



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 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. 91-10
October 25, 1991**

Topic: Aiding the Unauthorized Practice of Law

Digest: An attorney aids in the unauthorized practice of law, and violates Rules of Professional Conduct regarding conflict of interest, fee splitting, and the provision of independent legal advice, when the attorney participates in a financial planning company's arrangement whereby the company gathers information necessary to prepare estate planning documents, prepares the documents, and send the documents to the client's selected attorney for review, legal advice, and execution.

Ref.: ISBA Rules of Professional Conduct 1.7, 5.4 and 5.5
ISBA Opinion Nos. 261, 474, 90-19, 90-20

FACTS

A financial planning company, Company A, provides to its clients an information gathering service for the preparation of various estate planning documents, such as revocable living trusts, durable health powers, durable powers of attorney, living wills, and pour-over wills. Company A provides this service for a stated fee. In addition to providing the necessary information, the client executes a "disclosure and compliance" statement that provides in pertinent part:

I/We understand that the Representative (of Company A) is not an attorney *** and

has not offered *** legal advice and that I/we should consult an attorney *** for *** legal advice.

I/We understand that for deletions, alterations or additions to any document after it has been reviewed by the attorney named below, the company will charge \$25.00 per page. Before ordering any changes, consult your attorney. ***

I/We understand that (Company A) will only work with me/us through my/our attorney of choice named below to develop our estate plan.

I/We state that after having the option of selecting from a list of attorneys, I/we have designated the attorney named below as my/our designated attorney of choice for my/our estate plan ***.

The estate planning documents are initially prepared by Company A according to information provided by the client on Company A's application form. The attorney then reviews the prepared documents for legal sufficiency under Illinois law and meets with the client, after which the documents are executed, if satisfactory.

QUESTIONS

1. Does the attorney who participates in the facts described above aid the unauthorized practice of law?
2. Does the attorney in this fact pattern violate any other provisions on professional responsibility?

OPINION

1. The Committee concludes that the attorney who participates in Company A's arrangement may facilitate Company A's unauthorized practice of law in violation of Rule 5.5(b) (a "lawyer shall not *** assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law"). According to the facts as submitted, Company A gathers all necessary information and drafts the appropriate estate planning documents. Although the client's attorney reviews the documents and provides legal advice to the client, this legal consultation does not occur until after Company A has already advised the client of which estate planning documents would or might be appropriate, and after Company A has prepared the estate planning documents selected by the client.

Similar arrangements have found disfavor from this Committee. In ISBA Opinion No. 90-19, the Committee determined that an attorney aided a financial planner's unauthorized practice of law, where the planner explained the advantages of a revocable trust, obtained the necessary information from the client, and filled out the trust, which was reviewed by an attorney prior to execution. In Opinion No. 90-20, the Committee stated that "preparation of the trust by [a banking] institution for consumers is clearly the unauthorized practice of law and the attorney [who reviews these documents at the behest of the bank] would be violating Rule 5.5(b) by assisting the institution in reviewing or preparing those documents intended for individual consumers." See also ISBA Opinion No. 474 (attorney employed by an insurance agency aided the agency's unauthorized practice of law, when the attorney prepared estate planning and life insurance proposals for clients

of the insurance agency); ISBA Opinion No. 261 (attorney's preparation of will for bank customer, at bank's request and pursuant to bank's gathering of necessary information transmitted to attorney, aided bank's unauthorized practice of law).

As in these Opinions, the attorney's participation in the instant facts could facilitate Company A's provision of legal advice to its clients, and would thereby aid in Company A's unauthorized practice of law. The fact pattern indicates that the client executes a "disclosure and compliance" statement acknowledging that Company A's representative has not provided "legal advice" to the client. Nevertheless, the representative could, in fact, provide legal services when the representative explains to the client the advantages and disadvantages of the various estate planning documents available to the client, and prepares the selected documents on the client's behalf. By so doing, the representative could be engaged in the unauthorized practice of law.

2. The arrangement between Company A and the client's attorney infringes upon the lawyer's duty to provide independent legal representation to the client that is free from conflict of interest and may constitute an impermissible fee splitting with a non-attorney.

The fact pattern does not disclose who pays the attorney's fee for reviewing the documents drafted by Company A. Company A's payment to the attorney could create a question of whether the attorney's client is Company A or the individual client. The Committee's comments in Opinion No. 90-20, regarding conflict of interest problems pursuant to Rule 1.7, are equally applicable to the instant fact pattern. As in No. 90-20, Company A "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 [Company A] 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 [Company A], and vice-versa."

In addition, the present arrangement could violate Rule 5.4 regarding an attorney's professional independence. If the client's fee to Company A is partially paid over to the attorney, the attorney has shared legal fees with a non-attorney in contravention to Rule 5.4(a). The fact pattern as presented could compromise the lawyer's obligation under Rule 5.4(c), which states that 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 such legal services." In ISBA Opinion No. 90-20, we observed that a "lawyer may run afoul of Rule 5.4(c) if the institution retains any authority to direct the creation of the trust or its terms." These words of caution are equally applicable to the present fact pattern.

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