
E-92-2 Marketing living trust plans: Lawyer participation

You have requested the opinion of the Committee on Professional Ethics regarding a number of questions concerning lawyer participation in the marketing of living trust plans. We have redrafted your request, for clarity of response, as follows:

Facts

A. The ABC Company, based in another state, sells living trusts in Wisconsin. The forms are prepared in that other state and are reviewed by an attorney in that state. ABC Company salespersons present seminars in Wisconsin to encourage people to purchase their living trust product. Purchasers are interviewed by the salesperson, who obtains information needed to complete the living trust documents. The documents are then drafted to include this information in the other state by ABC Company personnel. ABC Company then sends the documents to *Attorney X*, a Wisconsin lawyer, to provide an opinion that they “are in conformity with Wisconsin law.”

1) No attorney ever directly communicates with the purchasers.

2) *Attorney X* meets with the purchasers upon referral by ABC Company, but does not review the appropriateness of the living trust plan or discuss any other financial planning options.

B. Wisconsin Living Trust Company is incorporated in Wisconsin. Nonattorney salespersons present seminars and prepare living trust documents for purchasers based upon material given them by *Attorney Y*, a licensed Wisconsin lawyer, who never meets with the purchasers or sees the documents that are prepared by the salespersons.

C. A Wisconsin court decision or Attorney General’s opinion rules that the filling out of living trust forms for compensation by a nonattorney is the unauthorized practice of law. How would that affect the Ethics Committee’s response to fact situations A and B above?

Opinion

In Committee on Professional Ethics Formal Opinion E-90-7 (*Wisconsin Lawyer*, p. 38 (Nov. 1990)), this committee addressed many of the issues raised by the facts presented here as follows:

“A lawyer, at a client’s request, may represent a client who is considering purchase of estate planning products, but we believe that nonwaivable conflicts of interest are created if the lawyer has some type of contractual association with a seller of an estate planning product to provide related legal services to client buyers. SCR 20:1.7 and SCR 20:2.1.”

Regarding whether any of the activities in question could constitute the unauthorized practice of law, we stated that “this is not an issue that this committee has the authority to address. *See generally*, Annot., 71 A.L.R.3d 1000, ‘Sale of books or forms designed to enable laymen to achieve legal results without assistance of attorney as unauthorized practice of law.’ ” E-90-7. If a Wisconsin court or the Attorney General find any of the activities in question to constitute unauthorized practice of law, lawyers participating with organizations engaged in such conduct could be held in violation of the disciplinary rules relating to lawyers assisting or participating in unauthorized practice of law activities. SCR 20:5.4 and SCR 20:5.5.

These lawyers also could be held in violation of disciplinary rules relating to conflict of interest as stated in E-90-7, if they purport to be providing legal services to purchasers of estate planning products while participating in some type of contractual or employment relationship with the seller of the product.

If lawyers are assisting nonlawyers in preparing estate planning documents for sale while the seller states or implies that the documents have been prepared with the assistance of a lawyer or lawyers, we believe that such lawyers risk violation of SCR 20:5.5. *See also* Wisconsin OAG 39-86 (10/21/86) and Committee on Professional Ethics Formal Opinion E-89-8 (*Wisconsin Lawyer*, p. 28 (July 1989)).

Assuming that, under the facts presented for consideration in this opinion, there was no problem for the lawyers for unauthorized practice of law or conflict of interest reasons, we believe that the lawyers described in these facts who did not make clear to purchasers who their client was in the transaction also could be held to have an attorney-client relationship with the purchaser. *See, e.g.*,

Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978). That would, of course, trigger all of the duties to a client, including particularly:

- 1) SCR 20:1.1, Competence;
- 2) SCR 20:1.4, Communication;
- 3) SCR 20:1.6, Confidentiality of Information;
- 4) SCR 20:1.7, Conflict of Interest;
- 5) SCR 20:2.1, Advisor, relating to exercise of independent professional judgment; and
- 6) SCR 20:8.4(c), regarding conduct involving, among other things, misrepresentation.

Assuming, again, that there is no unauthorized practice of law problem under the facts presented, and further assuming that lawyers make it clear that their client is only the seller, these lawyers would have to refrain from providing the purchasers with any legal advice or assistance. SCR 20:4.3.

In conclusion, we believe that E-90-7 concisely answered the issues raised by the facts presented but have here highlighted the concerns confronting lawyers who are considering participating—in any way—in the activities of sellers of estate planning products.