



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7, 5.4, and 5.5(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 90-20
January 29, 1991**

Topic: Unauthorized Practice of Law; Fee Sharing with Non-Attorney

Digest: It is professionally improper for an attorney, employed by an institution which markets Revocable Living Trusts to consumers as estate planning tools, to prepare or review such documents; or for the attorney to share fees with the institution.

Ref.: Rules of Professional Conduct, 1.7, 5.4(a), (b) and (c), 5.5(b)
ISBA Advisory Opinion No. 89-1

FACTS

Recently, some institutions have expressed interest in marketing "revocable living trust" documents in the State of Illinois. These institutions promote the use of revocable living trust as an "estate planning tool". Contact is made with proposed clients by mailing, phone solicitation, or similar techniques. The institutions would like to employ an Illinois attorney to review or prepare the documents to make sure they comply with Illinois law and meet the individual's needs. The Institution would charge for furnishing the revocable living trust and it would be contemplated that the attorney would profit from the relationship also.

QUESTIONS

1. May the attorney, representing the institution, prepare or review trusts furnished to consumers? Does this aid the unauthorized practice of law?
2. May the attorney prepare the documents for the consumer and submit the bill to the institution? Does this constitute an attorney entering into a partnership with a non-attorney?

OPINION

1. The facts submitted by the inquiring attorney indicate that he or she will be "employed" by the institution and the institution contemplates soliciting Illinois consumers to purchase a "revocable living trust." Clearly, then, the attorney has a duty to represent the interests of the institution just as for any other client.

In the role of representing the institution, the attorney may advise the institution regarding Illinois law on revocable living trust and the requirements necessary for proper drafting of same. However, preparing or reviewing trusts for consumption by consumers may pose conflict-of-interest problems for the attorney.

The general conflict of interest Rule, Rule 1.7, states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after disclosure.

The institution that the attorney represents intends to make money by providing the trusts to consumer-clients. The attorney's involvement in trust document preparation for consumer-clients may cause the attorney to owe some duty to the consumer-clients, and that duty, as well as the interest of the institution-client in the document preparation process, may result in a conflict situation that precludes the attorney from fairly representing the consumer-client and acting in the consumer-client's best interests. The attorney could not reasonably believe that his representation of the consumer-client would not be adversely affected by the pressures exerted by his institutional-client, and vice-versa.

A similar situation arose in ISBA Advisory Opinion 89-1 where an attorney proposed to be hired by a business broker to prepare documents for the closing of transactions between sellers and buyers brought together by the broker. The potential for conflict-of-interest problems was significant enough that the Committee determined such representation would be unprofessional conduct.

Additionally, preparation of the trust by the institution for consumers is clearly the unauthorized practice of law and the attorney would be violating Rule 5.5(b) by assisting the institution in reviewing or preparing those documents intended for individual consumers.

2. Assuming, for the moment, that conflict-of-interest problems are not present, can the attorney represent the consumer-client and receive payment for his services from his institutional-client?

Rule 5.4, regarding the professional independence of an attorney, states:

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

[None of the exceptions are relevant to this case]

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering legal services.

In this case, the consumer-client would pay the institution for the preparation of the trust. The institution would then keep a portion of that fee and provide payment to the attorney. This sharing of legal fees violates Rule 5.4(a).

Although there is insufficient information provided regarding the business relationship of the attorney and institution-client, it may have enough characteristics of a "partnership" to constitute a violation of Rule 5.4(b) since the preparation of a trust document is the practice of law.

Finally, the attorney may run afoul of Rule 5.4(c) if the institution retains any authority to direct the creation of the trust or its terms.

For the reasons stated it is the opinion of the Committee that it is professionally improper to prepare or review trust documents for general marketing to consumers by an institution or to share fees for consumer trust preparation with said institution.

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