

Ethics Opinion

910222

QUESTION(S) PRESENTED:

1. Is a company carrying on an unauthorized practice of law:
 - a. by advising the customer that he or she needs a living trust as the device for planning their estate;
 - b. by preparing the living trust documents and explanations; or
 - c. by preparing the other documents such as powers of attorney, living wills, deeds and other instruments of transfer?

2. Is the agreeing to be recommended by the company attorney violating Rule 5.5(b) of the Montana Rules of Professional Conduct by assisting a person who is not a member of the bar (the company) in the performance of activity that constitutes the unauthorized practice of law:
 - a. by submitting the proposed opinion letter without ever seeing the customer to review the documents;
 - b. by submitting the proposed opinion letter in cases where the customer opts to see another lawyer;
 - c. by submitting the proposed opinion letter in cases where the customers come to the attorney and receive a full review and explanation of the documents?

3. Does the arrangement with the company result in improper communications regarding the lawyer's services in violation of Rules 7.1, 7.2 and 7.3?

ANSWER:

1. Yes.
2. Yes.
3. Possibly.

ANALYSIS: A member of the State Bar has been approached by a company offering financial products for sale to Montana residents. The attorney has been asked to author an opinion letter which would accompany a package of legal documents (the product) consisting generally of a living trust, a pour-over will, a durable power of attorney, a durable power of attorney for health care and various documents and schedules for use in transfer of real and personal property to the living trust. It appears that the thrust of the sales effort promotes the living revocable trust as the ultimate estate planning device. Company salespersons use a "workbook" to explain the benefits of the revocable living trust to and gather information from customers. Using this information, the salesperson prepares the package of documents outlined above including a draft of the attorney's opinion letter respecting the documents. A suggested draft of such a letter accompanied the request for this opinion. During the initial interview, the customer signs a documents entitled "Disclosure and Compliance" which states:

I/we understand that the representative is not an attorney or certified tax authority and that I/we should consult an attorney and/or tax accountant for legal or tax advise [sic].

The workbook questions also suggest to the customer that selection of a "family attorney" is "often helpful" to surviving family members and elicits an attorney's name for insertion in certain of the documents. If the customer does not offer a name, the company representative suggests the name of an attorney who ". . . is knowledgeable in estate planning and the intent and purpose of the living trust" Provision of this name is said not to obligate the customer but is provided as a convenience. It is at this point that the requesting attorney is recommended to the customer. The customer is encouraged to contact the attorney. The attorney is free to do other work for the customer but must agree not to provide comparable revocable trust services for any other company in a similar business.

Payment for any attorney's fees is made by the customer by check separate from payment to the company for the product. Both checks are delivered to the salesperson and the opinion letter says nothing about how or when the attorney's fees are established.

The requesting attorney has reviewed the pro forma documents used by the company and made suggestions for change to adapt them to Montana law and practice and does review each completed package before signing the opinion letter. A face-to-face meeting between customer and attorney may, but would not necessarily occur, though some telephone contact is reasonably certain in each case.

The opinion letter is directed to the customer and describes in very general terms the workings of the documents in the package, urges the customer to complete documents which transfer assets to the trust according to the instructions with the documents, and offers to be available for consultation if the customer cannot complete the task without assistance. It opines that the documents ". . . are in compliance with [Montana] law and will allow for the orderly transfer of your assets upon your death within the Trust rather than through Probate" It is not clear whether or not this opinion is provided in cases where the customer seeks legal advice from counsel other than the attorney recommended by the company.

1. While promoting living trusts in the abstract is not necessarily looked on as the practice of law, when it follows a detailed interview with the customer so the recommendation purports to be specifically responsive to that individual's needs there is probably little disagreement that this constitutes the practice of law. This is particularly true when documents are also prepared purporting to respond to the customer's particular needs. *People ex rel. Dunbar v. Schmitt*, ___ Colo. ___, 251 P.2d 915 (1953); *People ex rel. MacFarlane v. Boyls*, ___ Colo. ___, 591 P.2d 1315 (1979); Annot., Services in Connection With Tax Matters as Practice of Law, 9 A.L.R. 2d 797 (1950); Annot., Validity of Will Drawn by Layman in Violation of Statutory Requirement if is to be Done by Attorney, 18 A.L.R. 2d 918 (1951); Annot., Drafting of Will or Other Estate Planning Activities as Illegal Practice of Law, 22 A.L.R. 3d 1112 (1968); Annot., Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of an Attorney as Unauthorized Practice of Law, 71 A.L.R. 3d 1000 (1976). Cf. *Pulse v. North American Land Title Co. of Montana*, 218 Mont. 275, 707 P.2d 1105 (1985) (Bank can prepare

form deeds and mortgages for customers if it is a party to the instruments and need only fill in the blanks on a pre-printed forms, without separate charge, and incident to its regular business).

It should be noted that this committee expresses its opinion that the company's activity constitutes the unauthorized practice of law only as necessary to our analysis of the obligation of requesting counsel to avoid violation of Rule 5.5 of the Montana Rules of Professional Conduct (proscribing assistance in the authorized practice of law). Investigation of complaints of unauthorized practice is the province of the Commission on Unauthorized Practice of Law. See 47 St. Rep. 2232 (December 11, 1990) for the rules of the Commission which are effective January 1, 1991.

2. Submission of the opinion adds to the already unauthorized practice of the company a stamp of professional approval which is of immeasurable assistance in the sale of the company's product and is a clear violation of the rule. See *People ex rel. MacFarlane v. Boyls, supra*. It is doubtful that consultation by the customer will cure this violation, particularly with a different lawyer. Rule 1.2(a) requires that the lawyer consult with the client about the means by which the client's objectives in the representation are to be pursued. Rule 1.2(c) allows a lawyer to limit the objectives of his representation only if the client consents after consultation. Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter. Further, Rule 1.5(b) requires that an attorney who has not regularly represented a client must communicate to the client the basis or rate of the fee to be charged (preferably in writing) before or within a reasonable time after commencing the representation. There would appear to be no possibility of satisfying these obligations in either 2.a. or 2.b., above.

Assuming, without resolving, that the recommended attorney by full consultation can overcome the unfortunate origin of his relationship with this client in 2.c. above, a host of problems remain.

The circumstances make it very difficult to believe that the attorney even now can overcome the problems of conflict of interest addressed by Rules 1.7(b), 5.4(c) and 2.1. Can the lawyer reasonably believe the representation will not be adversely affected by the lawyer's responsibility to a third person, the company (1.7(b))? The lawyer cannot permit the company (the person recommending him/her) to direct or regulate the lawyer's professional judgment in rendering legal services (5.4(c)). Can the lawyer exercise independent professional judgment and render candid advice if he believes after review of the facts relating to this client's peculiar circumstances that none of the documents prepared by the company are appropriate (2.1)? If so, Rule 1.7(b) requires that the client must consent to continued representation after consultation.

And what about the fee arrangement? While the lawyer is paid by a separate check, nothing is revealed about how or by whom the fee is set and whether or not it is consistent with the fee the lawyer would charge others not referred by the company for the same service. How much does the company charge for its involvement? Will the combination of fees in reality violate Rule 1.7(c) as an excess payment for advertising or improper payment for referral?

3. The facts suggest that the lawyer has no control over the content of company advertising which may refer to the availability of his/her services through the company. Having permitted the company to use the lawyer's name, has the lawyer abdicated the responsibility for the

contents of ads implicit in Rule 7.1(a) prohibiting false or misleading statements or statements creating an unjustified expectation respecting the results which can be achieved with the company's program under Rule 7.1(b)? Without more information about the nature of the advertising involving the lawyer's name, the answer is unclear. But the potential for impropriety seems an unwarranted risk though prior approval of media advertising might adequately address the problem. The reference to the lawyer's abilities respecting estate planning and living trusts may well improperly imply specialization contrary to the limitations of Rule 7.4 though in the final analysis it appears to be a question of whether or not such a characterization is false or misleading under Rule 7.1.

Of perhaps greater concern is the use to which the lawyer's name might be put by the company's salespersons - a situation over which the lawyer could exercise far less control than in the case of prior approval of media advertising. These sales contacts could readily involve harassment, approaches to people who do not wish to be contacted on behalf of the lawyer, or contacts with persons who cannot exercise reasonable judgment in employing a lawyer. Each of these contacts would violate Rule 7.3 relating to direct contacts with prospective clients.

The committee cannot say that such a relationship between the lawyer and the company could not be structured carefully enough to avoid each of the problems described in this opinion. But it seems likely that one or more of them would be present in nearly every situation. The need for extreme care is amply demonstrated by the recent disbarment of a member of this State Bar of Montana involving just such a financial planning program. See *Stewart A. Pearce III*, 47 State Reporter 2054, ___ Mont. ___, ___ P.2d ___ (November 1, 1990).

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