

87

COLLABORATION WITH NON-LAWYERS IN PREPARATION AND MARKETING OF ESTATE PLANNING DOCUMENTS

Adopted July 14, 1990.

Revised December 14, 1991.

Addendum issued 1995.

Introduction and Scope

The Committee has received inquiries addressing several facets of lawyer involvement in the preparation and marketing by non-lawyers of estate planning documents, such as living trust “packages.” In particular, the Committee has considered the following scenarios:

1. A non-lawyer (such as a financial planner or life insurance agent) markets a living trust package, gathers family and asset information from the consumer, and forwards the information to a central “factory,” which generates the living trust documents. The non-lawyer then delivers the documents to the consumer for signature. While an attorney, either in-state or out-of-state, may assist in preparation and review of documents at the “factory,” the consumer has no personal contact with that attorney. In instructions accompanying the living trust package, the consumer is advised to contact independent legal counsel for assistance in clarifying the trust terms and funding the trust. The consumer remits a fee for the living trust documents directly to the non-lawyer, payable to the “factory,” out of which the non-lawyer receives a sales commission.

2. A publishing house markets living trust “kits” to the public through direct mail advertising. The consumer makes a payment to the company and receives a living trust kit in return. The kit includes the name of a local attorney, with a recommendation that the consumer contact this attorney for assistance in review of the documents and funding requirements. If the consumer does so, he or she then enters into a fee agreement with the attorney which is independent of the consumer’s arrangement with the publishing house.

3. A non-lawyer solicits a customer, collects relevant information, delivers that information to a local attorney, and schedules an appointment for the customer to meet with the attorney. The attorney then prepares a living trust package and arranges for execution of the documents at a subsequent meeting, at which the lawyer supervises those funding tasks characterized as “legal” in nature, including assignment of business interests and preparation of deeds for real estate passing to the trust. The non-lawyer assists the client with funding tasks characterized as “non-legal,” such as changing beneficiary designations, bank account titles, and stock account titles. In this scenario, there are several conceivable options for collecting and distributing the client’s payment for these services. For example, the client might pay a fee for all services to the non-lawyer, from which the attorney is paid for his services according to a pre-arranged “split” of the fee, and the non-lawyer retains the remainder of the fee as compensation for gathering the information and assisting with the “non-legal” funding. As another possibility, the client could pay the entire fee to the lawyer, who would then pay the non-lawyer according to a pre-arranged split which is based on the relative “value” of the lawyer’s and non-lawyer’s efforts and responsibilities, e.g., one third to the non-lawyer and two-thirds to the lawyer.

4. In other possible variations on the third scenario, compensation could be provided in some manner other than a “split” of fees between the lawyer and non-lawyer. The consumer could make one payment to the non-lawyer for the information gathering and “non-legal” assistance, and a second payment to the attorney for preparation of the documents and other legal services. The division of fees would reflect a percentage breakdown of the total charge for the living trust package and would be fully disclosed by the non-lawyer to the consumer. In another variation, the attorney, after receiving the entire fee from the consumer, might pay a fee to the non-lawyer off the non-lawyer’s invoice, which would reflect an hourly fee for information gathering and “non-legal” funding.

5. Educational seminars on estate planning are sponsored and financed by non-lawyers (such as insurance agents, accountants, or financial planners) and are marketed by newspaper advertisement or direct mail. An attorney addresses certain topics as a guest speaker, but does not share seminar costs or split fees with the seminar sponsors. At the conclusion of the seminar, attendees are asked to complete evaluation forms on which they may request a free interview with the attorney, to be coordinated through the seminar sponsor. A non-lawyer representative of the seminar sponsor would then accompany the attendee to the lawyer's office, where the attorney and the attendee determine whether representation is appropriate. If so, the attorney and client agree to the appropriate legal work and fee.

This Opinion addresses violations of the Code of Professional Responsibility and related ethical considerations in each of the above scenarios. The Opinion does not address related issues with respect to what may constitute the unauthorized practice of law by a non-lawyer, except insofar as those issues have already been decided by the Colorado Supreme Court.

Syllabus

The scenarios described above raise several issues bearing on the appropriate relationships between lawyers and non-lawyers.

By knowingly affiliating or collaborating with a non-lawyer person or entity who prepares and markets legal documents used in estate planning, a lawyer violates DR 3-101(A) of the Code of Professional Responsibility. This principle, which is clear from decisions of the Colorado Supreme Court, applies to the "factory" lawyer in the first scenario and the lawyer whose name is used in connection with the publishing-house kits in the second scenario described above.

A lawyer violates DR 3-102 by sharing a client's payment for preparation of estate planning and funding documents with a non-lawyer. Where the non-lawyer's activities include soliciting customers or marketing these services, the lawyer also violates DR 2-103(B) and (D).

Whenever a lawyer and a non-lawyer collaborate to prepare estate planning and funding documents, there is a danger that the non-lawyer may impermissibly interfere with the lawyer's exercise of independent professional judgment on behalf of the client. Where the lawyer is not in a position to exercise control over the non-lawyer, the non-lawyer solicits the client, and tasks are allocated between the lawyer and non-lawyer based on their mutual agreement as to which tasks are "legal" or "nonlegal" in nature, the lawyer violates DR 5-107 and also may violate DR 3-101(A), DR 3-103, and DR 2-103(D). This applies to the third and fourth scenarios described above.

A lawyer may participate in an educational seminar at which attendees are asked to complete evaluation forms whereby they may request individual consultation with the attorney, but must fully comply with all applicable disciplinary rules.

In all of the scenarios described in this Opinion, the lawyer's collaboration with a non-lawyer raises serious questions of aiding in the unauthorized practice of law, partnership or division of fees with non-lawyers, solicitation, interference with the attorney's independent professional judgment, preservation of client confidences, and competent representation of the client. In undertaking any collaboration with a non-lawyer, the lawyer must assure his or her compliance with all applicable disciplinary rules.

Opinion

A. Aiding the Unauthorized Practice of Law

DR 3-101(A) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. This Rule protects the public in its need for and reliance on the integrity and competence of those who undertake to render legal services, recognizing that competent professional judgment is the product of a trained familiarity with law and legal process and a disciplined, analytical approach to legal problems coupled with a firm ethical commitment. *See*, EC 3-1 and 3-2. As recognized in EC 3-5, while there is no single, specific definition of what constitutes the practice of law, it involves the rendition of services for others that call for the professional knowledge and judgment of a lawyer. *See*, Formal Opinion No. 79, adopted by the Ethics Committee on February 18, 1989.

Determining what acts do or do not constitute the practice of law is a function of the Colorado Supreme Court and falls outside the responsibilities of the Ethics Committee.¹ What constitutes the unlawful practice of law is not precisely defined, but is judged by the court in each circumstance. *See, Denver Bar Assn. v. Public Utilities Comm.*, 154 Colo. 273, 391 P.2d 467 (1964). Generally, the practice of law includes counseling, advising, and assisting others in connection with their legal rights and duties. *Id.*; *see also* Formal Opinion No. 79, *supra*.

The Colorado Supreme Court has held that the preparation and marketing of living trust documents by a non-lawyer or a corporation constitutes the unauthorized practice of law. *People v. Schmitt*, 126 Colo. 546, 251 P.2d 915 (1952). The Court also has suspended attorneys for their participation in such ventures. In *People v. Macy*, 789 P.2d 188 (Colo. 1990), an attorney was suspended for reviewing living trust packages prepared by non-lawyers for individuals, answering questions addressed to him by non-lawyer salespersons regarding individual customers' concerns and accepting an hourly fee from a non-lawyer salesperson for those services. In *People v. Boyls*, 197 Colo. 242, 591 P.2d 1315 (1979), a lawyer was suspended for working with non-lawyer salesmen to answer clients' questions regarding individual trusts, prepare promotional materials for trusts and assist purchasers in formulating effective trusts.

The lawyer's involvement in the first scenario appears legally indistinguishable from the *Boyls* and *Macy* cases. Both the "factory" and its non-lawyer salesperson are engaged in the practice of law by preparing and marketing living trust packages, and the attorney's assistance to the factory is an integral part of this process. A lawyer may not assist a non-lawyer corporation which provides legal services to third parties. *See*, Formal Opinion No. 63, adopted by the Ethics Committee on February 19, 1983.

In the second scenario, the publishing house's marketing and preparation of living trust "kits" constitutes the unauthorized practice of law as decided in *Schmitt, supra*. While we hesitate to say that any attorney would violate DR 3-101(A) by representing a client who had obtained such a living trust kit, an attorney who willingly associated himself or herself with such an enterprise, allowing his or her name to be given out in the living trust kits, would certainly violate the rule.

The third and fourth scenarios also may involve, to some extent, the unauthorized practice of law since in each case, a living trust package is marketed and perhaps prepared in part by a non-lawyer. It is quite possible that the non-lawyer will analyze and resolve legal issues, problems or planning possibilities (or worse, fail to recognize such issues, problems or possibilities) without the benefit of a lawyer's legal training and professional judgment. Further, the lawyer's involvement may lead the consumer to assume, perhaps incorrectly, that such training and judgment will be applied for the consumer's benefit. A related danger is the likely impairment of the lawyer's independent professional judgment in such circumstances, which is discussed in greater detail below.

In the fifth scenario, the lawyer should assure that the non-lawyer's participation does not constitute the practice of law as discussed herein. If the lawyer is aware that the non-lawyer will use the seminar presentation and follow-up to engage in the unauthorized practice of law, the lawyer may violate DR 3-101(A) even by lending his or her name to the venture as a guest speaker.

B. Fee Splitting or Partnership with a Non-Lawyer

DR 3-102 prohibits a lawyer or law firm from sharing legal fees with a non-lawyer, except in certain limited circumstances which are outside the scope of this Opinion. Similarly, DR 3-103 prohibits a lawyer from forming a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law." Also related is DR 5-107(A)(1), which provides that a lawyer shall not accept compensation for his or her legal services from one other than the lawyer's client, except with the consent of the client after full disclosure.

As the American Bar Association has recognized, the purpose of the fee-sharing prohibition is to avoid the possibility of non-lawyer interference with the exercise of the lawyer's independent professional judgment in representing a client, and to ensure that the total fee paid by the client is not unreasonably high. ABA Formal Ethics Opinions 88-356 (Dec. 16, 1988) and 87-355 (Dec. 5, 1987). While a lawyer may employ a non-lawyer to provide services, payment for those services may not be based on a per-

centage of the lawyer's fee. ABA Informal Ethics Opinion 86-1519 (April 18, 1986). The lawyer-client relationship should be direct and personal, without intermediaries, and any compensation paid by the client to the lawyer should be agreed on with, and paid directly to, the lawyer. ABA Informal Ethics Opinion 1212 (Feb. 9, 1972).

Past opinions of this Committee have also addressed the fee-splitting prohibition. A lawyer violates DR 3-102 if, with the lawyer's knowledge and consent, a non-lawyer retains any part of the fee charged to a customer for legal services. Formal Opinion No. 12, adopted by the Ethics Committee on March 26, 1960. It is impermissible for a non-lawyer entity to collect the client's payment for legal services, pay part of it to the lawyer, and keep the other part for itself. Formal Opinion No. 63, *supra*.

In the first scenario, if the living trust "factory" is a lawyer or law firm, it violates DR 3-102 by paying a commission to the non-lawyer salesperson. The second scenario does not raise any issue of fee sharing or partnership, since the customer's fee agreement with the attorney is independent of any payment to the publishing house.

In the third scenario, the pre-arranged "split" of the fee for services between the lawyer and the non-lawyer violates DR 3-102, much like the traffic clinic discussed in Formal Opinion No. 63, *supra*. The methods of compensation in the fourth scenario do not violate DR 3-102 or DR 5-107(A)(1), but the lawyer's fee must not be excessive under DR 2-106. Even if the fee arrangement is permissible, the lawyer's conduct may be prohibited by DR 3-103 as a partnership with a non-lawyer whose activities include the practice of law, particularly if the lawyer and non-lawyer share clients, rather than each being selected independently, if they jointly advertise or solicit clients, or if they share fees and expenses like a partnership. This determination would necessarily be based on principles of partnership law, which are outside the scope of this opinion, and on the particular facts and circumstances of each case.

C. Solicitation

DR 2-103(B) prohibits "feeder operations":

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client. . . .

In general, a lawyer may not request another person or organization to solicit prospective clients, DR 2-103(C), or knowingly assist a person or organization that recommends legal services to others to promote the use of his or her services, DR 2-103(D). *See also*, Formal Opinion No. 83 (Part V.B.2), adopted by the Ethics Committee on November 18, 1989. The exceptions to DR 2-103(C) and (D) are outside the scope of this Opinion.

Any otherwise permitted solicitation by non-lawyers is also limited by the restrictions on lawyer solicitation in DR 2-101. *See*, Formal Opinion No. 83, *supra*. Thus, a lawyer cannot avoid the prohibition against in-person solicitation, DR 2-101(E), by associating with a non-lawyer who engages in such conduct. In-person solicitation of prospective clients by a non-lawyer acting on behalf of a lawyer, where pecuniary gain is a significant motive, is prohibited. *See*, Formal Opinion No. 83, *supra*. DR 2-101(A) also prohibits the transmission of a solicitation "in any manner involving undue influence."

If the living trust "factory" in the first scenario is a lawyer or law firm, it violates DR 2-103(B) by paying a sales commission to the non-lawyer salesperson. In the second scenario, the living trust "kit" includes the name of a single local attorney whom the customer is encouraged to contact. Such a solicitation, while not made in person, may involve "undue influence" in violation of DR 2-101(A), since a consumer who has already purchased the living trust kit will likely be unduly influenced to follow the specific recommendation contained in the instructions for the kit.

The arrangements described in the third and fourth scenarios may be "feeder operations" prohibited by DR 2-103(B), (C), and (D). While the non-lawyer's compensation is purportedly based on his or her role in information-gathering and non-legal funding, it is not merely coincidental that the same person who "sold" the trust package is retained to perform these tasks as well. Therefore, the lawyer's sharing compensation with a non-lawyer in the third scenario may violate DR 2-103(B) as well as DR 3-102. In

the fourth scenario, if the non-lawyer is paid an hourly fee for his or her “non-legal” services, the compensation would be prohibited by DR 2-103(B) if it is in fact a disguised form of compensation for referral rather than a reasonable and fair compensation for services actually provided to the client. Moreover, even where the non-lawyer’s compensation is independent of the lawyer’s, the lawyer may violate DR 2-103(D) by knowingly assisting a non-lawyer to promote the use of the lawyer’s services, and may vicariously violate DR 2-101(E) to the extent that the non-lawyer recommends the lawyer’s services to the client in person.

Solicitation through an educational seminar, as in the fifth scenario, also raises issues under DR 2-101(E), which prohibits in-person solicitation where pecuniary gain is a significant motive for the solicitation. The evaluation form described in this scenario allows the attendee to request an interview with the attorney. An attorney participating in an educational seminar must, to avoid the prohibitions against solicitation, comply with DR 2-104(B). This rule prohibits the lawyer from emphasizing his or her own professional experience or reputation or that of his or her firm or any other affiliated lawyer, and from undertaking to give any individual advice.

The distribution to all seminar attendees of an evaluation form which, among other things, offers a free interview with the participating attorney, does not in itself constitute prohibited solicitation. The offer must be extended to a general group rather than a specific person, and must not be referred to or communicated orally at the seminar. There must be no pressure on the seminar participants to accept the offer. The evaluation form offering an attorney interview is subject to the requirements of DR 2-101(E) and (F) for written solicitation, including the label “advertising material.” Moreover, attorneys participating in seminars, particularly where follow-up interviews are offered to attendees, must comply scrupulously with the standards set forth in all applicable disciplinary rules, including DR 2-101, DR 2-103, and DR 2-104(A) and (B). *See*, Formal Opinion No. 83, *supra*.

D. Independent Professional Judgment

DR 5-107 states that a lawyer “shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal service.” EC 5-1 recognizes that a lawyer’s professional judgment should be exercised “solely for the benefit of his client and free of compromising influences and loyalties,” and the “desires of third persons” should not be permitted to dilute the lawyer’s loyalty to the client. A lawyer “must decline to accept direction of his professional judgment from any layman.” EC 5-24.

The arrangement described in the third and fourth scenarios involves essentially a triangular relationship among the lawyer, non-lawyer and consumer, as opposed to the usual direct relationship between lawyer and client. By mutual agreement, part of the responsibilities are delegated to the lawyer and other responsibilities to the non-lawyer. The Committee recognizes that a multi-professional “team” approach is often appropriately used in the estate planning process. However, a lawyer involved in such a team must take great care to ensure that such an arrangement does not limit or preclude the lawyer’s exercise of independent professional judgment, either with regard to matters delegated to the non-lawyer, or particularly in advising the client as to whether a living trust is appropriate at all.

The fee arrangement in these scenarios also may tend to restrict the lawyer’s exercise of independent professional judgment for the client’s benefit. The lawyer apparently is compensated as part of a “sale” of a living trust package, which may deter the lawyer from questioning whether a living trust is the most appropriate estate planning vehicle for the client.

The American Bar Association has recognized that to draft a will appropriate for an individual, a lawyer must determine what facts are relevant, obtain all relevant facts and determine the appropriate type of will. If any of these tasks is performed without the lawyer’s involvement, the lawyer’s exercise of independent professional judgment is restricted, and the lawyer may be aiding a non-lawyer in the unauthorized practice of law. ABA Informal Ethics Opinion 1254 (Dec. 15, 1972). The lawyer’s role in preparing trust documents is just as central as in drafting wills, and the lawyer must perform this task free from any influence of non-lawyer third parties.

This Committee's past opinions have recognized that any "intermediary" between lawyer and client, particularly where the lawyer's business depends in part on the intermediary, may restrict impermissibly the exercise of the lawyer's independent professional judgment. *See*, Formal Opinion No. 12, *supra*, and Formal Opinion No. 17, adopted by the Ethics Committee on January 20, 1961. In each of the scenarios described herein, the non-lawyer acts in some manner as an intermediary between lawyer and client, at least in the initial stages. The lawyer must assure that the intermediary does not subject the lawyer to economic or other pressures, particularly in an ongoing relationship, and thereby be in a position to restrict or influence the lawyer's exercise of professional judgment.

E. Other Ethical Concerns

A lawyer has the duty to preserve a client's confidences and secrets. DR 4-101. In each of the above scenarios, the client may desire and assume that the information communicated to both the lawyer and the non-lawyer will be treated as privileged and confidential. Any information communicated in the non-lawyer's presence or through the non-lawyer as intermediary may not be privileged [*see, Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894)], so the client should be fully informed before waiving any privilege by communicating in this manner. Absent a fully informed waiver by the client, the lawyer may violate DR 4-101 by gathering information from the client in this manner. This danger is one justification for the prohibitions against the unauthorized practice of law by non-lawyers. *See*, EC 3-3 and 3-4.

A lawyer also must act competently in representing a client. DR 6-101. When a lawyer shares his or her responsibilities with a non-lawyer, the lawyer must assure that the client is competently advised and represented. *See*, Formal Opinion No. 79, *supra*.² This may be difficult in all of the scenarios described above.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.4(a) and (b) (regarding fee splitting and partnership with a non-lawyer); Rules 7.1, 7.2, and 7.3 (regarding solicitation and related issues); Rule 1.5(e) (prohibiting referral fees); Rules 1.7(b), 1.8(f), 2.1 and 5.4(c) (requiring the lawyer's exercise of independent professional judgment); Rule 1.6(a) (regarding confidentiality); Rule 1.1 (requiring competent representation) and Rule 5.5(b) (regarding the unauthorized practice of law). For further discussion of issues considered in this opinion, attorneys may wish to read *People v. Cassidy*, 884 P.2d 309 (Colo. 1994).

NOTES

1. The Ethics Committee's responsibilities do, however, include interpreting DR 3-101(A), which prohibits aiding a non-lawyer in the unauthorized practice of law.

2. As noted above and in Formal Opinion No. 79, duties constituting the practice of law may not be delegated to a non-lawyer.



USE AND MISUSE OF “CONFIDENTIALITY WALLS”

Adopted May 18, 1991.

Amended April 18, 1992.

Introduction

DR 5-105(D) of the Code of Professional Responsibility (“CPR”) provides:

If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment.

Rule 1.10(a) of the proposed Model Rules of Professional Conduct¹ (“MRPC”) similarly provides:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

As written, these ethical precepts are simple and far-reaching. Unfortunately, they have proven to be too far-reaching; and for years courts and ethics commentators have struggled to reconcile the unyielding language quoted above with other societal goals and with the realities of law practice.²

In an effort to avoid imputed disqualification, law firms in both public and private settings have attempted to create a screen or “Confidentiality Wall”³ around one or more attorneys who themselves would be ethically prohibited from working on a given matter. Over the past few years, the CBA Ethics Committee has received an increasing number of inquiries as to when construction of a Confidentiality Wall is proper and what factors to consider in constructing such a Wall. We attempt by this Formal Opinion to provide some overall guidance on these issues.

At the outset, the Committee notes that these issues implicate a number of important legal and social considerations (which at times may conflict) such as a person’s right to counsel of his or her choice, a client’s right to confidentiality and loyalty in his or her relationship with legal counsel, and the right of attorneys to move from job to job. *E.g.*, *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 224 (6th Cir. 1988); *Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.*, 632 F.Supp. 418, 425 (D. Del. 1986); *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 781 P.2d 1099, 1104 (1989) (all discussing the various factors to consider in analyzing whether a Confidentiality Wall can avoid a firm’s imputed disqualification). Moreover, these issues oftentimes arise in the context of a contested motion to disqualify an opposing party’s law firm, and thus are frequently analyzed in a highly charged setting in which the moving party’s motives are just as much a matter for judicial scrutiny as the subject attorney’s behavior.⁴ *See, Manning*, 849 F.2d at 224 (reporting that motions to disqualify opposing counsel are “becoming an increasingly popular litigation technique.”); *cf.* this Committee’s Ethics Opinion No. 78 (adopted June 18, 1988) (regarding the ethical considerations to bear in mind in seeking to disqualify opposing counsel by listing counsel as a fact witness at trial).

For these reasons, it is difficult to set forth black letter principles in this area. The authorities on point are at times difficult to reconcile, and are in any event quite fact-specific.

Nevertheless, while the law is still developing in this area, the authorities do provide some general ethical guidance. The Committee, like the Colorado Supreme Court, *see, Osborn v. District Court*, 619 P.2d 41, 46 (Colo. 1980), is “aware of the current trends regarding the erection of a so-called ‘Confidentiality Wall’” By its analysis of various informal requests for ethical guidance, the Committee is also aware of a number of areas in which some members of the bar fail to appreciate the limited circumstances in which a Confidentiality Wall is appropriate. Accordingly, the Committee believes that it is in a position to provide some useful information to the bar by analyzing these authorities and describing where Confidentiality Walls have been permitted, where they have been found ineffective, and what factors to consider (where a Confidentiality Wall is otherwise proper) in constructing one effectively.