address the public health risks associated with cigarette smoking. Either would have been a better use of the tobacco settlement proceeds for public benefit.⁷⁷

More recently, taxpayers have challenged state and local governments when they retain private counsel to assist in prosecuting public nuisance claims and consumer protection violations.⁷⁸ For example, a group of California municipalities recently retained outside counsel to assist government attorneys in a public nuisance action against manufacturers of lead-based paint products.⁷⁹ The fee agreements with outside counsel provided for compensation as a percentage of the net amount recovered, and generally specified that government counsel would retain complete control over the course of the litigation.⁸⁰

The defendant manufacturers unsuccessfully sought to bar the plaintiffs from hiring outside counsel under a contingency fee agreement. In response, the court emphasized that the public nuisance action sought to redress harm to the public, raising public policy concerns not applicable to a typical civil action between private parties.⁸¹ Nevertheless, the court found “no indication that the contingent-fee arrangements . . . created a danger of governmental overreaching or economic coercion.”⁸² Therefore, the court did not categorically bar contingency fee agreements.⁸³ However,

77. Griffis, *supra* note 74, at 22 (citing Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 975).

78. See, e.g., *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 475 & n.50 (R.I. 2008); *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 647-48 (W. Va. 2013). See generally David M. Axelrad & Lisa Perrochet, *The Supreme Court of California Rules on Santa Clara Contingency Fee Issue - Backpedals on Clancy*, 78 DEF. COUNS. J. 331, 332-35 (2011) (contending that use of contingency fee counsel to enforce public rights creates appearance of impropriety and negatively affects government integrity and neutrality). Very recently, a federal district court rejected a due process challenge against the Kentucky Attorney General who had retained outside counsel on a contingency fee arrangement to litigate alleged violations of the Kentucky Consumer Protection Act. See *Merck Sharp & Dohme Corp. v. Conway*, CIV. A. 3:11-51-DCR, 2013 WL 2297179, at *5 (E.D. Ky. May 24, 2013). The court reasoned that the attorney general had “retained and exercised decision-making authority in the underlying litigation” sufficient to protect the defendant drug manufacturer’s due process rights. *Id.* at *17.

79. *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 25-26 (Cal. 2010), *cert. denied sub nom. Atl. Richfield Co. v. Santa Clara Cnty.*, 131 S. Ct. 920 (2011). Retained counsel agreed to finance all litigation costs beyond an initial contribution of \$150,000 by Santa Clara County. *Id.* at 26-27. If successful, the private firms would recover their unreimbursed costs plus 17% of the net recovery, but if unsuccessful, nothing. *Id.* at 27.

80. *Id.* at 40-41.

81. See *id.* at 34.

82. *Id.*

83. The court rejected defendants’ argument that contingency fee contracts with government entities are inherently suspect, observing that “[c]ontingent-fee arrangements are deeply entrenched as a legitimate and sometimes prudent method of delegating risk [to counsel] in the context of civil litigation” *Id.* at 39 n.14.

because local governments undertook the civil litigation on behalf of the public, the court invoked a “heightened standard of ethical conduct” in considering the propriety of the fee agreements with private counsel.⁸⁴ Applying this heightened scrutiny, the court concluded that the challenged fee agreements passed muster under the circumstances.⁸⁵

The fact that outside counsel had agreed to work under the close supervision of in-house counsel reassured the court that government attorneys would “place the interests of their client above the personal, pecuniary interest of the subordinate private counsel they have hired.”⁸⁶ The court remanded for further proceedings to ensure that all contingency fee agreements with outside counsel adequately retained government control and supervision of the litigation “to safeguard against abuse of the judicial process.”⁸⁷

Outsourcing public litigation to private counsel continues to be controversial.⁸⁸ Very recently, the West Virginia high court rejected a motion to disqualify private counsel appointed by the state attorney general to prosecute violations of state consumer protection laws against defendant’s credit card services.⁸⁹ Although a West Virginia statute⁹⁰ authorizes appointment of assistant attorneys general only on the condition that their compensation remain within the limits of appropriations, the court held that the state attorney general retains common law power to appoint special assistants and determine their compensation.⁹¹

84. *Id.* at 35. “[A] civil attorney acting on behalf of a public entity, in prosecuting a civil case such as a public nuisance abatement action, is entrusted with the unique power of the government and therefore must refrain from abusing that power by failing to act in an evenhanded manner.” *Id.* (citations omitted).

85. *Id.* at 36.

86. *Id.* In particular, the court held that “retention agreements between public entities and private counsel must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity’s own attorneys.” *Id.*

87. *Id.* at 41.

88. *See, e.g.,* *Merck Sharp & Dohme Corp. v. Conway*, CIV. A. 3:11-51-DCR, 2013 WL 2297179, at *17 (E.D. Ky. May 24, 2013) (contingency-fee arrangement with outside counsel in consumer protection case did not violate due process); *Int’l Paper Co. v. Harris Cnty.*, 01-12-00538-CV, 2013 WL 3864317, at *14 (Tex. Ct. App. July 25, 2013) (use of contingent-fee lawyers may allow pursuit of complex, non-frivolous litigation government entity could not otherwise afford, and may provide specialized expertise that government lawyers lack). *But see* *Greater Ga. Amusements, LLC v. State*, 728 S.E.2d 744, 746 (Ga. Ct. App. 2012) (invalidating contingency fee agreement retaining outside counsel to assist in prosecuting convenience stores for violating Georgia’s RICO Act); *Amusement Sales, Inc. v. State*, 730 S.E.2d 430, 438 (Ga. Ct. App. 2012) (categorically disqualifying special assistant district attorneys appointed on contingency agreement to prosecute *in rem* civil forfeiture against commercial gambling machines).

89. *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 651 (W. Va. 2013).

90. W. VA. CODE ANN. § 5-3-3 (LexisNexis 2006).

91. *Nibert*, 744 S.E.2d at 648.

Concerns about government retention of contingency fee counsel and expertise are not limited to state and local governments. On May 18, 2007, President George W. Bush issued an Executive Order⁹² generally prohibiting federal agencies from compensating attorneys and expert witnesses based on contingency fees.⁹³ The order announced,

[I]t is the policy of the United States that organizations or individuals that provide [legal and expert witness] services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law.⁹⁴

The stated purpose of the Executive Order was “[t]o help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States.”⁹⁵ President Obama has not rescinded the order, so it remains in effect.

Similar public policy and ethical concerns pertain when local government officials “outsource” auditing services to private parties in consideration for a contingency fee.⁹⁶ In a “contract audit,” the tax assessor engages a third party to audit the books of a property owner, rather than assigning the work to an employee of the assessor’s office. The fee paid to a contract auditor may be a fixed fee or a percentage of any additional taxes recovered.⁹⁷ When local tax officials compensate outside auditors and accountants on a contingency fee arrangement, they divert a percentage of the property taxes recovered to pay private parties rather than to finance public services.⁹⁸

The potential for abuse is even greater when tax assessors contract with private auditors to assist with the assessment function. Local tax officials are not attorneys, and most private auditors and accountants are not

92. Exec. Order No. 13,433, 3 C.F.R. 638 (2007).

93. Under the Order, federal agencies are barred from entering into contingency fee agreements for legal or expert witness services unless required by law, as determined by the Attorney General. *Id.* at § 2(b). Contingency fees are defined as “a contract or other agreement to provide services under which the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained.” *Id.* at § 3(b).

94. *Id.* at § 1.

95. *Id.*

96. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 32 (1989) (“[M]any contingent fees are invalid as a matter of ethics, policy, and law since they are often used in situations where there is either no contingency or . . . the contingent fee far exceeds any legitimate risk premium for the anticipated effort.”).

97. *Nontraditional Audit Programs*, BNA TAX MANAGEMENT PORTFOLIOS STATE SERIES § 1730.12, A.3 (defining “contract audit”) [hereinafter *Nontraditional Audit Programs*]; see also *id.* at E. (discussing contingent fee arrangements).

98. *Murphy v. Swanson*, 198 N.W. 116, 120 (N.D. 1924).

subject to the same ethical constraints against conflicts of interest as are lawyers. Further, when an outside auditor is compensated on a contingency fee basis, a negative incentive exists to identify assessment errors that overvalue taxable property, because reducing those assessed values would result in a refund to the taxpayer and a concomitant reduction in the auditor's contingency fee.⁹⁹ The practice of outsourcing tax assessment functions with the fee contingent on the amounts recovered thus raises both conflict of interest and due process concerns.¹⁰⁰ On the other hand, advocates of outsourcing argue that private contract auditors have improved the overall fairness of the property tax by strengthening enforcement, and that existing safeguards are sufficient to prevent abuse.¹⁰¹

Contingency fee arrangements with private auditors raise other concerns unique to property tax administration. To compensate for revenue lost when taxable property escapes identification by the local assessors, a marginally higher tax rate must apply to all other taxable property in a given jurisdiction in order to finance the local budget. Local government finance is uniquely a zero-sum game.¹⁰² When taxable property escapes taxation or is undervalued for assessment purposes, the underpayment imposes an economic burden on local government and indirectly on all other property owners, who effectively subsidize local government services provided to owners of undervalued or escaped property. Furthermore, contingency fee agreements for outsourced tax audit services avoid accountability through the local budget process because the true costs of identifying undervalued property are "hidden" in the form of an offset to property tax revenue.¹⁰³

99. *Nontraditional Audit Programs*, *supra* note 97, at E. (discussing conflicts of interest associated with contingent fee arrangements).

100. See PARRILLO, *supra* note 55, at 203 (referring to "the deep objection to tax ferrets – indeed to the very notion that [tax] enforcers should have a monetary self-interest in the act of enforcement"). The Institute of Property Tax Professionals has taken the position that engaging private auditors under contingency fee agreements with local governments violates property owners' due process rights. See Institute of Property Taxation as Amici Curiae Supporting Respondents, *Philip Morris, Inc. v. Cabarrus Cnty.*, (No. 93-1710), 1994 WL 16101056, at *4. *But see, e.g., Priceline.com Inc. v. City of Anaheim*, 103 Cal. Rptr. 3d 521, 536 (Cal. App. 4th Dist. 2010) (rejecting due process challenge to city's contingent fee contract retaining outside legal counsel to recover several million dollars in unremitted hotel occupancy taxes from online travel reservation sites).

101. *Nontraditional Audit Programs*, *supra* note 97, at E.

102. See Rohlf, *supra* note 43, at 873 ("[P]roperty tax is a zero-sum system. When a taxpayer receives a downward adjustment in the value of her property, the system simply spreads the burden relieved among other taxable properties.").

103. While contingency fees paid to private auditors are calculated as a percentage of the additional taxes recovered and therefore appear to be at "no cost" to local government, in fact they represent tax expenditures in the same manner as tax exemptions and credits.

B. Judicial Constraints

States have addressed the issue of outsourcing property tax audits in a variety of ways.¹⁰⁴ In a few states, the courts have barred the agreements, narrowly interpreting statutory authority granted to municipalities by holding that only those powers expressly conferred by statute may be exercised by local officials.¹⁰⁵ In others, the courts have broadly interpreted general statutory taxing authority granted to local assessors to include the implied authority to retain outside private entities to assist in the auditing function.¹⁰⁶ This is particularly so in states that have granted home rule authority to municipalities, which generally confers all powers reasonably necessary to carry out the operation of local government unless specifically contrary to uniformly applicable state law.¹⁰⁷

A few courts have held that contingency fee contracts with outside auditors are void and unenforceable on public policy grounds.¹⁰⁸ Those courts have reasoned that an agreement by which a tax ferret "contingently shares in a percentage of the tax collected [inherently] offends public policy."¹⁰⁹ Some courts have suggested that testimony offered by contingent fee auditors and appraisers is entitled to very little credibility in a tax valuation dispute because of the inherent bias associated with the terms on which

104. See generally 16 McQUILLIN, *supra* note 51, at § 44.102.

105. E.g., *Fitzgerald v. Town of Magnolia*, 184 So. 59, 59-60 (Miss. 1938) (barring 50% contingency fee contract for discovering escaped real property); cf. *Coonrod v. Marsh*, 830 N.E.2d 91, 94-95 (Ind. Ct. App. 2005) (absent specific statutory authorization and approval by appropriate county officials, county auditor lacked authority to contract with private accountant for 33% contingency fee to recover more than eight million dollars in local tax funds held by State Treasurer).

106. E.g., *Union Pac. Res. Co. v. State*, 839 P.2d 356, 381 (Wyo. 1992) (no statutory or constitutional limitation precluding use of contractors; contingency fees, if reasonable and realistic, do not violate public policy).

107. E.g., *Tippecanoe Cnty. v. Ind. Mfr's. Ass'n*, 784 N.E.2d 463, 466 (Ind. 2003); *Whitney v. City of Terrell*, 278 S.W.2d 909, 912 (Tex. Civ. App. 1955).

108. See, e.g., *Sears, Roebuck & Co. v. Parsons*, 401 S.E.2d 4, 5 (Ga. 1991) (while Georgia statute expressly permits local board of tax assessors to contract for identification of escaped personal property, no statute expressly authorizes contingency fee agreements). But see *Simpson v. Silver Bow Cnty.*, 285 P. 195, 198 (Mont. 1930) (contingent fee contract not against public policy); *In re Appeal of Philip Morris*, 436 S.E.2d 828, 831 (N.C. 1993) (contingency fee contract with outside firm to provide expertise to assessor not contrary to public policy; issue was for legislature), *cert. denied sub nom. Philip Morris, Inc. v. Cabarrus Cnty.*, 512 U.S. 1228 (1994).

109. *Sears, Roebuck & Co.*, 401 S.E.2d at 5. The court stopped short of declaring the contract unconstitutional, instead inviting the Legislature to consider the public policy issue if it disagreed with the court. *Id.*; see also *Yankee Gas Co. v. City of Meriden*, 29 Conn. L. Rptr. 285, 2001 WL 477424, at *21 (Super. Ct. Apr. 20, 2001). The court in *Yankee Gas* reasoned,

When an auditor is hired based on a contingent fee basis, there is an inherent and initially unfounded assumption that the original assessment was wrong, and it creates an incentive to determine its inaccuracy and to increase the assessment. Contingent fee arrangements may very well lead to unfair results, as in the instant case.

Id. (internal footnote omitted).

they have been retained and compensated.¹¹⁰ Scholars and taxpayers have challenged contingency fee agreements between local governments and tax ferrets as a constitutional violation of due process.¹¹¹ To date, however, these arguments have been generally unsuccessful.¹¹²

Finally, courts have not missed the irony when property owners challenge the legitimacy of a tax audit: "There is a syllogism that defies realism that comes affixed to this subject. It provides a conclusion without the recitation of the initial premise . . . why a taxpayer should object to a cross check of public records if accurate reporting and proper tax payments have occurred."¹¹³

C. Statutory Limitations

State statutes address the issue in various ways. Some specifically authorize local taxing jurisdictions to retain outside private parties to assist in

110. *E.g.*, *Hubbell, Inc. v. City of Bridgeport*, 16 Conn. L. Rptr. 85, 1996 WL 66270, at *4 & n.8 (Conn. Super. Ct. 1996) ("[Contract auditor's] methodology is so indefensible and its interest in distorting data so evident that the evidence and testimony it presented is not worthy of belief.").

111. *E.g.*, *Sears, Roebuck & Co.*, 401 S.E.2d at 5; *Tippecanoe Cnty.*, 784 N.E.2d at 468 (35% contingency fee agreement with personal property tax ferret); *Coalson & Houghton*, *supra* note 49, at 220-21; *Janata*, *supra* note 7, at 106 (encouraging state and federal due process challenges); *cf.* *Price-line.com Inc. v. City of Anaheim*, 103 Cal. Rptr. 3d 521, 536 (Cal. App. 4th Dist. 2010) (rejecting due process argument challenging use of contingency fee legal counsel to assist city attorney in tax assessment proceedings); *Hubbell*, 16 Conn. L. Rptr. 85, 1996 WL 66270, at *4 & n.8 (dicta). In a footnote, the *Hubbell* court raised the due process issue, suggesting that contingency fee arrangements between assessors and outside auditors may implicate due process absent "independent review by an official who is untainted by such terms for compensation." *Id.* (citing, *e.g.*, *Tumey v. Ohio*, 273 U.S. 528 (1927)). In rejecting a public policy challenge, a Pennsylvania court observed, "[a]s local governments increasingly turn to private tax collectors and auditors with the legislature's approval, [the court] must assume that the legislature knows how such arrangements are structured and does not foresee that private collectors and auditors will turn into tax bounty hunters threatening the public's right to fair and impartial tax assessment." *Suburban Cable TV Co. v. City of Chester*, 685 A.2d 615, 619 (Pa. Commw. Ct. 1996). For an excellent analysis and discussion of the due process issue, see Nancy S. Rendleman & Charles B. Neely Jr., *Can Contingent-Fee Property Tax Audits Be Challenged on Due Process Grounds?*, 4 J. MULTISTATE TAX'N & INCENTIVES 80 (May/June 1994).

112. *See, e.g.*, *Tippecanoe Cnty.*, 784 N.E.2d at 468 (nature of tax ferret's role not sufficiently judicial to render commission agreement impermissible); *Philip Morris*, 436 S.E.2d at 831 (rejecting due process argument); Rendleman & Neely, *supra* note 111, at 80; *see also Hubbell*, 16 Conn. L. Rptr. 85, 1996 WL 66270 at *4 ("We neither reject nor endorse the trial court's dicta regarding the public policy implications of such a contract and the procedures by which such a contract may be challenged.").

113. *Union Pac. Res. Co. v. State*, 839 P.2d 356, 373 (Wyo. 1992); *see also id.* at 381 (Thomas, J., concurring).

An earnest argument is made addressing the unseemliness or probable impropriety of expending public funds for reimbursement of the "bounty hunters" on a contingent fee basis. The irony I perceive is that this argument is made on behalf of those who have it within their control to prevent any such payments. All that is required to avoid any contingent fee payments is correct and consistent reporting of [taxable property]. If that goal is achieved, there will be no recoveries out of which to pay such contingent fees.

Id.

the assessment function, without limiting the method of compensation.¹¹⁴ Others grant contracting authority, subject to certain restrictions. In Connecticut, for example, a statute authorizes local assessors to contract for valuation services, but the State Office of Policy and Management must certify private companies retained for that purpose.¹¹⁵ In several states, statutes that expressly allow local taxing jurisdictions to contract with private entities for assistance in assessing property preclude or limit compensation in the form of contingency fees as a percentage of taxes recovered.¹¹⁶

However, authorizing statutes do not always control when a contingency fee arrangement is challenged in court. In *Sears, Roebuck & Co. v. Parsons*,¹¹⁷ even though a statute expressly authorized contracts with outside entities for assistance in identifying and reporting escaped or under-assessed property, the Georgia Supreme Court refused to enforce a contingency fee contract with a private auditor.¹¹⁸ The court reasoned that the agreement was void as against public policy in the absence of more explicit authorizing legislation.¹¹⁹

In some states, statutes generally authorizing local governments to appoint outside auditors have subsequently been amended to preclude fees as

114. *E.g.*, FLA. STAT. ANN. § 193.024 (West 2007); IOWA CODE ANN. § 441.50 (West Supp. 2013); KAN. STAT. ANN. § 19-425 (2007); *see* Walker v. Trump, 549 So. 2d 1098, 1102 (Fla. Dist. Ct. App. 1989); Dillon Stores v. Lovelady, 855 P.2d 487, 491 (Kan. 1993) ("tax ferret" metaphor inapplicable when accounting firm assists with record interpretation, as authorized by statute).

115. CONN. GEN. STAT. ANN. § 12-2c (West 2008). The statute was enacted following a report of the governor's commission on tax reform in 1972, which recommended certification as a means for ensuring the competence of companies retained to conduct general revaluations. Chamber of Comm. of Greater Waterbury, Inc. v. Lanese, 439 A.2d 1043, 1045 (Conn. 1981).

116. *E.g.*, IND. CODE ANN. § 6-1.1-36-12(c) (LexisNexis Supp. 2013); Appeal of Trippet, 101 P.2d 1058, 1060 (Okla. 1940) (affirming contract based on OKLA. STAT. tit. 68, § 481, providing for contingency fee not to exceed 15% of taxes recovered); *see* White v. McGill, 114 S.W.2d 860, 863 (Tex. 1938) (voiding tax ferret contract for assessment and collection of personal property taxes as lacking statutory authority and approval by Comptroller and Attorney General (citing TEX. REV. CIV. STAT. ANN. art. 7335a (repealed 1982), which limited contingent compensation to 15%)).

117. 401 S.E.2d 4 (Ga. 1991).

118. *Id.* at 4-5, 5 n.2. "In the exercise of [the] power [to tax], the government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of the tax collected, and we hold that such an agreement offends public policy Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends." *Id.* at 5 (citing GA. CODE ANN. § 13-8-2(a)). The court acknowledged freedom of contract as a "competing policy," but rejected it as a secondary consideration. *Id.* at 5 n.2. For a comprehensive discussion of public policy considerations counterbalancing traditional freedom of contract principles, *see* Mark Pettit, *Freedom, Freedom of Contract, and the 'Rise and Fall'*, 79 B.U. L. REV. 263, 354 (1999) ("If there is a direct conflict between freedom of contract and some other clearly articulated value, . . . freedom of contract often loses."). *But see* Shinn v. Cunningham, 94 N.W. 941, 942 (Iowa 1903) ("The valid contract of a municipal corporation is just as sacred from legislative interference or destruction as is one made between individual citizens.")

119. *Sears, Roebuck & Co.*, 401 S.E.2d at 4-5, 5 n.2.

a fixed percentage of tax collections.¹²⁰ In Indiana, for example, a former statute expressly authorized boards of county commissioners to contract with private parties for discovery of taxable property *omitted* from the tax rolls,¹²¹ which the Indiana courts had interpreted to include the implied authority to audit for *undervalued* property as well.¹²² The 2002 Indiana Legislature amended the statute to expressly authorize contract audits for undervalued property, but to specifically prohibit contingency fees.¹²³ Utah amended its authorizing statute in 1994 to preclude counties from paying compensation to private appraisers on a contingency fee basis.¹²⁴ In other states, statutes expressly authorizing local taxing jurisdictions to contract with outside auditors have been interpreted by state attorneys general to preclude contingency fee agreements.¹²⁵ A few states have recently enacted statutes precluding local governments from paying outside tax auditors a contingency fee based upon a percentage of collections.¹²⁶

D. Administrative Concerns

Some statutes, courts, and commentators have distinguished contracts for collection of delinquent property taxes as permissible, while contract services that support the assessment function are not.¹²⁷ The rationale is that once the underlying tax liability has been established, contracts for collection of delinquent taxes do not implicate the judgment inherent in the assessment function itself.¹²⁸ Unlike collection of delinquent taxes, the

120. *E.g.*, IND. CODE ANN. § 6-1.1-36-12(c); N.C. GEN. STAT. ANN. § 105-299 (West Supp. 2012); OKLA. STAT. ANN. tit. 68, § 262 (West 2001); TEX. TAX CODE ANN. § 25.01(b) (West 2008); UTAH CODE ANN. § 59-2-703(2)(c) (LexisNexis 2011); *see* Tex. Att’y Gen. Op. JC-0290 (Oct. 10, 2000) (Texas statute reflects legislative intent to “closely regulate contingent fee contracts involving taxing units”).

121. *See* Ind. Pub. L. No. 178-2002 § 39.

122. *See* *Tippecanoe Cnty. v. Ind. Mfr’s Ass’n*, 784 N.E.2d 463, 466-67 (Ind. 2003) (rejecting taxpayers’ argument interpreting former statute narrowly to permit contract audits only for omitted property but not undervalued property; enforcing contract for 35% contingency fee).

123. *Id.* at 466 n.5 (citing Ind. Pub. L. No. 178-2002 §§ 37-39 (current version codified at IND. CODE ANN. § 6-1.1-36-12(c) (LexisNexis Supp. 2013))).

124. UTAH CODE ANN. § 59-2-703(2)(c).

125. *E.g.*, Ala. Att’y Gen. Op. No. 2009-074 (June 10, 2009); Tex. Att’y Gen. Op. No. JC-0290 (2008) (interpreting TEX. TAX CODE ANN. § 25.01). *But see* Kan. Att’y Gen. Op. No. 94-8 (Jan. 27, 1994) (tax ferret contracts not void as against public policy, even if contingency fees are not capped).

126. *E.g.*, ALA. CODE § 40-2A-6(a) (LexisNexis 2011); MO. ANN. STAT. § 136.076(1) (West 2009); TEX. TAX. CODE ANN. § 25.01 (West 2008); *Tippecanoe Cnty.*, 784 N.E.2d at 466 n.5 (citing Ind. Pub. L. No. 178-2002 §§ 37-39); *see* Coalson & Houghton, *supra* note 49, at 221.

127. *See, e.g.*, ALA. CODE § 40-2A-6 (contingency fee agreements for local assessment services void and unenforceable, without prohibiting or restricting contracts for collection of delinquent tax); *see also* Ala. Att’y Gen. Op. No. 2009-074 (June 10, 2009) (narrowly interpreting § 40-2A-6 so as not to authorize contracts to collect delinquent property taxes for a contingency fee).

128. Bruce Stavitsky, *Georgia and North Carolina—Are Contingency Fee Agreements Against Public Policy?*, 1 J. MULTISTATE TAX’N & INCENTIVES 181, 182 (Sept./Oct. 1991) (observing that a

assessment and classification of taxable property involve a high degree of expertise, and assessment in particular is considered a quasi-judicial function.¹²⁹

Among other arguments, critics have challenged "tax ferret" contracts, which compensate outside parties based on the percentage of taxes recovered, because these contracts effectively permit the local assessor to supplement the local budget for assessment and collection of property taxes.¹³⁰ Contingency fees based on a percentage of the increased tax collections allow the local taxing officials to provide for enhanced audit functions not otherwise possible with the existing staff of the assessor's office. Moreover, the contingency fee provides an incentive to the contractor to select large businesses for audit, whose taxable property is most likely to be under-assessed by substantial amounts.¹³¹

On occasion, taxpayers have challenged the reasonableness of the percentage contingency fee paid to contract auditors. For example, one court upheld a fifty percent contingency fee over an argument that the fee was presumptively excessive.¹³² The court was unable to conclude as a matter of law that the contract terms were unreasonable or unjust and ultimately enforced the contract, deferring to the judgment of local elected officials.¹³³ In most cases, as long as the compensation does not exceed statutory restrictions and the appropriate officials authorize the agreement, the courts have held the contracts enforceable.

E. Constitutional Considerations

Contingency fee agreements with outside auditors raise understandable suspicions among property owners regarding objectivity and fairness. If the outside auditor lacks appropriate oversight by local officials, these agreements amount to delegation of broad powers to private agents who

private agent may be paid a contingency fee only if the county surrenders tax *collection* as opposed to tax *assessment* (citing NEB. REV. STAT. § 2:77-377.01; N.D. CENT. CODE § 57-22-29)).

129. Scholars who have raised due process concerns about outsourcing local property tax audits for a contingency fee emphasize the quasi-judicial nature of the assessment function. See Rendleman & Neely, *supra* note 111, at 82 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Hagan v. Reclamation Dist. No. 108*, 111 U.S. 701 (1884)).

130. Cf. Axelrad & Perrochet, *supra* note 78, at 337 & n.23 (advancing analogous argument with respect to contingent fee counsel (citing David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 320 n.3 (2001))).

131. E.g., *In re Philip Morris*, 424 S.E.2d at 223.

132. E.g., *Shinn v. Cunningham*, 94 N.W. 941, 941-42 (Iowa 1903).

133. *Id.* at 942.

lack political accountability.¹³⁴ In addition, property owners have observed that contingency fee agreements effectively divert to private entities funds that would otherwise accrue to local government.¹³⁵ At the very least, contingency fee agreements between local tax assessors and private auditors, even when entered into in good faith, have the appearance of impropriety. For that reason alone, they undermine taxpayer confidence and are contrary to public policy.

Under some circumstances, compensating property tax auditors based on a percentage of the taxes recovered may violate the Due Process Clause of the Fourteenth Amendment. In a very early decision, a federal circuit judge reached that conclusion in addressing a due process challenge to the Ohio property tax assessment scheme, under which an auditor was paid a percentage of the tax recovery from escaped property.¹³⁶

In *Meyer v. Shields*,¹³⁷ the auditor received four percent of the taxes recovered upon identifying omitted property. Inquisitors, who received twenty percent of the tax recovery, provided evidence in the assessment process.¹³⁸ The court held that the direct pecuniary interest of the tax auditor in the outcome of the assessment process disqualified him from making a valid assessment, reasoning vociferously (in the flowery prose characteristic of the times) that the procedure violated the Due Process Clause:

[I]n the eager and hot pursuit of the citizen who wrongfully evades his just taxes we must be careful not to graft upon the body of our judicial system proceedings so arbitrary and summary that they may hereafter be the basis and precedent for laws dangerous in the highest degree to the personal liberty and property rights of every citizen. . . . [T]he auditor's compensation is directly dependent upon the finding he makes. If he finds against the taxpayer, he is sure of his reward, and it is secured by the highest lien, and most summary process for its collection. Not only is he interested in finding against the taxpayer, but his fee grows with the increasing amount of his assessment. . . . The fee is evidently not intended to be given in the nature of compensation for services alone. It is therefore not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible. As

134. See Stavitsky, *supra* note 128, at 181-82 (suggesting that taxing authorities in jurisdictions that allow retroactive audits "have abdicated their auditing responsibilities to tax consultants, which, for a contingency fee, audit a business taxpayer's personal property tax returns").

135. *Union Pac. Res. Co. v. State*, 839 P.2d 356, 378 (Wyo. 1992).

136. *Meyer v. Shields*, 61 F. 713, 725-27 (N.D. Ohio 1894).

137. *Id.*; see also *Brinkerhoff v. Brumfield*, 94 F. 422, 426 (N.D. Ohio 1899) (describing broad authority Ohio law conferred to auditors compensated on contingency fee; adopting reasoning in *Meyers*).

138. *Meyer*, 61 F. at 727.

the proceedings are arbitrary . . . the temptation to a large assessment is so great that it would be wrong to submit the ordinary mortal to it.¹³⁹

The United States Supreme Court discussed the constitutional issue in another context in *Tumey v. Ohio*,¹⁴⁰ occasionally cited in support of the argument that due process guarantees preclude compensating local property tax auditors based on a percentage of taxes recovered.¹⁴¹ However, the facts and reasoning in *Tumey* offer little direct support for the argument. In that case, the Court reversed a conviction under the Ohio Prohibition Act as a violation of due process.¹⁴² State law provided that a city mayor could preside at the criminal trial, and upon conviction receive as compensation (in addition to the mayor's salary) any costs assessed against the accused.¹⁴³ The Court held in part that the mayor's pecuniary interest in the outcome denied the accused due process of law.¹⁴⁴ Moreover, the Court expressed concern that the mayor had exercised inherently conflicting duties as the city's chief executive and as judge in a criminal proceeding with the power to assess monetary penalties that accrued to the city.¹⁴⁵ Nevertheless, dicta in *Tumey* raised a federal due process issue, as yet unresolved, with respect to outsourcing property tax assessment functions in consideration for a percentage of the taxes recovered.¹⁴⁶

More recently, *In re Philip Morris USA*,¹⁴⁷ a tax appeal from the North Carolina Property Tax Commission, addressed the due process issue. Cabarrus County contracted with Tax Management Associates, Inc. (TMA) for audit services involving a selected sample of county businesses. The fee arrangement provided for Cabarrus County to pay TMA thirty-five percent of the taxes and penalties yielded from TMA's efforts to identify escaped or undervalued property.¹⁴⁸ At the behest of TMA, the county assessor ultimately assessed back taxes on escaped personal property at Philip Morris's cigarette manufacturing plant, the largest taxpayer in the county, in the

139. *Id.* at 725-27. Just a year earlier, the Ohio Supreme Court had concluded that the statutes did not violate the state constitution, reasoning that the auditor's assessment decision was subject to judicial review. See *Probasco v. Raine*, 34 N.E. 536, 539 (Ohio 1893) (dicta).

140. 273 U.S. 510, 534 (1927).

141. *E.g.*, *Hubbell, Inc. v. City of Bridgeport*, 16 Conn. L. Rptr. 85, 1996 WL 66270, at *4 & n.8 (Conn. Super. Ct. 1996); Rendleman & Neely, *supra* note 111, at 82.

142. *Tumey*, 273 U.S. at 514-15.

143. *Id.* at 520.

144. "The [mayor's] court is a state agency, imposing substantial punishment It is not to be treated as a mere village tribunal for village peccadilloes." *Id.* at 532.

145. *Id.* at 533-34.

146. *Id.* at 532. In dicta, the Court merely observed that *Meyer* had reached the "exact opposite conclusion" from *Probasco v. Raine*, 34 N.E. 536 (Ohio 1894). *Tumey*, 273 U.S. at 528.

147. 436 S.E.2d 828 (N.C. 1993).

148. *In re Philip Morris U.S.A.*, 424 S.E.2d 222, 223 (N.C. App. 1993), *rev'd*, 436 S.E.2d 828 (N.C. 1993).

total amount of nearly \$1 billion. On appeal, the county board of equalization reduced the assessed value to \$599,426,934.

On review of the county board's final determination before the North Carolina Property Tax Commission, Philip Morris moved to strike the original assessment as null and void, contending that the county's contingency fee contract with TMA was not only void as against public policy but also unconstitutional. In a 3-2 decision, the Commission concluded that the contract was contrary to public policy, observing that it lacked jurisdiction to decide the constitutional issue.¹⁴⁹ But the Commission reasoned that the contingent fee arrangement "so offended conventional standards requiring fair, impartial, and uniform treatment of this State's taxpayers that [the contract] could not stand."¹⁵⁰

On appeal, the North Carolina Court of Appeals affirmed.¹⁵¹ The court agreed that the contract was contrary to public policy, expressing particular concern that the contract permitted TMA, rather than the county assessor, to select businesses for audit.¹⁵² The contingency fee nature of the agreement, which gave TMA a financial stake in the outcome of the audit, gave the appearance of bias and potential abuse, and therefore was contrary to public policy.¹⁵³ The Court of Appeals summarily rejected the alternative due process and equal protection arguments asserted by Philip Morris.¹⁵⁴

The County then appealed to the North Carolina Supreme Court, which reversed.¹⁵⁵ The court rejected the argument that the contingency fee agreement with TMA was contrary to public policy, observing that the legislature had authorized counties to contract with outside auditors to assist county assessors, without limiting the nature of the compensation to be paid. Incidental to that express power, the court reasoned that the county also had authority to determine the terms for compensating private audi-

149. *Id.* at 224. In most states, property tax tribunals lack authority to decide constitutional issues, even though they are effectively courts of record for purposes of judicial review. To preserve the constitutional issue for judicial consideration, an aggrieved property owner must nevertheless raise the issue, with supporting evidence in the record, as early as possible in the administrative proceeding. *See Janata, supra* note 7, at 106; *cf. Ward v. State*, 538 S.E.2d 245, 247 (S.C. 2000) (agencies cannot rule on constitutional validity of statutes, but can decide whether a party's constitutional rights have been violated).

150. *Philip Morris*, 424 S.E.2d at 224 (quoting Final Decision of the Property Tax Commission, May 24, 1991).

151. *Id.* at 226.

152. *Id.* (citing *Sears, Roebuck & Co.*). "We believe the present facts to be [even] more egregious to the notion of fair and impartial taxation than in *Sears*, because . . . here TMA is given the discretion to choose its sample of taxpayers." *Id.*

153. *Id.*

154. *Id.*

155. *In re Philip Morris U.S.A.*, 436 S.E.2d 828, 831 (N.C. 1993), *cert. denied sub nom. Philip Morris, Inc. v. Cabarrus Cnty.*, 512 U.S. 1228 (1994).

tors.¹⁵⁶ While the Legislature had expressly barred contingency fee contracts in other specific circumstances, it had not elected to so restrict contracts for tax assessment services. Deferring to the Legislature, the court concluded that the county's contingent fee contracts were not contrary to public policy.¹⁵⁷

Philip Morris sought certiorari on the constitutional question: specifically, "[w]hether the use of private 'bounty hunters' by a county government to conduct property tax audits under a pure contingent fee arrangement violates the Due Process Clause of the Fourteenth Amendment."¹⁵⁸ After accepting several amicus briefs, the Supreme Court denied certiorari, leaving the due process issue unresolved.¹⁵⁹

Thus, it remains an open question whether retaining property tax auditors on a contingency fee basis violates the due process rights of property owners, under either the Fourteenth Amendment or the counterpart provisions of state constitutions. Relevant considerations include whether the arrangement with private auditors includes sufficient safeguards and oversight by public officials.¹⁶⁰ For example, constitutional concerns are substantially mitigated when contract auditors limit their role to reviewing public records to identify discrepancies, without auditing taxpayers' private records, unilaterally increasing or recommending increases in the assessed valuation, or serving in a quasi-judicial capacity.¹⁶¹ If the appointment of auditors is approved by local elected officials, and especially if the local assessor exercises independent judgment in selecting audit targets and retains authority to make all significant assessment decisions requiring judgment, contracts with outside auditors will most likely withstand constitutional, statutory, and public policy scrutiny.¹⁶² But whether a con-

156. *Id.* at 830-31.

157. *Id.* at 831 (citing N.C. GEN. STAT. § 105-299).

158. Petition for Writ of Certiorari, *Philip Morris*, 436 S.E.2d 828 (No. 931710), 1994 WL 16099642, at *i.

159. *Philip Morris Inc. v. Cabarrus Cnty.*, 512 U.S. 1228 (1994). Ironically, the North Carolina Legislature recently amended the challenged statute. Effective July 1, 2012, counties may no longer appoint any outside firm to assist in the assessment function who are "compensated, in whole or in part, on a contingent fee basis or any other similar method that may impair the assessor's independence or the perception of the assessor's independence by the public." N.C. GEN. STAT. ANN. § 105-299 (West Supp. 2012); 2012 N.C. Sess. Laws 152.

160. See Coalson & Houghton, *supra* note 49, at 223-24 (suggesting factors influencing state court consideration of public policy and due process issues).

161. *E.g.*, *Union Pac. Res. Co. v. State*, 839 P.2d 356, 377 (Wyo. 1992) ("In no sense did the activity of the counties' contract representatives actually consist of an audit."); see *Dillon Stores v. Lovelady*, 855 P.2d 487, 491 (Kan. 1993) (statute limited contractor's services to record review).

162. See Scott M. Edwards, *Indiana High Court Approves Use of Outside, Contingent-Fee Auditors*, 13 J. MULTISTATE TAX'N & INCENTIVES 34, 34 (Sept. 2003) (discussing Tippecanoe Cnty. v. Ind. Mfr's Ass'n, 784 N.E.2d 463 (Ind. 2003)).

tingency fee arrangement dictates a contract auditor's compensation is certainly a relevant factor to consider.¹⁶³

Setting aside the constitutional issues, contract assessors who have a pecuniary interest in the outcome raise legitimate policy concerns, which local governments could ameliorate by compensating them on a fee-for-service or hourly arrangement rather than a contingency fee.¹⁶⁴ State certification or registration, requiring minimum education and training for contract auditors and assessors, would help ensure government oversight and discourage unethical conduct.

III. ETHICAL AND LEGAL ISSUES RELATING TO TAX CONSULTANTS, TAX DETECTIVES, AND TAX AGENTS RETAINED ON A CONTINGENCY FEE BASIS

In 2009, the Texas Attorney General filed a complaint against O'Connor and Associates, a large Houston tax consulting firm,¹⁶⁵ for violating Texas consumer protection statutes.¹⁶⁶ Specifically, the State alleged that O'Connor's firm "engaged in unlawful and deceptive acts and practices in violation of the Texas Deceptive Trade Practices Act."¹⁶⁷ O'Connor represents property owners who challenge their assessed valuations before state and local assessment officials, and the firm typically charges a contingency fee of fifty percent of the tax savings.¹⁶⁸

According to the Complaint, many consumers had notified local appraisal districts and the Better Business Bureau about ethical misconduct

163. See, e.g., *Gen. Motors Corp. v. State Tax Comm'n*, 504 N.W.2d 10, 12 (Mich. Ct. App. 1993) (distinguishing *Sears Roebuck* and *Philip Morris*; "Unlike those cases, the present case does not involve a contingent fee arrangement, nor is [the contract auditor] afforded the discretion to choose the target of the audit.").

164. Janata, *supra* note 7, at 106.

165. The firm claims to be the "largest independent real estate research and support services firm in the Southwest, conducting business nationwide," with over 200 employees. See *About Us: History*, O'CONNOR & ASSOCIATES, http://www.poconnor.com/au_history.asp.

166. Plaintiff's Original Petition and Application for Temporary Restraining Order and for Temporary and Permanent Injunction, *Texas v. Patrick O'Connor & Assoc.* (No. 2009-33833), available at https://www.oag.state.tx.us/newspubs/releases/2009/052909oconnor_pop.pdf [hereinafter cited as *O'Connor Complaint*].

167. *Id.*; see TEX. BUS. & COM. CODE ANN. §§ 17.41-17.50 (West 2011 & Supp. 2013). The Act provides for civil penalties of up to \$20,000 for any practice calculated to deprive a consumer of money or property from a consumer in violation of the Act. If the consumer is 65 or older, civil penalties increase to \$250,000 per violation. TEX. BUS. & COM. CODE ANN. § 17.47(c) (West 2011).

168. *O'Connor Complaint* ¶ 9.28; see *Commercial Service Agreement*, O'CONNOR & ASSOCIATES, http://www.poconnor.com/offer_2.asp (last visited Nov. 19, 2013) ("Our [30-50% Contingency] Fee Offer for Commercial Property Owners"); *Residential Service Agreement*, O'CONNOR & ASSOCIATES, http://www.poconnor.com/offer_1.asp (last visited Nov. 19, 2013) ("Our [50% Contingency] Fee Offer for Homeowners"). O'Connor's website also markets federal tax reduction services, market research, and appraisal services. See O'CONNOR & ASSOCIATES, <http://www.poconnor.com/> (last visited Nov. 19, 2013).

and misrepresentation by the firm.¹⁶⁹ For example, property owners asserted that O'Connor had filed tax protests on their properties without consent and billed them for fifty percent of the resulting tax savings. When complainants refused to pay, O'Connor filed suit.¹⁷⁰ Even when property owners specifically notified the firm that they did not want its services, the firm would nevertheless pursue tax appeals on their behalf, sometimes falsifying the required Appointment of Agent forms and supporting jurats.¹⁷¹ As a result, the appraisal district sent notices pertaining to the appeal to O'Connor's firm, not to the property owner.¹⁷²

In addition, the Complaint alleged that the firm had routinely failed to appear at scheduled tax protest hearings before the Appraisal Review Board. Records of the Harris County Appraisal District allegedly showed that after filing protests, "O'Connor failed to appear or present any evidence at the hearing in approximately 9,000 cases."¹⁷³ As a result, those property owners unknowingly and involuntarily waived or compromised their right to further appeal.¹⁷⁴

The Complaint also alleged a number of deceptive advertising practices based on representations on the firm's website.¹⁷⁵ In addition, O'Connor allegedly claimed "blanket" authority to compromise and settle lawsuits on behalf of property owners without their input or consent. Based on these allegations, the State claimed numerous violations of the Texas Deceptive Trade Practices Act.¹⁷⁶ The Attorney General sought temporary and permanent injunctive relief, as well as monetary penalties and attorney's fees.¹⁷⁷

On November 11, 2010, the case settled, with the O'Connor firm agreeing to a comprehensive injunction and payment of \$800,000 in restitution and attorney fees, but without admitting liability.¹⁷⁸ The settlement agreement included assurances that the firm would properly notify clients for whom the company intended to file tax protests, abide by client notices

169. *O'Connor Complaint*, *supra* note 166, at ¶ 9.14.

170. *Id.* at ¶ 9.15.

171. *Id.* at ¶ 9.18. Texas law requires an unsworn declaration to include a jurat or verification signed under penalty of perjury by the declarant. TEX. CIV. PRAC. & REM. CODE ANN. § 132.001(c) (West Supp. 2013).

172. *Id.* at ¶ 9.19.

173. *Id.* at ¶ 9.25.

174. *Id.*

175. *Id.* ¶¶ 9.26-9.28.

176. *Id.* ¶ 10.1; *see* TEX. BUS. & COM. CODE ANN. § 17.46(b) (West 2011).

177. *O'Connor Complaint*, *supra* note 166, at ¶¶ 13.1, 13.4.

178. Agreed Final Judgment and Permanent Injunction, at 17, 18, *Tex v. Patrick O'Connor & Assoc.* (Nov. 11, 2010), (No. 2009-33833), *available at* https://www.oag.state.tx.us/notice/Signed_AFJPI.pdf.

of intent to terminate representation, attend formal hearings on behalf of clients as authorized, refrain from negotiating settlements involving properties owned by multiple clients without notifying each one, comply with telemarketing laws, and refrain from false or misleading advertising.¹⁷⁹ The settlement included payment of \$550,000 in restitution to Texas consumers and \$250,000 to reimburse the state for attorney fees and costs.¹⁸⁰ The Harris County District Court has retained jurisdiction to oversee compliance with the injunction.¹⁸¹

The alleged misconduct of the O'Connor firm is all the more surprising because Texas is one of the few states that regulate individuals and firms who appear on behalf of clients in property tax valuation and protest proceedings.¹⁸² While perhaps the first time a tax consulting firm has been prosecuted for consumer protection violations, the O'Connor litigation is by no means the first instance of alleged unethical and illegal practices by property tax consultants.¹⁸³ Scandals involving bribery and kickbacks between tax consultants and tax assessors have been reported all over the country, some quite recently.

In 1965, San Francisco newspapers reported a major scandal involving kickbacks paid to a long-time San Francisco City Assessor by James Tooke, a property tax consultant. The scandal broke when Tooke's employee, Norman Phillips, removed five locked file cabinets in the dark of night from his employer's office and delivered them to a reporter for the *San Francisco Chronicle*.¹⁸⁴ The file cabinets were full of cancelled checks, correspondence, and detailed records documenting a widespread system of bribery and kickbacks that led to the indictment of more than twenty individuals, including the San Francisco City Assessor and thirteen county assessors.¹⁸⁵

179. *Id.* at 4-11, 13, 14.

180. *Id.* at 17.

181. *Id.* at 16.

182. TEX. OCC. CODE ANN. chs. 1151-52 (West 2012 & Supp. 2013) (regulating property tax professionals and property tax consultants).

183. See Clark, *supra* note 63, at 18, 28-31 (describing a variety of "questionable and unethical practices that may be employed by unscrupulous consulting firms").

184. PAUL, *supra* note 20, at 94; see James Phelan, *When I Looked in Those Files, My Eyes Popped*, 239 THE SATURDAY EVENING POST 23, 23 (Sept. 10, 1966) (reporting sophisticated and widespread bribery scandal among California local assessors and property tax consultant James Tooke, leading to multiple indictments). When asked what triggered his suspicion, Mr. Phillips responded that over a period of several days at a convention of tax assessors, Tooke had been visited by a number of local assessors who were handed plain, sealed, white envelopes that they had tucked away, unopened. *Id.* at 24.

185. Phelan, *supra* note 184, at 25.

Following an in-depth investigation that extended to other states, the top deputy to the California Attorney General reported, "This is only the California tail on a very large national dog. The difference between California and other states is that we found out what has been going on."¹⁸⁶ Whistleblower Norman Phillips remarked, "There are men like Jim Tooke all over the country, operating the same way. They are well known in tax consultant circles and to people in many assessor offices in other states."¹⁸⁷

New York City has had its share of property tax scandals. In 2002, shortly after New York City Mayor Michael Bloomberg took office, an investigation revealed widespread corruption involving tax assessors, tax consultants, and possibly even some prominent tax lawyers.¹⁸⁸ Bloomberg referred to the scheme as "the largest and most financially damaging corruption scheme ever conducted within city government," a most remarkable indictment from the mayor of New York City with its well-known Tammany Hall history.¹⁸⁹ By late 2002, fifteen assessors had pleaded guilty.¹⁹⁰ The alleged mastermind of the scheme was former city tax assessor Albert Schussler, who pleaded not guilty and was scheduled to go to trial early in 2003.¹⁹¹ During his thirty-five-year career as a tax consultant after retiring from his career in city government, Schussler was accused of bribing city assessors in exchange for reducing tax assessments for large commercial property owners in Manhattan.¹⁹² One assessor, who had worked for city government for more than forty-five years before his 1996 retirement, pleaded guilty to having accepting \$4.1 million in bribes from Schussler from 1991 to 1997.¹⁹³

186. *Id.*

187. *Id.*

188. Charles V. Bagli, *Scandal Over Property Tax Bribes May Extend to Lawyers and Firms*, NY TIMES (Dec. 7, 2002), <http://www.nytimes.com/2002/12/07/nyregion/scandal-over-property-tax-bribes-may-extend-to-lawyers-and-firms.html?pagewanted=all&src=pm>.

189. *Id.*

190. *Id.*

191. *Id.* Schussler never went to trial; he died of a massive stroke on January 6, 2003. Charles V. Bagli, *Man at Center of Bribe Case Dies of Stroke*, NY TIMES (Jan. 7, 2002), <http://www.nytimes.com/2003/01/08/nyregion/man-at-center-of-bribe-case-dies-of-stroke.html>. Schussler had been a city tax assessor for thirty years before he retired in 1967. *Id.* According to the indictment, he had established his tax consulting business immediately after retiring, initiating the bribery scheme with a friend still working in the assessor's office. *Id.* By 2004, 17 of Schussler's codefendants had pleaded guilty, and the City of New York recovered \$17.5 million from Schussler's estate. CITY OF NEW YORK DEP'T OF INVESTIGATION, *DOI Recovers \$17.5 Million for New York City*, NYC.GOV (Oct. 22, 2004, Release # 62-2004), available at http://www.nyc.gov/html/doi/downloads/pdf/pr62schussler_check_102204.pdf.

192. Bagli, *supra* note 188.

193. Charles V. Bagli & William K. Rashbaum, *Grand Jury Examines Allegations Tax Assessors Took Bribes*, N.Y. TIMES (Jan. 14, 2002), <http://www.nytimes.com/2002/01/14/nyregion/grand-jury-examines-allegations-tax-assessors-took-bribes.html?pagewanted=print&src=pm>.

Returning to California, an investigation is underway involving an alleged scandal in the Los Angeles County Assessor's Office.¹⁹⁴ The elected county assessor, together with a tax consultant who was a major campaign contributor, have been accused of lowering property tax assessments in exchange for campaign contributions.¹⁹⁵ When the investigation widened with new charges filed in April 2013, a deputy district attorney told reporters, "This has turned out to be a very deep iceberg."¹⁹⁶ More charges may be forthcoming.¹⁹⁷

One might wonder how the financial stakes in the business of property tax consulting could be so great as to support alleged instances of widespread bribery and kickbacks paid by tax consultants to local assessors. The answer is that property tax consultants generally receive compensation based on a substantial percentage of the estimated tax savings generated on behalf of their clients.¹⁹⁸ And property tax assessment is a recurring phenomenon, with property tax valuation notices and tax bills sent out annually. With nearly a half trillion dollars nationwide transferring annually from property owners to local governments, it should not be surprising that entrepreneurs have devised methods for intervening to offer services to both taxing jurisdictions and property owners.¹⁹⁹

Variously known as property tax consultants, tax representatives, or tax agents, those who practice the trade generally receive compensation based on a fixed percentage of the estimated tax savings attributable to

194. Cris K. O'Neill, *Scandal Fallout Threatens Los Angeles Property Tax System*, NAT'L REAL EST. INV. (June 21, 2013), available at <http://nreionline.com/legal/scandal-fallout-threatens-los-angeles-property-tax-system>; Jack Dolan & Ruben Vives, *An Unlikely Player in L.A. County Assessor Scandal*, L.A. TIMES (Dec. 30, 2012), <http://articles.latimes.com/2012/dec/30/local/la-me-assessor-schenter-20121230>.

195. O'Neill, *supra* note 194.

196. Dakota Smith, *More Charges Filed in L.A. County Assessor John Noguez Scandal Case*, L.A. DAILY NEWS (April 23, 2013), <http://www.dailynews.com/general-news/20130423/more-charges-filed-in-la-county-assessor-john-noguez-scandal-case>.

197. *Id.* On October 28, 2013, a dozen new felony charges were filed against Noguez and tax consultant Ramin Salari. Los Angeles County District Attorney's Office, *More Corruption Charges Filed Against Noguez, Salari* (Oct. 28, 2013), <http://da.co.la.ca.us/mr/pdf/10.28.13%20More%20Corruption%20Charges%20Filed%20Against%20Noguez,%20Salari.pdf> (last visited Nov. 19, 2013). "Prosecutors allege that Noguez accepted bribes from Salari to lower property tax assessments for some of Salari's clients." *Id.*

198. See I. Henry Glickman, *Working with a Property Tax Consultant: Guidelines for an Effective Partnership*, 3 (Conway Data, Inc., Oct. 1995), available at <http://www.jcsco.com/New%20Website%20Images/Working%20with%20Property%20Tax%20Consultant%20Paper.pdf>. In some instances, a property owner may negotiate an hourly rate, a flat fee, or an upper limit on the contingency fee, but these variations are atypical. See *id.*

199. See Alexander Hazen, *Property Tax Ethics Issues Confront Practitioners and the Government*, 9 J. MULTISTATE TAX'N & INCENTIVES 22, 26 (July 1999) ("Political clout, cronyism, lavish entertaining of assessors and clients, the 'good old boy system'—all are phrases describing conditions that existed in the field of property taxation for much of its history.").

their services.²⁰⁰ In all but a handful of states, property tax consultants are not licensed or subject to ethical standards.²⁰¹ Property tax consultants offer a range of services, which generally include reviewing property records in the assessor's office to ensure accuracy, reviewing the property's physical characteristics and condition, analyzing comparable properties, and reviewing income and expenses for commercial properties.²⁰² If appropriate, the consultant may evaluate prospects for a successful appeal, develop an appropriate litigation strategy, present information to the assessor's office to advocate for a reduced valuation, and attend hearings on the client's behalf.²⁰³ In some cases, the consultant may even testify as an expert witness at a public hearing or trial, or the consultant may retain an expert witness for that purpose.

Some agreements give the property tax consultant exclusive authority to retain expert witnesses or attorneys as deemed necessary to pursue an appeal, typically with the consultant bearing the expense. The contract also may reserve to the consultant the unilateral authority to settle or compromise the claim, or to pursue an appeal. The agreement may provide for a tiered contingency fee percentage for each level of appeal, specifying a higher share if judicial review becomes necessary.²⁰⁴

In some cases, courts have refused to enforce contracts with tax consulting firms providing for a contingency fee.²⁰⁵ In others, the courts seem

200. Examples of tax consultant contracts are included in Appendix B. According to the National Association of Property Tax Attorneys, lawyers also perform these services, generally for 30 to 50% of the tax savings for each year in dispute. Jeannette Neumann & Saabira Chaudhuri, *How to Lower Your Property Taxes*, WALL STREET JOURNAL (Aug. 20, 2011), <http://online.wsj.com/article/SB10001424053111904070604576514573303531678.html?KEYWORDS=%22How+to+Lower+Your+Property+Taxes%22>. However, contingency fees may exceed 50% in particularly complex cases. For example, the Kansas Supreme Court enforced an agreement with a property tax attorney providing for a contingency fee of 50% of any savings resulting from informal appeals at the local level and 70% of the savings obtained on appeal to the state board of equalization. See *Miller v. Botwin*, 899 P.2d 1004, 1006, 1009-10 (Kan. 1995). These percentages appear extraordinary, even for a complex valuation case, especially because the attorney failed to keep records of the time spent on the case. *Id.* at 1010.

201. *E.g.*, Fla. Att'y Gen. Op. 2002-58 ("[S]ection 194.034(1)(a), Florida Statutes, does not require that an agent appearing before a value adjustment board be a licensed or qualified professional"); see Clark, *supra* note 63, at 29 ("The property tax consulting business is not generally regulated."); Glickman, *supra* note 198, at 2 (while tax consultants are generally unlicensed, voluntary membership in professional organizations that promote training, education, and ethical conduct is one indicator of professionalism).

202. See Glickman, *supra* note 198, at 2. Commercial properties, unlike residential property, are often valued using the income approach, which generates a value by capitalizing the net income annually produced by the property.

203. See *id.*

204. See *id.* at 3.

205. *E.g.*, Prop. Valuation Assocs., Inc. v. Town & Country Supermarkets, Inc., No. 96-2699 at 2, 3, 5 (Wis. App. 1st Dist. Sept. 16, 1997) (refusing to enforce 50% contingency fee after interpreting contract ambiguity against plaintiff because tax savings resulted not from consultant's efforts but from village's reassessment).

quite willing to enforce a contingency fee tax consulting contract according to its terms, at least when the property owner is a sophisticated commercial enterprise.²⁰⁶ South Carolina is the only state that has enacted a statute clearly prohibiting property tax consultants from charging contingency fees in most instances.²⁰⁷ In 2011 and 2012, California considered two bills; one would have prohibited contingency fees, and the other would have precluded property tax agents from charging unconscionable fees.²⁰⁸ Neither bill passed.

A. Champerty as a Contract Defense

Contingency fee agreements with property tax consultants have been challenged as unenforceable on various grounds. One basis for refusing to enforce the typical tax consultant contract is that it violates traditional doctrines disfavoring barratry, maintenance, and champerty,²⁰⁹ which common law prohibited.²¹⁰ Maintenance²¹¹ is the practice of stirring up litigation—specifically, assisting another in prosecuting or defending a legal claim when the maintainer has no bona fide interest in the matter.²¹² Barratry, a more egregious form of maintenance, involves “[v]exatious incitement to litigation, [especially] by soliciting potential legal clients.”²¹³ Champerty, a variation of maintenance, is an agreement by which a third party pursues litigation on behalf of another and bears the expenses in consideration for a

206. *E.g.* First Coast Consultants, Inc. v. Flagler Dev. Co., Case No. 16-2010-CA-2853-XXXX, 2011 WL 7859291 (Fla. Cir. Ct., 4th Dist. July 12, 2011) (enforcing plaintiff property tax consulting firm’s “clear and unambiguous” agreement providing for a 30% contingency fee against “the largest ad valorem tax payer in Duval County”).

207. *See infra* note 381 and accompanying text.

208. *See infra* notes 393 and accompanying text.

209. For a classic case of maintenance involving a local tax dispute, *see* Lucas v. Allen, 80 Ky. 681 (1883). The clerk of the Louisville Board of Aldermen claimed to have information that would support taxpayer claims to recover illegally collected city taxes. Lucas gave the information to defendant attorneys and promised to assist in prosecuting claims on behalf of the taxpayers in exchange for half the attorney fees. The attorneys were successful, recovering \$18,439 as their fee. Lucas sued for his half. The court refused to enforce the contract, in part because “it partakes of maintenance in its worst form.” *Id.* at 683. The court also held the contract unenforceable as against public policy. *Id.* at 682.

210. For an exhaustive account of the ancient underpinnings of the three doctrines, *see* Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935).

211. At common law, maintenance was an actionable wrong akin to a modern-day tort. *Id.* at 67.

212. BLACK’S LAW DICTIONARY 965 (7th ed. 1999); *see* Radin, *supra* note 210, at 66-67 (“[A] maintainer is one who stirs up vexatious suits to which he is not a party . . .”).

213. BLACK’S LAW DICTIONARY 144 (7th ed. 1999); *see* Radin, *supra* note 210, at 67 (“[A] barrator is one who makes a profession of [maintenance] . . .”). In modern parlance, barratry might be analogized to “ambulance chasing.” An example is *In re Lynch’s Estate*, 276 N.Y.S. 939 (Surrogate’s Court, N.Y. Cnty. 1935), in which the movant was engaged in locating foreign beneficiaries of U.S. estates and promising to secure their inheritances for a contingency fee. The court held the contracts void *ab initio*. *Id.* at 945.

share of any proceeds.²¹⁴ Both champerty and barratry were crimes at common law,²¹⁵ and the public interest warranted their suppression.²¹⁶

In the modern era, most states have relaxed or even abolished the common law doctrines of champerty and maintenance,²¹⁷ in part in recognition of the commonly accepted practice of contingency fees as a means for compensating attorneys under the American Rule.²¹⁸ However, several states continue to recognize barratry as a crime,²¹⁹ and many still recognize champerty, at least as a contract defense.²²⁰ For example, a Pennsylvania court has applied the champerty doctrine in considering the validity of a school district's contract with a realtor, who for a forty percent contingency fee had offered to file tax assessment appeals on properties he had identified as undervalued.²²¹ In Connecticut, a criminal statute specifically prohibits non-attorneys from soliciting, advising, requesting, or advising another person to file a cause of action for damages when the amount of

214. BLACK'S LAW DICTIONARY 224 (7th ed. 1999); see *Saladini v. Righellis*, 687 N.E.2d 1224, 1225 (Mass. 1997) (defining champerty); Radin, *supra* note 210, at 67 ("[A] champertor is one who does so for pecuniary gain . . .").

215. England abolished the offenses of maintenance and champerty in 1967, but retained the doctrines to the extent that a contract to maintain litigation without sufficient justification is unenforceable as contrary to public policy. Y.L. Tan, *Champertous Contracts and Assignments*, 106 L. Q. REV. 656, 657 & n.7 (1990).

216. *E.g.*, *Gregerson v. Imlay*, 10 F. Cas. 1185 (S.D. N.Y. 1861) (refusing to enforce contract "tainted with champerty and maintenance;" defendant had agreed to confer all rights to enforce patent infringement claims nationwide in exchange for 50% contingency fee, with plaintiff covering litigation costs and attorney fees); Radin, *supra* note 210, at 67. Radin makes a persuasive argument that the common law distaste for champerty and maintenance should not apply to contingency fees paid to attorneys, assuming appropriate oversight by the courts as required by the ABA Code of Ethics. *Id.* at 69-75; see also *In re Swartz*, 686 P.2d 1236, 1242 (Ariz. 1984) ("Abuses are best handled by control and regulation.").

217. *E.g.*, *Saladini*, 687 N.E.2d at 1226-27 (the evils champerty was intended to prevent can be remedied by rules requiring reasonable attorney fees, public policy against excessive fees, and contract doctrines of unconscionability, duress, good faith, and standards of fair dealing).

218. *Accrued Fin. Servs., Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 298 (4th Cir. 2002). In England and Europe, contingency fees are generally impermissible, even to compensate lawyers. *In re Swartz*, 686 P.2d at 1241 (citing Note, *Lawyer's Tight Rope—Use and Abuse of Fees*, 41 CORNELL L.Q. 683, 685-86 (1956)). But the United States Supreme Court has long since held that an agreement to pay an attorney a contingency fee for "professional services of a legitimate character" is not contrary to public policy. *Stanton v. Embrey*, 93 U.S. 548, 556-57 (1876).

219. *E.g.*, TEX. PENAL CODE ANN. § 38.12 (West Supp. 2013). Under Texas statutes, contracts for legal services procured as result of barratry are voidable at the election of the client. TEX. GOV'T CODE ANN. § 82.065(b) (West Supp. 2013); see *id.* § 82.0651 (civil liability for barratry).

220. Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1298 (2002) (arguing that champerty's critics underestimate its continuing vitality); see also *id.* at 1333 (Appendix summarizing each state's champerty laws).

221. *Brandywine Heights Area Sch. Dist. v. Berks Cnty. Bd. of Assessment Appeals*, 821 A.2d 1262, 1263, 1265-66 (Pa. Commw. Ct. 2003).

recovery determines the attorney's compensation.²²² In addition, Connecticut recognizes both champerty and public policy as common law defenses to contract enforcement actions.²²³ However, champerty is not a defense when enforcing a right not originating in the illegal agreement, or when proof of the agreement is not necessary to enforce the right.²²⁴

A classic example of a champertous agreement is *Merrell v. Stuart*,²²⁵ a 1941 case decided by the North Carolina Supreme Court. The agreement was analogous to a typical tax-consulting contract that authorizes the consultant to retain an attorney. A non-lawyer negotiated an agreement with an attorney to split a fifty percent contingency fee in a prospective suit against an estate on behalf of the decedent's adult daughter, born out of wedlock, whom the decedent had acknowledged during his lifetime.²²⁶ The non-lawyer, who was acquainted with the daughter and her family heritage, induced her to enter into a contingency fee contract prepared by the attorney, in which she agreed to pay half of any recovery from the estate.²²⁷ Ultimately she won a compromised judgment of \$9,000, which was paid to the attorney in trust for her. The non-lawyer sued, claiming \$2,250 as his share of the fee.²²⁸

The attorney demurred, arguing that the contract was champertous, contrary to public policy, and void.²²⁹ The court agreed and refused to enforce the contract.²³⁰ While the state had abolished champerty and maintenance as common law offenses,²³¹ the court held the contract unenforceable as contrary to public policy.²³² The court refused to aid the plaintiff in profiting from a void contract.²³³

On the other hand, in *Wardman v. Leopold*,²³⁴ a federal income tax refund case, the United States Court of Appeals for the District of Columbia

222. CONN. GEN. STAT. ANN. § 51-86(a) (West 2005). It is doubtful that the statute would apply to actions seeking a reduction in value for taxable property because a reduced assessment does not necessarily result in a tax refund, unless the disputed taxes have been paid under protest.

223. See *Robertson v. Town of Stonington*, 750 A.2d 460, 463 (Conn. 2000).

224. *Id.* Therefore, the Town could not challenge the property owner's right to pursue an adjusted assessment just because his agreement with a non-attorney tax consultant was champertous or contrary to public policy. *Id.* The court hinted, however, that the defense might be cognizable if the tax consultant sought to enforce the agreement. See *id.* at 463-64.

225. 17 S.E.2d 458 (N.C. 1941).

226. *Id.* at 459.

227. *Id.*

228. *Id.*

229. *Id.* at 459-60.

230. *Id.* at 460.

231. *Id.*

232. *Id.* at 463.

233. *Id.*

234. 85 F.2d 277 (D.C. Cir. 1936).

affirmed a judgment in favor of a non-lawyer tax specialist and accounting partnership, rejecting a defense of champerty and maintenance.²³⁵ Under their agreement, the partners were to receive one third of the income taxes recovered on behalf of the taxpayer, which they in turn had agreed to divide with retained legal counsel who pursued the refund on appeal.²³⁶ The taxpayer sought to set aside the agreement, arguing that it was a contract of maintenance and champerty.²³⁷ The court disagreed and affirmed, finding the agreement enforceable.²³⁸ The court distinguished actions before government agencies from actions filed in court, holding that the contract in question was not champertous because it was not for the purpose of litigation, but rather to recover taxes from the government.²³⁹ The court also declined to hold that an equitable lien could not be imposed on the tax proceeds just because plaintiffs were not lawyers. "[I]t is immaterial whether it be for an attorney's fee . . . or for the fee of an engineer . . . or for the fee of tax specialists, as in the instant case."²⁴⁰

With respect to tax consulting contracts, Pennsylvania courts have twice invoked the champerty doctrine to preclude a tax-consulting firm from representing property owners in tax assessment appeals.²⁴¹ Under Pennsylvania law,²⁴² three elements are generally required to support a claim or affirmative defense of champerty: first, the party must lack any legitimate interest in the lawsuit; second, the party must advance its own

235. *Id.* at 278-80.

236. *Id.* at 277-78.

237. *Id.* at 278.

238. *Id.* at 282.

239. *Id.* at 279-80.

240. *Id.* at 281. The *Wardman* court's reasoning is highly questionable in light of the proliferation of administrative tax tribunals at the state and local levels. Courts have generally refused to distinguish between administrative tribunals and courts of law with respect to issues involving the unauthorized practice of law. *E.g.*, *Shortz v. Farrell*, 193 A. 20, 21 (Pa. 1937).

In considering the scope of the practice of law mere nomenclature is unimportant, as, for example, whether or not the tribunal is called a 'court,' or the controversy 'litigation.' Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. It is the character of the act, and not the place where it is performed, which is the decisive factor.

Id.; see also, *e.g.*, *De Pass v. B. Harris Wool Co.*, 144 S.W.2d 146, 148 (Mo. 1940) (en banc); *Carlson v. Workforce Safety & Ins.*, 765 N.W.2d 691, 703 (N.D. 2009).

241. *E.g.*, *Westmoreland Cnty. v. RTA Group, Inc.*, 767 A.2d 1144, 1148 (Pa. Commw. Ct. 2001); *Clark v. Cambria Bd. of Assessment Appeals*, 747 A.2d 1242, 1245-46 (Pa. Commw. Ct. 2000).

242. See *Brandywine Heights Area Sch. Dist. v. Berks Cnty. Bd. of Assessment Appeals*, 821 A.2d 1262, 1265-66 (Pa. Commw. Ct. 2003) ("[T]he doctrine of champerty continues to be viable in this Commonwealth and can be raised as a defense.").

funds to pay the litigation costs; and third, the agreement must entitle the party to a percentage of the proceeds, suggesting a profit motive.²⁴³

In three successive cases spanning four years, the Pennsylvania Commonwealth Court barred the same tax consultant from representing property owners before two different county boards.²⁴⁴ Over the years, the tax consultant had solicited several taxpayers to enter into contingency fee agreements.²⁴⁵ The fee agreement provided for a specified percentage of the client's tax savings as a fee,²⁴⁶ generally 100 percent of the tax savings in the first year.²⁴⁷ In some instances, the consultant paid the costs of litigation, including the fees of an appraisal witness and if necessary, legal counsel.²⁴⁸ The tax consultant retained sole authority²⁴⁹ to hire an attorney, who had no contact with the property owners.²⁵⁰ The consultant advised clients how to deal with real estate tax bills pending the outcome of an appeal.²⁵¹ In all three cases, the county boards argued that the tax consultant had engaged in champerty and maintenance as well as the unauthorized practice of law. The court agreed.²⁵²

Although the fee percentage varies, the terms and conditions of the tax consulting agreements addressed in the Pennsylvania cases are typical of the agreements tax consultants have used for many years.²⁵³ For states that continue to recognize the common law doctrine of champerty, whether as a cause of action or as a contract defense, tax consultant agreements appear to meet all three elements. First, a tax consultant who solicits unrelated property owners to enter into these agreements has no legitimate interest in the property itself or in the tax appeal. Second, the tax consultant typically agrees to bear the costs of the litigation, including filing fees, expenses for

243. See *id.*; *RTA Group*, 767 A.2d at 1148; *Clark*, 747 A.2d at 1245. "[C]hamperty has long been considered repugnant to public policy against profiteering and speculating in litigation and grounds for denying the aid of the court." *Clark*, 747 A.2d at 1245-46.

244. See *RTA Group*, 767 A.2d at 1151; *Clark*, 747 A.2d at 1247; *Westmoreland Cnty. v. Rodgers*, 693 A.2d 996, 997 n.1 (Pa. Commw. Ct. 1997). The court also held that the trial court lacked jurisdiction to entertain property tax appeals the consultant had filed on behalf of several clients because he was not the real party in interest. *Rodgers*, 693 A.2d at 999; see also Pa. R. Civ. P. 2002.

245. See *RTA Group*, 767 A.2d at 1146-47; *Clark*, 747 A.2d at 1244, 1247; *Rodgers*, 693 A.2d at 997.

246. *Rodgers*, 693 A.2d at 997-998.

247. *Clark*, 747 A.2d at 1247.

248. *Rodgers*, 693 A.2d at 997-998.

249. *Clark*, 747 A.2d at 1247.

250. *Rodgers*, 693 A.2d at 997-998.

251. *Id.* at 998.

252. See *RTA Group*, 767 A.2d at 1149-51; *Rodgers*, 693 A.2d at 998-99. In *Rodgers*, the Commonwealth Court did not address the champerty issue. 693 A.2d at 998-99 & nn.6, 10. However, the court later interpreted its opinion to have affirmed the trial court's finding on both issues. See *Clark*, 747 A.2d at 1246 n.8.

253. See Appendix B for representative examples of tax consulting agreements.

expert witnesses, and even legal fees if necessary to pursue an appeal beyond the informal administrative level.²⁵⁴ Finally, whenever the consideration is a percentage share of the anticipated tax savings, the agreement entitles the tax consultant to a percentage share of the litigation proceeds, suggesting a profit-making motive.²⁵⁵

B. Unenforceability of Agreements as Contrary to Public Policy

In some instances, the courts have refused to enforce contracts with these champertous features on the reasoning that the agreements are void as against public policy, rather than referring to them specifically as contracts of champerty or maintenance.²⁵⁶ For example, the Connecticut Supreme Court agreed in dicta that a contract was contrary to public policy because a non-attorney appraiser had solicited clients to challenge property assessments in consideration for one-third of any tax savings over a three-year period.²⁵⁷ Nevertheless, the court held that the possible illegality of the agreement was not a bar to the taxpayer's action seeking a valuation reduction for his marina, which all parties agreed had been overvalued.²⁵⁸ The court emphasized the tension between the public policy against lending aid to illegal contracts and the overriding public policy concern for just taxation.²⁵⁹ This trend is consistent with those jurisdictions, like Florida, that no longer recognize common law claims for champerty and maintenance but do continue to recognize them as contract defenses.²⁶⁰

Most recently, a New York appellate court addressed a challenge to the legality of property owners' "tax reduction representation" agreements

254. An issue beyond the scope of this article is whether these agreements are unlawful because they provide for fee-splitting between lawyers and non-lawyers. See MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2012); e.g., Mich. Prof. Jud. Eth. Comm. Op. RI-104 (Oct. 31, 1991), available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-104.cfm? (law firm's agreement to pay independent contractor consultant a contingency share of tax savings realized by clients in appeals before tax tribunal violated rules against sharing legal fees with non-lawyers).

255. See *Clark*, 747 A.2d at 1245; see also *Fleetwood Area Sch. Dist. v. Berks Cnty. Bd. of Assessment Appeals*, 821 A.2d 1268, 1272-73 (Pa. Commw. Ct. 2003). An argument might be made that valuation appeals do not result in monetary proceeds to the taxpayer client but rather a reduction in the assessed property value. However, if the property owner has paid taxes under protest and seeks a refund, this element would clearly be met. Moreover, the focus should be whether the consultant has a profit motive rather than the measure of calculated "savings."

256. See Radin, *supra* note 210, at 67 n.73.

257. See *Robertson v. Town of Stonington*, 750 A.2d 460, 461-62 (Conn. 2000) (dicta).

258. See *id.* at 462-64. The Town had contracted with a private company to revalue all real property in the jurisdiction. The opinion did not address the terms of the agreement between the Town and the company it commissioned to conduct the revaluation. See *id.* at 462.

259. *Id.* at 464-65.

260. E.g., *Hardick v. Homol*, 795 So. 2d 1107, 1109, 1111 (Fla. Dist. Ct. App. 2001) (doctrine of champerty viable only as defense to contract enforcement, but damages may be recovered for abuse of process, wrongful initiation of litigation, or malicious prosecution).

with a real estate broker.²⁶¹ The agreements provided for representation in negotiations and proceedings before the town's tax assessor or board of assessors, as well as any subsequent judicial appeals. A contingency fee was due only if the proceedings were successful.²⁶² After the board of assessors denied the requested reductions, the broker retained an attorney to initiate judicial review.²⁶³

The town argued that the representation agreements were champertous, or alternatively that they purported to authorize the broker to engage in the unauthorized practice of law.²⁶⁴ The trial court agreed and dismissed the action. But the Appellate Division held that the agreements were not champertous as a matter of law. In New York, a finding of champerty requires that "the foundational intent to sue on [the claim acquired] must at least have been the primary purpose for, if not the sole motivation behind, entering into the transaction."²⁶⁵ The court found no evidence supporting this element because it was in the broker's financial interest to resolve the tax disputes through negotiation or administrative proceedings, without incurring legal expenses by pursuing judicial review.²⁶⁶

Nevertheless, the court invalidated the agreements because they purported to authorize the broker to represent property owners in court, and therefore impinged on the practice of law.²⁶⁷ It was irrelevant that an attorney had been retained to appear in court because the attorney was under the broker's "domination and control."²⁶⁸ Therefore, the trial court properly dismissed the appeals, not because they were champertous but because the broker lacked authority to seek judicial review on behalf of his clients.²⁶⁹

C. Unauthorized Practice of Law

As observed in the discussion of champerty and maintenance, courts and state bar associations have struggled with the issue of tax consultants engaging in unauthorized practice of law by representing property owners

261. *Barthel v. Town of Hurley*, 739 N.Y.S.2d 771, 772 (N.Y. App. Div. 2002).

262. *Id.* at 754-755.

263. *Id.* at 755.

264. *Id.*

265. *Id.* (quoting *Bluebird Partners v. First Fid. Bank*, 731 N.E.2d 581, 587 (N.Y. 2000)) (alteration in original).

266. *Id.* at 755-756.

267. *Id.* at 756.

268. *Id.* (quoting *People ex rel. Trojan Realty Corp. v. Purdy*, 162 N.Y.S. 56, 60 (N.Y. App. Div. 1916)).

269. *Id.*

in disputing property tax assessments.²⁷⁰ While a full treatment of the issue is beyond the scope of this article, the courts have sometimes reasoned that contracts not otherwise void as champertous are nevertheless contrary to public policy if the tax consultant engages in services requiring a license to practice law.²⁷¹ The issue has received a good deal of attention from state bar associations and attorneys general, but almost no legal scholarship has addressed the issue.²⁷²

In one representative case, the court refused to enforce a contingency fee contract between a property owner and a non-attorney licensed realtor, who had been engaged to secure a reduction in the property owner's tax assessment.²⁷³ The court held that the agreement amounted to the unauthorized practice of law, even though the realtor had engaged an attorney to appear before the county tax board for a share of the realtor's fifty percent contingency fee.²⁷⁴ The court reasoned,

Such circumstances . . . operate not to relieve the [tax consultant], but only to embroil the attorney in the illegal scheme. If such subterfuge were permitted, it would result in a destruction of the confidential relationship that an attorney bears to his client. It would permit one not a lawyer to be engaged in the business of handling legal matters for others. A layman could spend his time making contacts and obtaining 'clients,' conduct all negotiations with them, and then retain lawyers unknown to the 'clients,' to perform the legal work. It would mean that a corporation would be free to engage in the practice of law.²⁷⁵

The same reasoning applies to tax consulting agreements authorizing the consultant to retain an attorney to litigate the claim in the event of a judicial appeal.²⁷⁶

Once again, states have taken different approaches to the unauthorized practice of law issue.²⁷⁷ In some instances, state attorneys general and bar

270. *E.g.*, *Stack v. P.G. Garage, Inc.*, 80 A.2d 545, 546 (N.J. 1951); *Krier v. Franklin Cnty. Bd. of Revision*, 654 N.E.2d 122, 125 (Ohio Ct. App. 1994); *see also* Thomas J. McNulty, *UPL and Property Tax Assessment Appeals in Illinois*, 88 ILL. B.J. 710 (2000); *Unauthorized Prac. of Law Comm. Op.* 98-101, 130-131 (Pa. Bar Ass'n, 5th ed. 1998), available at <http://www.pabar.org/public/committees/UNA01/Opinions/Opinions.asp> (opining that tax consultants engage in unauthorized practice of law by representing property owners before county assessment boards) [hereinafter Pa. Bar Op. 98-101].

271. *E.g.*, *Barthel*, 739 N.Y.S.2d at 773.

272. *Cf.* McNulty, *supra* note 270, at 710; Thomas J. McNulty, *Unlicensed Practice of Law Issues in Property Tax Assessment Appeals—The Debate Continues*, 56 TAX TRENDS no. 10, Apr. 2013, at 1, 1-3 (practitioner author).

273. *Stack*, 80 A.2d at 546.

274. *Id.* at 546-47.

275. *Id.* at 547.

276. *See Barthel*, 739 N.Y.S.2d at 773; Peter R. Jarvis & Bradley F. Tellam, *Attorneys Working with Property Tax Consultants May Face Ethics Issues*, 3 J. MULTISTATE TAX'N & INCENTIVES 20 (Mar.-Apr. 1993).

277. *See* McNulty, *supra* note 270, at 716 & n.45 (citing cases). *Compare* *Clark v. Cambria Cnty. Bd. of Assessment Appeals*, 747 A.2d 1242, 1247 (Pa. Commw. Ct. 2000) (contingency fee agreement

associations have issued opinions declaring that tax consultants may not represent property owners before administrative tax tribunals because the practice amounts to unauthorized practice of law.²⁷⁸ Several courts have held that non-attorneys may not appear in court on behalf of property owners, even if the tax consultant retains an attorney to appear in court on the property owners' behalf.²⁷⁹ While an individual property owner may appear *pro se*, a corporation, as an artificial legal entity, cannot initiate litigation or appear in court except by a corporate officer or other representative.²⁸⁰ The courts reserve authority over anyone who appears on behalf of a client, including a corporation or other legal entity, and who engages in activities akin to legal practice.

In Ohio, a series of appellate court decisions have addressed whether non-attorneys may appear on behalf of property owners before county boards of revision and under what circumstances. In 1994, in *Krier v. Franklin County Board of Revision*,²⁸¹ the Ohio Court of Appeals held that a tax consultant who had been retained for a fifty percent contingency fee could not invoke the local board's jurisdiction on behalf of an unrelated property owner.²⁸² Three years later, the Ohio Supreme Court reaffirmed *Krier* in *Sharon Village Ltd. v. Licking County Board of Revision*,²⁸³ hold-

with tax consultant who controlled tax litigation unenforceable as unauthorized practice of law and champerty), *with* Ky. State Bar Ass'n v. Bailey, 409 S.W.2d 530, 530-531 (Ky. Ct. App. 1966) (accountant held in contempt for unauthorized practice of law by representing clients in matters involving statutory interpretation and constitutional law), *and* Grand Partners Joint Venture I v. Realtax Res., Inc., 483 S.E.2d 922, 924 (Ga. Ct. App. 1997) (enforcing contract with consultant who secured value reduction from \$75 to \$51 million at the local level; statute permits taxpayers to appear by authorized agent), *and* *In re* Petition of Burson, 909 S.W.2d 768, 777 (Tenn. 1995) (upholding statute permitting representation by non-attorney agents absent evidence that representation requires professional legal judgment). *Cf.* Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 16-17 (2004) (addressing issues involving practice of law by accountants).

278. *E.g.*, Kan. Att'y Gen. Op. No. 93-100 (July 26, 1993) ("[W]hile a duly authorized representative may participate in the proceedings, a non-attorney representative may not engage in the unauthorized practice of law."); Pa. Bar Op. 98-101, *supra* note 270 (tax consultants engage in unauthorized practice of law by appearing before various county assessment boards).

279. *E.g.*, *Barthel*, 739 N.Y.S.2d at 773; *Westmoreland Cnty. v. Rodgers*, 693 A.2d 996, 997-998 (Pa. Commw. Ct. 1997). *Cf.* *Interstate N. Sporting Club v. Cobb Cnty. Bd. of Tax Assessors*, 551 S.E.2d 91, 95 (Ga. Ct. App. 2001) (filing notice with county board requesting certification of appeal to superior court was not unauthorized practice of law).

280. *See* Bd. of Educ. of Worthington City Sch. Dist. v. Bd. of Revision, 707 N.E.2d 499, 502 (Ohio 1999) (non-lawyer corporate officer's verification and signature on assessment complaint prepared and filed by legal counsel did not amount to unauthorized practice of law).

281. 654 N.E.2d 122 (Ohio Ct. App. 1994).

282. *Id.* at 127. *Krier* is a classic example of a tax consultant who purports to represent property owners in *ad valorem* tax proceedings. Observing that "the contesting of real estate valuations has become somewhat of a cottage industry in Ohio," the court emphasized, "Although it may have become customary for non-attorneys to practice before the [Board of Revision], it is clear that this has become an aberrant custom, leading to an abuse of the [tax assessment] system." *Id.* at 125.

283. 678 N.E.2d 932 (Ohio 1997).

ing that a tax consultant had engaged in unauthorized practice of law by filing a complaint with the county board of revision.²⁸⁴

In *Dayton Supply & Tool Co. v. Montgomery County Board of Revision*,²⁸⁵ the Ohio Supreme Court considered whether a non-attorney corporate officer may appear before a local board of revision representing a corporation without engaging in unauthorized law practice. While a statute²⁸⁶ had been amended to specifically authorize corporate officers to file tax appeals on behalf of their corporate principals, the court held that the statute did not control because the courts are exclusively responsible for regulating the practice of law.²⁸⁷ Nevertheless, the court concluded:

[A] corporate officer does not engage in the unauthorized practice of law by preparing and filing a complaint and presenting the claimed value of the property before the board of revision on behalf of [the] corporation, so long as the officer does not make legal arguments, examine witnesses, or undertake other tasks that can be performed only by an attorney.²⁸⁸

Recently the Ohio Supreme Court has further relaxed its position with respect to appearances by non-lawyers. In *Columbus City School District Board of Education v. Franklin County Board of Revision*,²⁸⁹ the court held, consistent with a statutory amendment, that a property owner's spouse may appear without engaging in unauthorized practice of law.²⁹⁰ And most recently, in *Marysville Exempted Village Local School District Board of Education v. Union County Board of Revision*,²⁹¹ the court upheld the amended statute that authorized salaried corporate employees to file tax appeals on behalf of their principals.²⁹² The court found "ample precedent for exercising deference to laws or policies that, in properly limited contexts, authorize non-lawyers to engage in activities that fall into the broad category of the practice of law."²⁹³ The court thus deferred to the statute authorizing narrow exceptions to allow specific individuals to file property tax disputes on behalf of others, while otherwise reserving its constitutional

284. *Id.* at 936.

285. 856 N.E.2d 926 (Ohio 2006).

286. OHIO REV. CODE ANN. § 5715.19(A)(1)(f) (LexisNexis Supp. 2013).

287. *Dayton Supply & Tool*, 856 N.E.2d at 931-32.

288. *Id.* at 928.

289. 983 N.E.2d 1285 (Ohio 2012) (4-3 decision).

290. *Id.* at 1292 (citing OHIO REV. CODE ANN. § 5715.19(A)(1)).

291. 991 N.E.2d 1134 (Ohio 2013).

292. *Id.* at 1142 (citing OHIO REV. CODE ANN. § 5715.19(A)(1)).

293. *Id.* at 1141.

authority to regulate conduct before boards of revision that amounts to the practice of law.²⁹⁴

IV. LEGAL AND ETHICAL PROHIBITIONS AGAINST CONTINGENCY FEES

Contingent fees are neither good nor bad. They are good when they assist an otherwise helpless litigant to secure his right against a powerful antagonist. They are bad when they deprive this litigant of a substantial part of the compensation for his injury.²⁹⁵

A. Prohibition Against Contingency Fees for Expert Witness Testimony

In most states, an expert witness may not receive a contingency fee.²⁹⁶ It is “a settled principle of American law [that] expert witnesses should not receive contingent fees.”²⁹⁷ If the tax consultant agrees to a contingency fee arrangement, most jurisdictions bar the consultant from testifying as an expert, assuming the tax tribunal or the court is aware of the contingent nature of the fee agreement and has authority to enforce the prohibition.²⁹⁸ Consequently, the typical tax consulting agreement authorizes the consultant to appoint expert witnesses to testify on behalf of the property owner.²⁹⁹ The fee arrangement may raise issues about whether the nature of the retained expert’s compensation taints the testimony.

Some courts do not permit even a salaried employee of a contingency fee tax-consulting firm to testify as an expert.³⁰⁰ But others hold that expert testimony is not precluded absent proof that the witness personally is com-

294. See *id.*; *Dayton Supply & Tool Co. v. Montgomery Cnty. Bd. of Revision*, 856 N.E.2d 926, 933 (Ohio 2006) (public-interest factors justified exception for corporate officers representing their own corporations).

295. Radin, *supra* note 210, at 75.

296. MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 3 (2012); see, e.g., *Ethics Op. No. 553*, 67 TEX. B.J. 982, 982 (Dec. 2004) (tax consultant cannot testify as expert witness if paid contingency fee based on outcome of tax proceeding); *New England Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E.2d 263, 267 (Mass. 1984) (majority rule bars expert witness from recovering compensation contingent on outcome of controversy).

297. *City & Cnty. of Denver v. Bd. of Assessment*, 947 P.2d 1373, 1379 (Colo. 1997). “Case law on the subject is sparse because this precept has such wide acceptance . . . [A]n expert witness whose fee is contingent upon the outcome is improperly motivated and cannot objectively inform the court on an issue about which the court needs additional instruction.” *Id.*

298. E.g., *id.* at 1376, 1378 (independent appraisal testimony based on contingency fee agreement is contrary to COLO. REV. STAT. § 12-61-712(1)(b) (1991 & 1996 Supp.) and public policy. *But cf.* COLO. REV. STAT. § 12-61-702(2.5) (2013) (“Nothing in this subsection (2.5) shall be construed to preclude a person from acting as an expert witness in valuation appeals.”).

299. See representative tax consultant agreements in Appendix B.

300. *City & Cnty. of Denver*, 947 P.2d at 1379-80; see also *Ethics Op. No. 553*, *supra* note 296, at 982 (“The payment of a contingent fee to an entity that is the employer of an expert witness clearly comes within the prohibition of Rule 3.04(b) [of the Texas Disciplinary Rules of Professional Conduct]”; *cf.* MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (precluding “offer[ing] an inducement to a witness that is prohibited by law”).

pensated contingent on the outcome, even if the witness's employer firm agrees to a contingency fee arrangement.³⁰¹ Some courts have held that the testimony of an expert witness who has agreed to a contingency fee may not be absolutely disregarded for that reason alone, but those courts will consider the nature of the compensation in weighing the expert's credibility.³⁰²

B. Statutory Prohibitions Against Contingency Fees for Independent Appraisal Assignments

Under federal statutes and regulations, contingency fee appraisals are unlawful in federally related transactions.³⁰³ However, those federal restrictions by their terms do not apply to property tax valuations in state and local tax proceedings because they have no relationship to federal transactions. Nevertheless, some state legislatures have enacted specific requirements paralleling the federal law by prohibiting contingent fees for "independent appraisal assignments."³⁰⁴ In Colorado, for example, the courts have interpreted the state statute to preclude appraisers and appraisal firms from appearing as expert witnesses before the Board of Assessment

301. *Harris Cnty. Appraisal Dist. v. Houston Laureate Assoc., Ltd.*, 329 S.W.3d 52, 56 & n.2 (Tex. App. 2010) (alleged violation of ethical rule prohibiting attorney from offering expert testimony based on contingency fee did not justify its exclusion; no evidence that witness or his firm was paid a fee contingent on outcome, even assuming tax consultant who retained expert's firm was so compensated).

302. *New England Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E.2d 263, 268 (Mass. 1984). In dicta, however, the court observed that if the witness did have a contingency fee agreement, it would be unenforceable. *See id.* at 267.

303. *See* 12 U.S.C. § 3339 (2012); 12 C.F.R. § 323.4(a) (2013); *see also* 12 C.F.R. § 323.2(f) (2013) (defining "federally related transactions" to include any real estate related financial transaction in which the Federal Deposit Insurance Corporation or any federally regulated institution either engages itself or contracts with another party to conduct, and which requires appraiser services). Appraisal practice for federally related transactions is governed by the Uniform Standards of Professional Appraisal Practice, issued and periodically updated by the Appraisal Foundation. APPRAISAL STANDARDS BOARD, THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (2012-2013 ed.), available at <http://www.uspap.org/> [hereinafter USPAP]. The Foundation was established in 1987 in response to the need to strengthen appraisal practices in the wake of the widespread failures in the savings and loans industry. *See generally History of the Foundation*, THE APPRAISAL FOUNDATION, <https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=TAF&WebCode=History> (last visited Nov. 20, 2013). The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) and its implementing regulations require real estate appraisals for "federally related transactions" to comply with USPAP. *See* 12 U.S.C. § 3339; 12 C.F.R. § 323.4(a). Compliance may be required by contract with the client or the intended users of an appraisal; otherwise, compliance is voluntary. USPAP, *supra*, at U-6.

304. *E.g.*, COLO. REV. STAT. § 12-61-712(1) (2013); *see City & Cnty. of Denver*, 947 P.2d at 1377-78, 1380 n.6. In Colorado, however, contingent fees may be charged for "consulting services," including "counseling and advocacy in regard to property tax assessments and appeals thereof," as long as the consultant discloses that a contingent fee may or has been paid. COLO. REV. STAT. § 12-61-702(2.5) (2013); *id.* § 12-61-712(1)(d). A consultant may not misrepresent that a "consulting service" is an "independent appraisal." *Id.* § 12-61-712(1)(c).

Appeals under contingency fee agreements.³⁰⁵ In addition to Colorado, numerous states have enacted statutes prohibiting persons from engaging in independent appraisal assignments based on contingency fees, including Alabama,³⁰⁶ Arizona,³⁰⁷ Georgia,³⁰⁸ Louisiana,³⁰⁹ New York,³¹⁰ Ohio,³¹¹ Oklahoma,³¹² and South Carolina.³¹³ However, these statutes generally carve out an exception for “specialty services for which contingent fees may be accepted.”³¹⁴

305. *City & Cnty. of Denver*, 947 P.2d at 1379.

306. ALA. CODE §§ 34-27A-24, 34-27A-25 (LexisNexis 2010) (contingency fee prohibited for appraisal assignments in which appraiser serves, or is perceived to serve, as a disinterested third party); *see also id.* § 34-27A-23 (licensed real estate appraisers must comply with USPAP).

307. ARIZ. REV. STAT. ANN. § 32-3636 (2008) (“A state licensed or state certified appraiser may not accept a fee for an appraisal assignment that is contingent on the appraiser reporting a predetermined estimate, analysis or opinion or that is contingent on the opinion, conclusion or value reached or on the consequences resulting from the appraisal assignment.”); *see also* ARIZ. REV. STAT. ANN. § 32-3601(2) (Supp. 2013) (defining “appraisal assignment”).

308. GA. CODE ANN. § 43-39A-20(c) (2011). *But see id.* § 43-39A-20(d) (“An appraiser who enters into an agreement to perform specialized services may be paid a fixed fee or a fee that is contingent on the results achieved by the specialized services.”); *id.* § 43-39A-20(e) (“If an appraiser enters into an agreement to perform specialized services for a contingent fee, this fact shall be clearly stated in each written and oral report.”); *id.* § 43-39A-20(f) (licensing, certification, or registration requirements imposed by “any other law” must be met before performing specialized services).

309. LA. REV. STAT. ANN. § 37:3409(A)(4) (2007); LA. REV. STAT. ANN. § 37:3410(A) (Supp. 2013) (licensed real estate appraiser required to comply with USPAP). In 2012, the statute was amended to require licensed real estate appraisers to include in the appraisal report “the amount of the appraiser’s fee.” *Id.* § 37:3410(B). In Louisiana, compensation for an “appraisal assignment” may not include a contingency fee based on the results of the assignment. LA. REV. STAT. ANN. § 37:3392(2) (Supp. 2013).

310. N.Y. EXEC. LAW § 160-y (1), (2) (McKinney 2010) (state-certified or licensed appraiser may not accept contingency fee for “appraisal assignment” but may agree to perform “specialized services” for contingent fee); *see id.* § 160-x (2), (3) (distinguishing “appraisal assignment” and “specialized services” based on whether third parties would perceive appraiser as rendering unbiased analysis, opinion, or conclusion of value as disinterested third party).

311. OHIO REV. CODE ANN. § 4763.12(B) (LexisNexis 2013) (certificate holder or licensee may not accept fee for appraisal assignment contingent upon reporting predetermined estimate, analysis, or opinion; upon the opinion, conclusion, or valuation reached; or upon consequences resulting from appraisal assignment, but may charge contingent fee based on results achieved by “specialized services,” with required disclosures); *see also id.* § 4763.01(E), (F) (defining relevant terms).

312. OKLA. STAT. ANN. tit. 59, § 858-728 (West 2010) (certified appraiser may not accept contingent fee for “appraisal assignment” but may do so for performing “specialized services,” with required disclosures); *see id.* § 858-703(13), (14) (distinguishing “appraisal assignment” from “specialized services”).

313. S.C. CODE ANN. § 40-60-38 (2011) (requiring board to adopt USPAP standards applicable to appraiser apprentices and state-licensed and certified appraisers); *see also id.* § 40-60-20(3), (23) (defining “appraisal assignment” and “specialized services”).

314. *City & Cnty. of Denver v. Bd. of Assessment*, 947 P.2d 1373, 1380 n.6 (Colo. 1997); *e.g.*, COLO. REV. STAT. § 12-61-702(2.5), (4.5) (2013); GA. CODE ANN. § 43-39A-2(26) (Supp. 2013). For example, the Colorado statute defines “consulting services” as

services performed by an appraiser that do not fall within the definition of an ‘independent appraisal’ in subsection (4.5) of this section. “Consulting services” includes . . . valuations, analyses, and opinions and conclusions given in connection with . . . counseling and advocacy in regard to property tax assessments and appeals thereof; except that, if in rendering such

Thus, even in states that have enacted laws in an effort to conform to the more stringent federal requirements prohibiting contingency fees to protect against unethical appraisal practices, the scope of those laws typically excludes services provided by property tax consultants.³¹⁵ Most states fail to regulate or prohibit contingency fee agreements between property tax consultants and their clients. If regulated at all, it is by virtue of state licensing or regulatory requirements specifically applicable to property tax consulting services. In the unlikely event that a tax assessment appeal reaches the courts, the potential for some oversight exists by the qualification of expert witnesses or by judicial authority to preclude unauthorized practice of law.³¹⁶

V. STATUTORY AND REGULATORY OVERSIGHT OF TAX CONSULTANTS

A. Federal Regulation and Oversight of Contingency Fees Paid to IRS Tax Practitioners

Treasury Department Circular No. 230 is a compilation of the regulations governing practice before the Internal Revenue Service (IRS).³¹⁷ The regulations govern who may qualify to practice before the IRS and the United States Tax Court, including attorneys, certified public accountants, enrolled agents, and registered tax return preparers.³¹⁸ An individual must meet detailed requirements to qualify for practice and periodic renewal, including minimum educational standards, continuing education, and com-

services the appraiser acts as a disinterested third party, the work shall be deemed an independent appraisal and not a consulting service.

COLO. REV. STAT. § 12-61-702(2.5). The difficulty for assessment tribunals and courts, of course, is to distinguish between "independent appraisal" and "consulting services," or in some states "specialized services."

315. The current version of the USPAP Ethics Rule appears to have extended its prohibition against contingency fees to "valuation assignments," not just "appraisal assignments." See USPAP, *supra* note 303, at U-8; see also *id.* at U-2 (defining "assignment" as "(1) [a]n agreement between an appraiser and a client to provide a valuation service; or (2) the valuation service that is provided as a consequence of such an agreement"); *id.* at U-4 (defining "valuation services" as "services pertaining to aspects of property value," including "all aspects of property value . . . including services performed both by appraisers and by others") (emphasis added).

316. *E.g., City & Cnty. of Denver*, 947 P.2d at 1379.

317. TREASURY DEP'T CIRCULAR NO. 230 (REV. 8-2011), REGULATIONS GOVERNING PRACTICE BEFORE THE INTERNAL REVENUE SERVICE, 31 C.F.R. subtitle A, pt. 10 (2012).

318. 31 C.F.R. § 10.3 (2012). Individual taxpayers may also appear on their own behalf. *Id.* at § 10.7(a). The regulations were amended in 2009 to apply to tax return preparers. For a critique of the lack of regulation of tax return preparers before the amendments, see Danshera Cords, *Paid Tax Preparers, Used Car Dealers, Refund Anticipation Loans, and the Earned Income Credit: The Need to Regulate Tax Return Preparers and Provide More Free Alternatives*, 59 CASE W. RES. L. REV. 351, 354 (2009) ("The inherent potential for abuse suggests the need for greater oversight.").

pliance with ethical rules.³¹⁹ The regulations authorize sanctions for violation of the rules governing practice before the IRS, including censure, suspension, or disbarment.³²⁰

In 2008, the IRS amended its regulations governing the fees its practitioners may charge their clients.³²¹ Since 1966, the regulations have prohibited unconscionable fees.³²² In 1994, the IRS amended the regulations to bar contingency fees in some circumstances, including the filing of original returns.³²³ As the IRS announced in proposing the most recent rule amendments, “[t]he primary rationales behind the prohibition on contingent fees is [sic] to preclude any fee arrangement that is related to or requires a favorable ruling by the IRS and that has the potential to exploit the audit selection process or compromise a practitioner’s duty of independent judgment.”³²⁴

The most recent version of Circular 230 broadens the prohibition against contingent fees. Effective 2009, a practitioner generally “may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.”³²⁵ Narrow exceptions allow contingency fees for services related to IRS audits of original returns, amended returns filed within 120 days after notice of an audit, refund claims based on assessed interest or penalties, or any judicial proceeding involving an IRS matter.³²⁶

319. 31 C.F.R. §§ 10.5-10.6; *id.* pt. 10, subpt. B.

320. *Id.* § 10.50.

321. *Id.* § 10.27 (effective Mar. 26, 2008).

322. See 31 C.F.R. § 10.27(a); Practice Before the Internal Revenue Service, 31 Fed. Reg. 10,776 (Aug. 13, 1966) (then codified at 31 C.F.R. § 10.28). Before 1966, the regulation prohibited “unreasonable” fees. See *id.* at 10,773.

323. See Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 59 Fed. Reg. 31,523, 31,525 (June 20, 1994) (then codified at 31 C.F.R. Subtitle A, pt. 10).

324. Contingent Fees Under Circular 230, 74 Fed. Reg. 37,183, 37,184 (July 28, 2009) (emphasis added) (then codified at 31 C.F.R. pt. 10). The pre-amendment version of the regulation read as follows:

(b) Contingent fees for return preparation.

A practitioner may not charge a contingent fee for preparing an original return. A practitioner may charge a contingent fee for preparing an amended return or a claim for refund (other than a claim for refund made on an original return) if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended return or claim will receive substantive review by the Service. A contingent fee includes a fee that is based on a percentage of the refund shown on a return or a percentage of the taxes saved, or that otherwise depends on the specific result attained.

31 C.F.R. § 10.28(b) (2001) (amended 2009).

325. 31 C.F.R. § 10.27(b) (2012).

326. *Id.* § 10.27(b)(2)-(4). The amended regulation broadly defines “contingent fee” to include “any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client’s fee in the event that a position taken on a tax return or other filing is challenged by the Internal

The IRS regulations restricting contingency fees were recently challenged on constitutional grounds in an action filed by a Texas-based tax consulting firm³²⁷ that claims its property tax practice is the largest in the United States.³²⁸ The firm and its principal argued that the general prohibition against contingency fees violates the Petition Clause of the First Amendment and the Due Process Clause of the Fifth Amendment.³²⁹ Specifically, they claimed that the restrictions hamper the tax consulting business, which represents clients on a contingency fee basis.³³⁰

The trial court dismissed both constitutional challenges.³³¹ With respect to the Due Process challenge, the plaintiffs lacked standing for failure to show any injury consistent with the asserted legal theory.³³² With respect to the Petition Clause argument, the complaint failed to state a cognizable claim.³³³ The court agreed with the government's argument that the regulations on contingency fees do not preclude taxpayers from filing refund claims; they only limit the method of compensating a tax practitioner if the taxpayer elects to retain one.³³⁴

B. State Regulation and Oversight of Property Tax Consulting Fees and Practice

In contrast to the federal statutes and regulations that restrict contingency fees for appraisers in federally related transactions³³⁵ and, as a general rule, for IRS tax practitioners, very few states impose any significant regulations on the practice of property tax consultants. Even fewer restrict or regulate their compensation. Only South Carolina has enacted a statute, akin to the federal regulations, that clearly bars a property tax practitioner

Revenue Service or is not sustained." *Id.* at § 10.27(c)(1). The regulation also defines "matter before the Internal Revenue Service" quite broadly. *See id.* at § 10.27(c)(2).

327. *Ryan, LLC v. Lew*, 934 F. Supp. 2d 159, 159 (D.D.C. 2013).

328. *See* RYAN, PROPERTY TAX 2 (2013), available at <http://www.ryan.com/Assets/Downloads/Brochures/Property-Tax.pdf>. For a description of Ryan LLC, its lucrative tax practice, and its extensive political connections, see Louise Story, *Lines Blur as Texas Gives Industries a Bonanza*, N.Y. TIMES (Dec. 2, 2012), http://www.nytimes.com/2012/12/03/us/winners-and-losers-intexas.html?pagewanted=all&_r=0.

329. *Ryan, LLC*, 934 F. Supp. 2d at 160. The Petition Clause prohibits laws "abridging . . . the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I.

330. 934 F. Supp. 2d at 160. The third count alleged that IRS exceeded its authority in amending the regulations, contrary to the Administrative Procedure Act. *Id.*

331. *Id.*

332. *Id.* at 169.

333. *Id.* at 171-74.

334. *Id.* at 173. The court did not address the third count because it was not the subject of the government's motion to dismiss. Therefore, the Administrative Procedure Act challenge remains pending. *See id.* at 174.

335. *See supra* note 303 and accompanying text.

from charging an unconscionable fee; the statute applies even to practice before local assessment boards. Further, no other state except South Carolina generally prohibits property tax consultants from entering into contingency fee agreements.

While in theory the courts presumably have authority to consider the reasonableness of a tax consultant's fee, as a practical matter judicial oversight is highly unlikely. For all but the most well-heeled property owners, challenging the enforceability of a fee agreement in court would be intimidating and cost-prohibitive, especially when the contingency fee is generally calculated not as a percentage of any cash refund, but rather as a percentage of the anticipated tax savings for the ensuing tax year. And most clients are unlikely to challenge the fee provisions as unenforceable. To the relatively unsophisticated property owner, even an exorbitant contingency fee percentage appears to be a "good deal" if the tax consultant's services yield a tax break, even if the property owner realizes only half the anticipated tax savings.³³⁶ Moreover, when courts have had occasion to consider the reasonableness of tax consultant fees, as when a tax consultant sues to recover the fee from a recalcitrant client, the courts have been remarkably amenable to enforcing the agreements by their terms, often without questioning the reasonableness of the fee.³³⁷

A few states have enacted statutes or regulations that specifically apply to services offered by property tax consultants. Appendix A provides a state-by-state overview. As it reflects, the great majority of states lack any statutes or rules imposing minimum qualifications or standards for non-attorneys who engage in property tax consulting. Nor do they regulate the terms of the agreements or the fees tax consultants charge to clients. A few states have enacted comprehensive regulatory statutes and regulations that provide some oversight of property tax consultants, but very few states curtail the common practice of charging contingency fees.

336. Unless the property owner has already paid the challenged taxes under protest, no *res* is available from which to pay the contingency fee. Most tax consulting agreements provide that the property owner is responsible for paying a contingency fee based upon the reduction in assessed value, multiplied by the most recently available tax rate. See example contracts in Appendix B. Once the tax consultant succeeds in achieving a reduced assessed value, the property owner is invoiced for the contingency fee, which may occur several months before any tax bill is issued based on the reduced assessment.

337. *E.g.*, *Strategis Asset Valuation & Mgmt., Inc. v. Pac. Mut. Life Ins. Co.*, 805 F. Supp. 1544, 1551 (D. Colo. 1992); *Prop. Assessment Review, Inc. v. Greater Mo. Builders, Inc.*, 260 S.W.3d 841, 848 (Mo. Ct. App. 2008); *cf. Miller v. Botwin*, 899 P.2d 1004, 1009-10 (Kan. 1995) (property tax attorney).

The following five states have taken leading roles in regulating the property tax consulting practice. Appendix A provides summary information for these and other states.

1. Indiana

Within certain constraints, Indiana law³³⁸ regulates the practice of property tax consultants, known as "tax representatives."³³⁹ As authorized by statute, the Indiana Board of Tax Review has adopted regulations governing the practice of non-lawyers in property tax proceedings. Practice is broadly defined to include "participation in any matters connected with a presentation to the [Indiana Board of Tax Review] or any of its members or employees relating to a client's rights, privileges, or liabilities under Indiana's property tax laws or rules."³⁴⁰

To qualify for practice, the tax representative must be certified by the Indiana Department of Local Government Finance and secure a power of attorney from the taxpayer client.³⁴¹ A certified tax representative may not assert tax exemption claims, arguments that taxes or assessments are contrary to law, constitutional challenges, or any other matter that would involve the practice of law.³⁴² The regulations prohibit a variety of unethical conduct and specifically address contingent fees.³⁴³ While not prohibiting or restricting them, the regulations provide that a "tax representative who charges a contingent fee may not testify without first disclosing the existence of the contingent fee arrangement."³⁴⁴ Failure to disclose entitles the board to presume that a contingent fee arrangement exists.³⁴⁵ Finally, the statute provides for denial, suspension, or revocation of certification under specific circumstances, which include violation of any rule of practice,

338. IND. CODE ANN. § 6-1.5-6-1(a) (LexisNexis 2007). "[T]he Indiana board shall adopt rules . . . to govern the practice of representatives in proceedings before the Indiana board under this article." However, the statutes preclude any regulations that restrict practice merely because the representative is not an Indiana-licensed lawyer, *id.* § 6-1.5-6-1(b)(1), or that "restrict the admissibility of the written or oral testimony of a representative or other witness . . . based upon the manner . . . compensated," *id.* § 6-1.5-6-1(b)(2).

339. 52 IND. ADMIN. CODE 1-1-6 (2013) (defining "tax representative").

340. *Id.* 1-1-4 (defining "practice before the board").

341. *Id.* 1-2-1(a).

342. *Id.* 1-2-1(b).

343. *Id.* 1-2-2 to -4.

344. *Id.* 1-2-4(a). "Contingent fee" is defined to include "a fee, whether accruing to the tax representative or to the entity with which the tax representative is affiliated, that is based on a percentage of the: (1) refund obtained; (2) taxes saved; or (3) reduction in assessed value." *Id.* at § 1-2-4(b).

345. 52 IND. ADMIN. CODE 1-2-4(c) (2013).

gross incompetence, dishonesty, or fraud while practicing before the board, or violation of any standards of ethics or rules pertaining to solicitation.³⁴⁶

2. Tennessee

Tennessee requires registration of property tax agents who appear before the state board of equalization.³⁴⁷ The governing statute begins by providing that “taxpayers and assessors of property shall be entitled to the assistance of a qualified agent and of such other persons as they may wish” in proceedings before the state board of equalization.³⁴⁸ The statute explicitly does not regulate practice before local boards of equalization.³⁴⁹ The statute next identifies those who may appear before the state board and participate as a taxpayer agent: an attorney; a regular officer, director, or employee of a taxpayer corporation or other artificial entity; a certified public accountant if the sole issue is the valuation of personal property; or a registered agent for classification or assessment disputes.³⁵⁰

To qualify as a registered agent, the statute requires four years of experience either appraising real property or valuing it for assessment purposes. In addition, for those seeking registration on or after July 1, 2002, 120 hours of additional instruction are required in property appraisal or assessment, as well as successful passage of an examination administered by the board.³⁵¹

The statute provides the board with broad power to “reprimand, revoke, or suspend from practice or place on probation or otherwise discipline any agent” for specified acts,³⁵² and authorizes the board to adopt additional rules of conduct when an agent appears before the board.³⁵³ Moreover, non-attorney agents who solicit clients must explicitly disclose that they may appear only on matters of classification, assessment, or valuation, and that they may not represent clients in court.³⁵⁴ Finally, the statute establishes a “regulatory panel” composed of six registered agents, which may adopt standards of conduct applicable to all agents subject to board

346. *Id.* 1-2-5.

347. TENN. CODE ANN. § 67-5-1514(c)(1)(D), (2), (3) (2013).

348. *Id.* § 67-5-1514(a).

349. *Id.* § 67-5-1514(j).

350. *Id.* § 67-5-1514(c)(1)(D); *see id.* § 67-5-1407(a).

351. *Id.* § 67-5-1514(c)(2).

352. TENN. CODE ANN. § 67-5-1514(f)(1) (2013).

353. *Id.* § 67-5-1514(f)(2).

354. *Id.* § 67-5-1514(g).

approval. Upon a two-thirds affirmative vote, the panel may impose disciplinary action against any registered agent.³⁵⁵

The board has adopted regulations consistent with the authority conferred by statute,³⁵⁶ including standards of conduct.³⁵⁷ The rules provide that “[an] agent shall not contract for or accept compensation or anything of value for services not performed,”³⁵⁸ but the rules otherwise neither regulate an agent’s compensation nor preclude contingency fee agreements.

3. Arizona

In order to practice in Arizona, property tax agents³⁵⁹ must register with the State Board of Appraisal; if approved, registration is for a two-year period.³⁶⁰ Statutes provide basic rules of conduct,³⁶¹ the violation of which may trigger an investigation and possible sanctions.³⁶² Arizona Supreme Court rules governing the unauthorized practice of law explicitly exclude property tax agents registered with the Board of Appraisal who practice as authorized and within the scope of those statutes.³⁶³

The Arizona State Board of Appraisal is authorized to adopt regulations to administer the statute, and it has done so by adopting formal “standards of practice.”³⁶⁴ Among other things, the standards prohibit a property tax agent from “[a]ssigning, accepting, or performing a tax assignment that is contingent upon producing a predetermined analysis or conclusion,”³⁶⁵ “[i]ssuing an appraisal analysis or opinion . . . that fails to

355. *Id.* § 67-5-1514(f)(3). An appeal may be taken to the Board of Equalization, which must affirm by a two-thirds majority to impose discipline on a registered agent. *Id.*

356. TENN. COMP. R. & REGS. 0600-01 to -09 (2011).

357. *Id.* at 0600-06-.06.

358. *Id.* at 0600-06-.06(8).

359. *See* ARIZ. REV. STAT. ANN. §§ 32-3601(14), 32-3651(4) (Supp. 2013) (both defining “property tax agent”).

360. *Id.* § 32-3651(4); ARIZ. REV. STAT. ANN. § 32-3652(A), (B) (Supp. 2013).

361. ARIZ. REV. STAT. ANN. § 32-3653 (Supp. 2013). A property tax agent:

1. Shall not knowingly misrepresent any information or act in a fraudulent manner.
2. Shall not prepare documents or provide evidence in a property valuation or legal classification appeal unless the agent is authorized by the property owner to do so and any required agency authorization form has been filed.
3. Shall not knowingly submit false or erroneous information in a property valuation or legal classification appeal.
4. Shall use appraisal standards and methods that are adopted by the board when the agent submits appraisal information in a property valuation or legal classification appeal. *Id.*

362. *See* ARIZ. REV. STAT. ANN. § 32-3654 (2008).

363. ARIZ. SUP. CT. R. 31(26).

364. ARIZ. REV. STAT. ANN. § 32-3655 (2008); *see* ARIZ. ADMIN. CODE § R4-46-601 to -602 (2013).

365. ARIZ. ADMIN. CODE § R4-46-601(6). “Tax assignment” is not defined. By statute, a state-licensed or certified appraiser may not perform an “appraisal assignment” for a contingency fee. ARIZ. REV. STAT. ANN. § 32-3636 (2008). But “appraisal assignment” is defined as “an engagement for which

disclose bias or the accommodation of a personal interest;”³⁶⁶ “[p]romoting a tax agent practice and soliciting assignments by using misleading or false advertising;”³⁶⁷ “[s]oliciting a tax assignment by assuring a specific result or by stating a conclusion on the assignment without first analyzing the facts;”³⁶⁸ and performing an “appraisal,” as defined by statute,³⁶⁹ unless the property tax agent is also a board-certified or licensed appraiser.³⁷⁰

By rule, the Board has formally adopted the Uniform Standards of Professional Appraisal Practice, which apply to all “appraisals” conducted in Arizona but do not apply to property tax agents or their reports.³⁷¹ None of the Arizona statutory or regulatory standards of conduct otherwise governs the compensation a property tax agent may require for services to a property owner.³⁷²

4. South Carolina

Unlike most states, South Carolina statutes govern the administrative tax assessment process before both local and state officials.³⁷³ The same persons authorized to represent taxpayers before the IRS may represent taxpayers during the state and local administrative tax process.³⁷⁴ In addition, for matters limited exclusively to the valuation of real property, a state-registered, licensed, or certified real estate appraiser may represent the taxpayer.³⁷⁵ The statute authorizes suspension, disbarment, or monetary penalties under certain circumstances, including incompetence, failure to

a real estate appraiser is employed or retained to act, or would be perceived by third parties or the public in acting, as a *disinterested third party* in rendering an unbiased analysis, opinion or conclusion.” ARIZ. REV. STAT. ANN. § 32-3601(2) (Supp. 2013) (emphasis added). Because property tax agents are advocates, this definition would not apply; nor, by implication, does the prohibition against contingent fees. Moreover, Chapter 36 of the Arizona Revised Statutes, which governs licensed and certified appraisers, expressly excludes “[a] property tax agent who is registered in this state and who, when acting as such, prepares a report analyzing real estate if the report is made for purposes of tax assessment or tax valuation of the real estate.” ARIZ. REV. STAT. ANN. § 32-3602(7) (2008).

366. ARIZ. ADMIN. CODE § R4-46-601(7).

367. *Id.* § R4-46-601(10).

368. *Id.* § R4-46-601(11).

369. See ARIZ. REV. STAT. ANN. § 32-3601(1) (Supp. 2013).

370. ARIZ. ADMIN. CODE § R4-46-601(12).

371. *Id.* § R4-46-401.

372. ARIZ. REV. STAT. ANN. § 32-3602(7) (2008); see *supra* note 365 and accompanying text.

373. S.C. CODE ANN. § 12-60-90(A) (Supp. 2012). “[T]he administrative tax process includes matters connected with presentation to a state or local tax authority . . . relating to a client’s rights, privileges, or liabilities pursuant to laws, regulations, or rules administered by state or local tax authorities.” *Id.* The South Carolina Tax Code was substantially amended in 2007, effective with the 2008 tax year. See 2007 S.C. Acts 41.

374. S.C. CODE ANN. § 12-60-90(C)(1); see TREASURY DEP’T CIRCULAR NO. 230 (REV. 8-2011), *supra* note 317.

375. S.C. CODE ANN. § 12-60-90(C)(2).

comply with rules, or misrepresentation.³⁷⁶ Subsection E incorporates by reference the standards of conduct in Circular 230,³⁷⁷ with appropriate modifications to make them applicable to property tax returns, property taxes, and property tax assessments under South Carolina law.³⁷⁸

By generally incorporating the standards of practice in Circular 230, in particular § 10.27, South Carolina law precludes property tax consultants from charging unconscionable fees in connection with any matter before state or local tax officials.³⁷⁹ In addition, South Carolina law specifically prohibits those who represent property owners in tax proceedings from charging contingent fees for their services, subject to certain exceptions comparable to those in Circular 230.³⁸⁰ South Carolina has thus adopted a progressive statute that broadly regulates those who appear before both state and local property tax tribunals, including their fees.

5. California

In 1965, as discussed earlier, California was the hotbed of a major property tax scandal fueled by property tax consultants' contingency fees and kickbacks to local assessors.³⁸¹ Given that history, one might expect that California would be among the more progressive states in enacting regulatory statutes to curb the potential for abuse by property tax consultants.

The California Board of Equalization is granted broad statutory power to adopt rules and regulations governing local boards of equalization and assessors.³⁸² The Board has adopted extensive rules and regulations governing the assessment and equalization of taxable property, including who may initiate a proceeding and appear on behalf of a property owner.³⁸³

Rule 317 provides that a property owner may appear in person or by an authorized agent, who must be "thoroughly familiar with the facts pertaining to the matter before the board."³⁸⁴ If a non-attorney agent initiates the proceeding, the application must include written authorization to repre-

376. *Id.* § 12-60-90(D).

377. *Id.* § 12-60-90(E). For a brief summary of Circular 230, see *supra* notes 317-326 and accompanying text.

378. S.C. CODE ANN. § 12-60-90(F).

379. See 31 C.F.R. § 10.27(a) (2012).

380. See *id.* § 10.27(b)(2), (3), (4).

381. See *supra* notes 184-187 and accompanying text.

382. CAL. GOV'T CODE § 15606(c) (West 2009).

383. CAL. CODE REGS. tit. 18, § 317 (2013).

384. *Id.* § 317(a).

sent the property owner.³⁸⁵ A corporation, limited partnership, or limited liability company may appear by any officer, employee, or authorized agent if “thoroughly familiar with the facts.”³⁸⁶ For an individual property owner, a co-owner or close relative may appear.³⁸⁷ No other regulations restrict the manner in which a non-attorney agent may represent a property owner during the proceedings.

California statutes do, however, regulate the solicitation of property owners by “assessment reduction filing services,” defined as any service offered for compensation in connection with an application to reduce the assessment of residential property.³⁸⁸ A service is prohibited from making untrue or misleading statements. Specific oral and written disclosures must be made to the residential property owner that the service is not affiliated with any government agency, and that the property owner may file on his own behalf, at no cost.³⁸⁹ Finally, a filing service may not charge or collect a fee until after filing a request or application on the property owner’s behalf.³⁹⁰

On the other hand, current California laws do not regulate the compensation for property tax agents, although efforts have been made to strengthen them. In 2011, for example, a bill was introduced in the California Legislature that would have enacted a new article comprehensively regulating property tax agents, including required registration, compliance with a code of ethics, and a prohibition against charging unconscionable fees.³⁹¹ The author of the bill described its purpose as “to advance the professional practice of tax agents so that they are held to the highest ethical

385. *Id.* § 305; see *Helene Curtis, Inc. v. L.A. Cnty. Assessment Appeals Bds.*, 16 Cal. Rptr. 3d 658, 665 (Ct. App. 2004) (requiring non-attorney agent to provide written authorization does not exceed regulatory authority of State Board of Equalization); see also CAL. BUS. & PROF. CODE § 17537.9(e)(1) (West Supp. 2013) (unlawful for assessment reduction filing service to file without written authorization from property owner).

386. CAL. CODE REGS. tit. 18, § 317(d).

387. *Id.* § 317(c), (e). “A husband may appear for his wife, or a wife for her husband, and sons or daughters for parents or vice versa.” *Id.* § 317(e).

388. CAL. BUS. & PROF. CODE § 17537.9(d)(1).

389. *Id.* § 17537.9(b).

390. *Id.* § 17537.9(c).

391. An Act to Amend Section 17537.9 of the Business and Professions Code, to Amend Section 15640 of the Government Code, and to add Article 2.5 (commencing with Section 1660) to Chapter 1 of Part 3 of Division 1 of the Revenue and Taxation Code, Relating to Local Government, A.B. 2183, 2011-2012 Sess. (Cal. 2011), available at http://leginfo.ca.gov/faces/billTextClient.xhtml?jsessionid=10563e267d558f31dfde4c932cd9?bill_id=201120120AB2183.

standards in California.”³⁹² Assembly Bill 2183 passed overwhelmingly in the California Assembly but died in a Senate Committee in late 2012.³⁹³

Also introduced in 2011 was Assembly Bill 404, which would have required property tax agents to register as lobbyists if they practice in any county that regulates lobbying.³⁹⁴ As explained by the author,

[t]his simple requirement would result in disclosure, to the media and the public, of who is paying so-called “tax agents” to obtain what are, in some cases, multi-million-dollar windfalls for their clients through favorable treatment by Assessors. It would also, in many cases, prevent tax agents from making campaign contributions to Assessors, who then hear the tax agents’ clients’ cases. . . . It seeks to improve the assessment process by ensuring that all citizens are given fair and equal access.³⁹⁵

Assembly Bill 404 passed the Assembly overwhelmingly but died in the Senate in late 2012.³⁹⁶

Finally, Senate Bill 342, also introduced in 2011, would have expressly prohibited contingency fees for services in connection with any matter before the State Board of Equalization, including property tax appeals.³⁹⁷ The bill’s purpose was to “eliminate the incentive for unregulated consultants to promote aggressive positions on tax returns on a contingency fee basis.”³⁹⁸ The bill died in early 2012, having failed to clear the Senate by the deadline.³⁹⁹

Thus, even in California, efforts to regulate or restrict the contingency fees charged by property tax consultants have so far failed.

392. Cal. A.B. 2183: *Hearing on A.B. 2103 Before the S. Gov’t & Finance Comm.*, 2012, 2011-2012 Sess. 5-6 (statement of Lois Wolk, Chair, S. Gov’t & Finance Comm.), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB2183.

393. Cal. A.B. 2183: *History*, 2012, 2011-2012 Sess. 1, available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?jsessionid=10563e267d558f31dfde4c932cd9?bill_id=

394. An Act to Add Section 23028 to the Government Code, Relating to Local Government, A.B. 404, 2011-2012 Sess. (Cal. 2011), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB404.

395. Cal. A.B. 404: *Bill Analysis in S. Floor*, - 2012, 2011-2012 Sess. 6, (statement of Gatto, Member, Assemb.), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB404.

396. Cal. A.B. 404: *History*, 2011, 2011-2012 Sess. 1-2, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB404.

397. An Act to Amend Section 19717 of, and to Add Section 41 to, the Revenue and Taxation Code, Relating to Taxation, S.B. 342, 2011-2012 Sess. (Cal. 2011), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB342.

398. Cal. S.B. 342: *Hearing on S.B. 342 Before the S. Gov’t & Finance Comm.*, 2011, 2011-2012 Sess. 5 (statement of Lois Wolk, Chair, S. Gov’t & Finance Comm.), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB342.

399. Cal. S.B. 342: *History*, 2011, 2011-2012 Sess. 1, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB342.

CONCLUSION

In the great majority of states, the ubiquitous practice of property tax consulting, compensated by contingency fees, goes largely unregulated. Federal laws enacted to reform appraisal practices in the wake of the savings and loans scandals of the late 1980s, including the prohibition against performing an “appraisal assignment” for a contingency fee, apply only to federally related transactions. While some states have enacted statutes to parallel the federal requirements, statutory definitions of the relevant terms effectively carve out an exception for “specialized” or “consulting” services of the kind typically offered by property tax consultants. In fact, the typical state statute implicitly or explicitly permits contingency fees for those services.

While courts have generally condoned contingency fees for attorneys notwithstanding common law prohibitions against champerty, their reasoning rarely acknowledges that non-lawyers regularly represent property owners in quasi-judicial tax proceedings compensated by contingency fees, without judicial or even meaningful administrative oversight. Those fees typically divert to the tax consultant thirty to fifty percent, and sometimes more, of the anticipated property tax savings as a result of challenging the local government’s assessed property value. Even when tax consultants bring contract enforcement actions before the courts, freedom of contract principles frequently sway the courts to enforce the agreements, however onerous or unreasonable the contingency fee calculation. And unless the property owner refuses to pay the contingency fee and the tax consultant files a contract enforcement action, most of these agreements never come to the attention of the courts. That is because the business of property tax consulting occurs largely in negotiation with local assessors’ offices and before decentralized administrative tax tribunals.

Courts that have abandoned champerty and maintenance as contract defenses reason that sufficient safeguards are in place to regulate contingency fees charged by attorneys to their clients. However, judicial safeguards do not apply to non-attorneys, who practice almost exclusively in administrative tribunals that lack authority to regulate the practice of law and often lack the statutory authority even to regulate the practice of tax consultants. Moreover, in the absence of specific authorizing statutes, administrative tribunals, unlike courts, have no power to regulate the compensation paid to those who appear on behalf of property owners. Moreover, courts themselves lack power to regulate compensation agreements with non-attorneys, unless one of the parties to the contract seeks

judicial intervention to either enforce the contract or declare it unenforceable.

The common practice of contingency fee agreements between tax assessors and contract auditors on the one hand, and property owners and tax consultants on the other, creates perverse financial incentives that undermine the integrity of property tax administration. Payment of contingency fees by the government to outside auditors for identifying undervalued or escaped property raises due process and ethical concerns. As a matter of policy, diverting a share of property tax revenues to private third parties for assessment functions undermines accountability and results in a substantially lower return of escaped taxes to the government coffers. As a result, honest taxpayers effectively subsidize both the tax dodger and the contract auditor. And when private tax consultants are permitted to split the property owner's anticipated tax savings or share in the recovery of erroneously assessed taxes, the associated high cost of assuring uniformity in tax assessment unduly burdens the entire property tax system.

The current practice of allowing contingency fees for both contract auditors and tax consultants is economically inefficient, prone to abuse, and contrary to the public interest. Statutory and regulatory oversight of contract auditors and property tax consultants must be strengthened to eliminate extravagant financial incentives, while providing for reasonable compensation on a fee-for-service or hourly basis. Ethical standards, educational prerequisites, and disclosure requirements are affirmative ways to hold the profession to higher expectations. State and local governments need better and less costly ways of ensuring access to property owners in order to optimize the accuracy and uniformity of property tax assessments.

The problems associated with contract auditors and property tax consultants are complex, controversial, and politically charged.⁴⁰⁰ But those challenges make even more compelling the need for legal scholars to lend their expertise in an effort to prevent overreaching by property tax entrepreneurs who have thrived for more than a century in a symbiotic relationship with the "worst tax."⁴⁰¹

400. "Tax policy is one of most difficult public policy issues to address because it requires recalcitrant and resentful people to pay some of their hard-earned money towards the greater good of funding civilization." Susan Pace Hamill, *The Vast Injustice Perpetuated by State and Local Tax Policy*, 37 HOFSTRA L. REV. 117, 154 (2008).

401. "[T]he general property tax as actually administered is beyond all doubt one of the worst taxes known in the civilized world." EDWIN ROBERT ANDERSON SELIGMAN, *ESSAYS IN TAXATION* 62 (8th ed. 1921).

APPENDIX A: STATE REGULATION OF TAX CONSULTANTS AND TAX FERRETS

State	Tax Consultants		Tax Ferrets	
	Regulation	Contingency Fees	Regulation	Contingency Fees
Alabama			Regulated	Prohibited
Alaska				
Arizona	Regulated			
Arkansas				
California	Regulated			
Colorado		Limited Regulation; Disclosure Required	Prohibited	Prohibited
Connecticut				
Delaware	Limited Regulation			
District of Columbia				
Florida				
Georgia				Prohibited
Hawaii				
Idaho				
Illinois	Limited Regulation		Prohibited	Prohibited
Indiana	Regulated	Disclosure Required		Prohibited
Iowa	Regulated			
Kansas				
Kentucky	Regulated	Disclosure Required		
Louisiana				
Maine				
Maryland				
Massachusetts	Limited Regulation			
Michigan				
Minnesota	Regulated		Regulated	Prohibited
Mississippi	Limited Regulation		Prohibited	Prohibited
Missouri			Regulated	Prohibited (in Part)
Montana				
Nebraska			Regulated	Regulated
Nevada				
New Hampshire	Regulated			
New Jersey	Regulated			
New Mexico			Prohibited	Prohibited
New York	Regulated			
North Carolina	Regulated		Regulated	Prohibited
North Dakota			Regulated	Prohibited (in Part)
Ohio	Regulated			
Oklahoma	Regulated		Regulated	Prohibited
Oregon	Regulated			
Pennsylvania	Regulated			
Rhode Island				
South Carolina	Regulated	Prohibited		
South Dakota			Prohibited	Prohibited
Tennessee	Regulated			
Texas	Regulated		Regulated	Prohibited
Utah			Regulated	Prohibited
Vermont				
Virginia				
Washington	Limited Regulation			
West Virginia				
Wisconsin				
Wyoming				

Legend:

No Regulation	Limited Regulation; Disclosure Required	Regulated	Prohibited
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APPENDIX B: SAMPLE TAX CONSULTANT AGREEMENTS

TAX REDUCTIONS APPLICATION FOR PROPERTY TAX ASSESSMENT CORRECTION

TERMS & CONDITIONS

1) **DESIGNATION OF REPRESENTATIVE:** I hereby authorize Empire Tax Reductions (ETR, Inc) to process my application for a property tax reduction in 2013 for the applicable tentative assessment roll, to represent me before the Board of Assessment Review (Assessment Review Commission in Nassau County) and/or Small Claims Assessment Review pursuant to my rights guaranteed by NYS Property Tax Law, and to negotiate any settlement of my claim.

2) **FEES:** I have read and understand that I will pay ETR a percentage of the First Year's tax savings that they obtain for my property. The percentage is determined by the county in which I live and follows:

County	APPLICATION TAX YEAR	Contingency Fee [% of Savings]	Market Analysis Fee FOR SUCCESSFUL REDUCTIONS ONLY	NYS Court* imposed filing fee Only if an appeal is warranted and required	EMPIRE'S FEE IF WE ARE NOT SUCCESSFUL IN OBTAINING A REDUCTION
Nassau	2014/15	40%	- 0 -	\$30	- 0 -
Orange	2013/14	50%	\$75	\$30	- 0 -
Putnam	2013/14	50%	\$100	\$30	- 0 -
Rockland	2013/14	60%	\$75	\$30	- 0 -
Suffolk	2013/14	50%	\$75	\$30	- 0 -
Westchester	2014/15	50%	- 0 -	\$30	- 0 -

The Market Analysis Fee - where applicable - is waived if I supply a certified appraisal dated within 18 months prior to 5/1/2013. I agree (i) to pay ETR within 30 days of receiving official notification of reduction; (ii) to pay such fees in the event I sell or move out of the subject property; (iii) to pay reasonable collection/attorney's fees incurred by ETR and 1% interest per month on the amount due should I fail to pay fees due within 30 days. Should my case require an appeal, a Court imposed filing fee (\$30) will apply.

Nassau County Only: - I agree to pay a discounted fee equal to 40% of the first years tax reduction and savings. The discounted fee will only apply if I pay (or obtain written payment agreement with ETR to pay) within 60 days of the postmark date of the communication from ETR enclosing my invoice and a copy of official documentation of the reduction; I understand that if I do not pay within that time then the FULL UNDISCOUNTED FEE of 50% of the first years tax reduction/savings will apply.

3) **ELIGIBILITY:** I understand that only A) a person named in the County records as a homeowner (if there is more than one owner, only one owner need sign); or B) that person's authorized agent; or C) a person who has contracted to buy a home; or D) the estate of a deceased homeowner; is eligible under law to receive a property tax refund. If you are not in any of these categories, you will not be able to receive a property tax refund and should not sign this agreement. I hereby represent that by signing below I am one of the persons listed within these categories.

4) **NOTIFICATIONS:** I am not required by law to use a tax reduction service to apply for a reduction in assessment and that I can cancel within 10 days of signing this agreement without penalty, by written notice. ETR will make reasonable effort to communicate the terms of any offer of settlement made in the course of these proceedings. ETR is an independent company & not affiliated with any municipality.

For Dutchess, Orange, Putnam, Rockland & Westchester Counties only: I understand that I may be requested to produce documents for the Board of Assessment Review and I agree to provide copies of requested documents (to the extent I have them) to ETR. ETR reserves the right to assign this contract for processing, with the same terms and conditions, to their affiliate ACO of NY, Inc, without further notice.

I have agreed to the terms and conditions and agree to have ETR, Inc file my Property Tax Grievance in 2013. I am qualified to authorize this agreement per the terms above, and agree that my signature is binding.

COUNTY (CIRCLE ONE) DUTCHESS NASSAU ORANGE PUTNAM ROCKLAND SUFFOLK WESTCHESTER

OWNER'S NAME (Please Print) _____ HOME PHONE _____ WORK OR MOBILE PHONE _____

STREET ADDRESS _____ CITY _____ STATE _____ ZIP CODE _____ Section - Block - Lot (if available) _____

OWNER'S SIGNATURE _____ DATE _____ EMAIL ADDRESS _____

Do you reside at this address? ☐ YES ☐ No

Did you file a property tax grievance in 2011? ☐ YES ☐ No

DLPDF-2

Complete this form and return to us:

MAIL TO:
EMPIRE TAX REDUCTIONS
PROCESSING CENTER
1A Schoolhouse Hill Rd. - #425
Glenwood, Landing, NY 11547

FAX TO:
855-TAX-FAQ9 (855-829-3299)
(Call 516-746-4646 to confirm receipt of your fax)



LANDTAX FLORIDA, LLC
A PROPERTY TAX COLLECTING FIRM

Commercial Real Estate Property Tax Representation Agreement

Property Owner(s)/Taxpayer(s): _____

Parcel ID/Folio# (if known): _____

Property Address: _____

City: _____ **State:** _____ **Zip:** _____ **County:** _____

LandTax Florida, LLC (hereinafter referred to as "Consultant" and "LandTax Florida") agrees to represent (hereinafter taxpayer(s)) for the purpose of filing a real property tax appeal for the above stipulated tax parcel. Consultant will file your 2012 property tax appeal, and work on your behalf to negotiate a lower tax assessment for your property. Consultant will thoroughly analyze current market data available to negotiate with the Value Adjustment Board ("VAB"), or a negotiated agreement with the local County Property Appraiser at or prior to the hearing in an attempt to reduce your property's assessed value to one that is more consistent with today's market.

Compensation/Fees/Terms

For appeal representation, Taxpayer(s) shall pay Consultant an administrative representation fee of \$395.00 per tax parcel due at engagement and in addition, shall pay Consultant 25% of the property tax savings for the tax year of representation. The 25% of property tax savings is due within 15 days of Consultant's communicating findings of property tax authority to owner, by invoice. "Tax Savings" is defined as the proposed 2012 assessment minus the final 2012 value, times the 2012 tax rate without consideration of any applicable tax exemptions. *If there is no reduction of the Taxpayer's assessment, no 25% fee is owed.* Invoices unpaid past 15 days will be subject to interest charges of 1.5% per month (or maximum allowed by law whichever is less) and shall accrue commencing on the third week after presentation. Consultant shall be entitled to reimbursement for all collection fees, attorneys' fees, court fees, and/or other delinquent charges or expenses that may apply in addition to any fees earned. Any party may terminate this agreement at any time by giving the other party 30 days written notice. However, if taxpayer terminates for any reason, Consultant retains the right to seek immediate repayment of fees incurred and any percentage fees owed for property tax savings, regarding the year filed per parcel. Any resulting percentage fees, as well as any unpaid administrative fees, will be due and billed to Taxpayer for immediate payment. This right is based on the work done on the taxpayer's behalf through the time of termination.

Taxpayer Authorization

The undersigned Taxpayer(s) hereby appoints LandTax Florida, LLC, as its administrative representative for purposes of representing the Taxpayer(s) in connection with the above-captioned matter. This authorization will also include anyone associated with LandTax Florida, LLC. The said representative is authorized to appear on behalf of, or, examine any records of, and discuss with appropriate governmental authority the valuation and assessment of the hereinabove described property. Additionally, said representative is authorized to file property tax returns and appeals if requested to do so by Taxpayer. The said Consultant is also authorized to request mailing address changes, or be listed to receive any tax bills, or tax notices on behalf of Taxpayer. Without limiting the foregoing, said representative is authorized full and complete access to the undersigned's files and property tax records in the offices of the appropriate county board of tax assessors, the Value Adjustment Board ("VAB"), and the tax appraiser.

Taxpayer's signature below authorizes LandTax Florida, LLC to represent Taxpayer(s) in all real property valuation appeal proceedings and activities for tax year 2012. It is agreed by owner and LandTax Florida, LLC that the purpose of this agreement is to reduce Taxpayer's real property tax and for LandTax Florida, LLC to earn a representation contingency fee/percentage of owner's property tax reduction savings for tax year 2012. LandTax Florida, LLC does not engage in the practice of law. However, if in a reasonable opinion of LandTax, the services of an attorney are required in connection with any appeal referred to herein, LandTax Florida, LLC will recommend an attorney to client. Any appeals filed to a State or Federal Court will have additional fees that are not included or contemplated herein. This authorization shall remain in effect for the current year and any future tax years until written notice of termination is issued by the Taxpayer and a copy of such termination is received by said representative. A copy of this authorization shall be as valid as the original. This document serves as both our agreement and as a letter of authorization to represent you. Our entire liability in representing you and your parcels in this regard is limited to the compensation you paid to LandTax Florida, LLC under this Agreement.

Property Owner/Company/Organization: _____

Signature of Representative: _____ **Date:** _____

Print Name: _____

Mailing Address: _____

Office Phone: _____ **Home Phone:** _____ **Cell :** _____

Best time & location to call: _____ **E-mail Address:** _____

If paying by check, please make payable to LandTax Florida, LLC. If paying by credit card, please complete the following information:

Name (As it appears on card) :		Please feel welcome to complete payment information online at our secure payment site, click here:	
Billing Address :		_____ MasterCard _____ Visa _____ AmEx	
City/ST/Zip :		Card # :	
Am't. Authorized :			
_____ \$395.00 per parcel (plus contingency fees)			
_____ plus 3% CC processing cost		Exp. Date :	
		GS/CVV Code :	
Print Name :		Signature :	

Appeal will not commence until contract administrative fee is fulfilled.

LandTax Florida, LLC | 2905 Corinthian Ave., #4, Jacksonville, FL 32210
Ph: 904-779-3195 | Fax 904-239-5941 | appeals@LandTaxFlorida.com | www.LandTaxFlorida.com



LANDTAX FLORIDA, LLC
A PROPERTY TAX CONSULTING FIRM

CONSULTANT AUTHORIZATION NOTIFICATION

Property Owner(s) _____

Property Address: _____ City: _____ St: _____ Zip: _____

County: _____ Folio #: _____

To Whom It May Concern: I, the legally authorized property owner of the parcel identified above, appoint LandTax Florida, LLC (herein after referred to as "Consultant") under the terms of a separate agreement to assist and represent my interests, and/or any legal counsel I may elect, in an effort to obtain a more equitable property assessment for Florida Ad Valorem property tax year 2012, in the capacity of an advocate, for the administrative appeal of the property referenced above.

Consultant will gather and analyze all pertinent value information, and will form an opinion of a fair and equitable tax value of the property which we believe will be defensible in Administrative Appeal Process. Consultant will act as expert witness and if applicable, will further prepare and present appeal evidence before the assigned State Court Judge, Value Assessment Board ("VAB"), County Appraiser, and/or the County Attorney or other attorneys representing the Assessor's Office in efforts to obtain a more equitable, fair and reduced assessed value. Consultant is not an attorney but may elect to engage an attorney of Consultant's choosing and at no additional charge other than the charges stated herein. Consultant is not acting as legal counsel, but will consult and advise in non-legal matters (and in legal matters after consultation with legal counsel) as the appeal progresses.

Please accept this as my notice of change of address for all future County property tax notices for the current tax year to the LandTax Florida address and contact information listed below.

PROPERTY OWNER'S SIGNATURE: _____

PRINT NAME: _____

CURRENT MAILING ADDRESS: _____

NEW MAILING ADDRESS: LandTax Florida, LLC, 2905 Corinthian Ave., Suite 4, Jacksonville, FL 32210

JOSEPH C. SANSONE CO.

REAL ESTATE AGREEMENT

Client:

Property Location:

(And any other properties submitted to JCS)

AUTHORIZATION: You exclusively retain us, Joseph C. Sansone Company (JCS) to evaluate the assessed value of the real estate described above (Real Estate) for the tax year 2000 (Tax Year) and for all prior years in which the jurisdiction allows an appeal or revision of assessed value. You give us exclusive authority to pursue protective appeals or actions for subsequent consecutive years. If in our opinion the assessed value of the Real Estate should be appealed, you give us exclusive authority to take those steps necessary to have the assessed value reduced. We have the right to employ, at our expense and discretion, an attorney or attorneys and any other professionals on your behalf as we feel are necessary. You give us exclusive authority to enter into any settlement agreements which we believe are appropriate, as to the assessed valuation of the Real Estate, solely at our discretion. You are also authorizing any and all of your agents or attorneys to pay our fees directly out of any refunds received.

FEES

(a) **Amount.** If the assessed value for the Tax Year is reduced, you agree to pay us a fee for our services equal to 50% of the tax savings for the Tax Year and 50% of the tax savings for the year following the Tax Year (Second Year).

(b) **Payment.** The fee for the Tax Year is payable as follows: One-half (1/2) upon the issuance of the valuation and/or assessment change notice and the other one-half (1/2) upon the date the tax bill is issued. The fee for the second year is payable as follows: One half (1/2) upon the date the jurisdiction's assessments are initially certified or published and the other one-half (1/2) upon certification of the new tax rate. If you receive a reduced assessment, any further appeal of the reduced assessment will not delay your obligation to pay our fee at the time referred to above. If interest is earned on protested tax funds or refunds, we are entitled to 50% of such interest for each of the years in question.

(c) **Tax Savings for Prior Tax Years.** If tax savings are applicable for years prior to the Tax Year, you shall also pay us 50% of the tax savings and any interest earned for such prior years; however, if any refunds of taxes are made, the fee is payable in full within 10 days after the tax refund is normally due for those years.

(d) **Fee for Years Other Than Tax Year.** If protective appeals or actions for subsequent consecutive years are pursued, our fee will be 50% of the tax savings and any interest earned for each year for which the tax savings result up to the latest year of our appeal or actions, and the year following. Payment shall be made as set forth in above paragraph "FEES" (b) however, if any refunds of taxes are made, the fee is payable as set forth in above paragraph "FEES" (c).

CALCULATION OF TAX SAVINGS. Tax savings for the Tax Year shall be the difference between the initial assessment and final assessment for the tax year multiplied by the tax rate for the Tax Year. Tax savings for the Second Year shall be the difference between the initial assessment for the Tax Year, (adjusted for the effect of the second year trending factor/statutory assessment level, if applicable), and the final assessment for the Second Year multiplied by the tax rate for the Second Year. If the final tax rate differs from the tax rate used for the calculation, an appropriate adjustment will be made. Any reduction achieved shall be deemed attributable solely to our efforts, whether the tax savings was the result of a formal appeal or otherwise. Tax savings for each year shall be any amount of savings in tax liability achieved including any reduction achieved obtaining a lower tax assessment, eliminating or reducing tax penalties or interest, reinstating any discounts for early payment, or achieving any other tax savings of any kind.

(Continued on Reverse Side)

UNPAID FEES. If you fail to pay any of the fees owed by you hereunder within thirty (30) days after they are due, or in the event of a bankruptcy filing by or against you, (f) all fees for all tax years shall be and become immediately due and payable, with the amount of future installments of fees being estimated based on the assessed valuation and tax rate in effect as of the date of default and any and all other tax savings as set forth in above paragraph "CALCULATION OF TAX SAVINGS" (subject to additional fees or a refund being due in the event the assessed valuation and/or tax rate changes), (g) you will be charged interest on all past due fees at a rate of 1 1/2% per month up to a maximum of 18% per year, or the maximum rate allowable by law whichever is less, and (h) you must pay the costs of collection of the fees, including attorney's fees and other related expenses. Upon sale of the Real Estate, all fees for all tax years shall be and become immediately due and payable, with the amount of future installments being determined based on the assessed valuation and tax rate in effect as of the date of sale, with no adjustment for any subsequent changes in the assessed valuation and/or the tax rate.

COOPERATION & TERMINATION. You agree to fully cooperate with us in your appeal, and agree to provide us with any required authorizations and necessary and accurate information, such as any proposed change or notice of change in assessment during the years related to this Agreement. You also agree to provide the information necessary to determine the assessed value at least 30 days prior to the first appeal deadline. If any taxes must be paid in order to preserve your appeal rights, you must pay such taxes when due. Your lack of cooperation under the terms of this Agreement does not release you from the obligation to pay our fees. Any tax savings achieved shall be deemed attributable solely to the efforts of us. In the event you do not fulfill your obligations under this Agreement, we have the right to cease rendering services to you with no liability to you whatsoever. In the event you attempt to terminate this contract and discontinue your appeal(s), you agree to reimburse us for our out-of-pocket expenses and the reasonable value of our services. In the event you attempt to terminate this contract and continue your appeal(s), in consideration of the valuable strategies and information divulged to you by JCS regarding your appeal(s), you agree in addition to any other remedies we have under law, to pay JCS the Fee.

MISCELLANEOUS PROVISIONS. This Agreement contains our entire Agreement. No alterations or variances from the terms this form shall be binding upon JCS unless approved in writing by the President of JCS. No oral or written modification or amendment to this Agreement shall be binding on JCS unless it is approved in writing by the President of JCS. If we fail to require strict performance of this Agreement, that failure will not waive any other default and will not keep us from requiring strict compliance with this Agreement. This Agreement shall be interpreted in accordance with the laws of the State of Missouri. The persons signing this Agreement have the authority to bind the parties. This Agreement is binding upon and is for the benefit of the parties, their heirs, successors, and assigns, shall bind subsequent owners of the Real Estate, and shall run with the Real Estate. However, if you sell, transfer or convey the Real Estate, you must notify JCS in writing at its national headquarters within 10 days of the sale, transfer or conveyance and all fees for all tax years shall become immediately due and payable, as stated in above paragraph "UNPAID FEES". All remedies available to us shall be cumulative and not exclusive. If any provision of this Agreement is declared invalid or unenforceable, the remaining portions shall remain in full force and effect. Paragraph headings are for convenience only and do not affect the interpretation of this Agreement. Any notices referenced herein to be given to either party shall be in writing and sent first class mail, postage prepaid, if to Client, to the address specified at the beginning of this Agreement, or if to JCS, to 18040 Edison Avenue, Chesterfield, Missouri 63008, Attn: Contract Administrator. Notice is deemed received the third day following mailing thereof. Any dispute or controversy arising from this Agreement shall be decided by arbitration in St. Louis, Missouri, or only if both parties agree otherwise, in the county of the state where the applicable Joseph C. Sansone Company office is located, by the American Arbitration Association in accordance with the rules of that Association. Judgement based on the award of said Arbitrator shall be entered by any court having jurisdiction. THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

Property Location:

_____	_____
_____	_____
_____	_____

JOSEPH C. SANSONE COMPANY

CLIENT: _____

By: _____ Date: _____

By: _____ Date: _____

(Authorized Signature)

(Printed Name & Title)

(Printed Name & Title)

18040 Edison Avenue, Chesterfield, Missouri 63008 (314) 537-2700, FAX (314) 537-2307
Atlanta • Boston • Brussels • Dallas • Kansas City • Los Angeles • Minneapolis