

ADVISORY ETHICS OPINION 94-01

SYNOPSIS:

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 said attorney participates in a financial planning company's arrangement whereby that organization gathers information necessary to prepare estate planning documents, prepares the documents and sends the documents to attorney for review.

FACTS:

Attorney has requested an advisory opinion concerning his relationship with an Organization which sells securities and insurance and offers estate and financial planning involving the securities offered by Organization. The Organization would collect information from prospective investors which would be reviewed by the Organization and Attorney so as to determine what legal documents "may or may not be necessary to go with the financial securities, insurance and other matters they are selling them."

The Organization proposes that if legal documents are necessary, Attorney would prepare them and Organization would pay his/her fees. The Attorney states there would be no direct customer contact except in cases where he or she believed there was an extraordinary problem.

QUESTIONS:

1. Does the Attorney participating in the matters described aid the unauthorized practice of law?
2. Does the Attorney's proposed conduct violate any other Disciplinary Rules?

The pertinent Disciplinary Rules are:

DR3-101 Aiding Unauthorized Practice of Law.

- (A) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

DR 3-102 Dividing Legal Fees With a Nonlawyer.

- (A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
 - (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
 - (3) A lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 5-107 Avoiding Influence By Others Than the Client

- (A) Except with the consent of his client after **full** disclosure, a lawyer shall not:
- (1) Accept compensation for his legal services from one other than his client,
 - (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.
- (B) 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 services.

OPINION:

1. The Committee concludes that Attorney's participation in Organization's operations may facilitate the Organization's unauthorized practice of law in violation of DR 3-101. According to the facts as submitted, Organization gathers all necessary information from its clients and would furnish it to Attorney for review and for the drafting of legal documents as Attorney might find necessary. This review and drafting does not occur until Organization has already proposed an estate plan.

2. The arrangement between Organization and Attorney might constitute an impermissible fee-splitting with a non-attorney. If the fee is paid for the preparation of the planning documents, then the Attorney responsible for drafting those documents may not share the fee with the Organization. None of the exceptions to DR 3-102 apply to this arrangement. If the fee is being paid for the financial products built into the estate plan, then the process may violate DR 5-107, since it will result in payment of Attorney's legal fees by the Organization for services rendered to Organization's customers.

There is the further issue of conflicts. To the extent Attorney is representing the individual for whom the estate plan was prepared and is paid by the Organization, there is an inherent conflict. The individual's best interests may or may not be the purchase of the products offered by Organization. In fact, the individual may be best advised by being told to look at competing products and to carefully compare them to the products offered by the Organization. Advising the purchaser to buy products from the party paying for Attorney's services, or advising the purchaser to compare products from other companies possibly to the detriment of the Organization, would produce a direct conflict.

The Committee is concerned, further, that the facts presented to it are closely related to the factual situation in its Opinion 91-12 and could be similarly construed to result in Organization's customers being Attorney's clients. In Opinion 91-12 we also noted that it may be extremely difficult to differentiate between purely business advice and legal services. A similar factual situation resulted in Opinion 523 (3 89) by the Legal Ethics Committee of the Oregon State Bar which ruled that:

“A lawyer may not enter into an agreement with a corporation that markets an estate planning service where the corporation provides estate planning forms, consults with customers, and offers recommendations and legal advice and the lawyer simply reviews and executes documents prepared by the corporation. Such an arrangement violates the rules on aiding in unauthorized practice of law and on interference with the lawyer's independent professional judgment.”¹

¹ DRs 2-103(B)(C), 3-101, 5-109.