



**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 Rule of Professional Conduct 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. 90-35
May 15, 1991**

Topic: Aiding Unauthorized Practice of Law

Digest: An attorney aids in the unauthorized practice of law when the attorney participates in a not-for-profit organization plan whereby the not-for-profit organization procures from its requesting member information necessary to prepare a will for the member, sends that information to the attorney who, based on that information, drafts the will and returns it or furnishes other legal advice concerning the will to the not-for-profit organization, which then transmits the will or advice to its requesting member.

Ref: 1990 Illinois Rules of Professional Conduct, Rule 5.5(b)
ISBA Opinion Nos. 90-13, 87-2, 474, 261
In re Yamaguchi, 118 Ill, 2d 417, 515 N.E.2d 1235 (1987)

FACTS

A not-for-profit organization (NPO) has adopted a plan to aid its Illinois members in drafting a valid will. The plan is offered by the NPO free of charge and regardless of whether the member bequeaths a charitable gift to the NPO. Under the NPO's arrangement, a member signs a request for a will and completes a questionnaire. Both the request and the questionnaire are provided by the NPO. From these documents, the NPO gathers the pertinent information for the drafting of the will and submits this information to an attorney, who prepares the will. If the attorney believes that additional instructions or information are required,

he submits these suggestions to the NPO and the NPO transmits these suggestions to the member. Corrections or additions to the draft are made by the attorney and returned to the NPO for transmission to the member. Once the final will is complete, the attorney signs the document, and the NPO forwards it to the member. All wills, cover letters, and instruction letters, are sent to the attorney for his review before the NPO mails these documents to the member.

QUESTION

Whether the lawyer who participates in the facts described above is aiding the unauthorized practice of law.

OPINION

The Committee concludes that the attorney who participates in the NPO's plan facilitates the NPO'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"). As described in the facts, all pertinent information is gathered by the NPO and forwarded to the attorney. The attorney then performs the necessary legal work and returns it to the NPO. Although the attorney reviews the NPO's correspondence to the member, it is the NPO which then transmits the necessary documents, including requests for additional information or suggested changes, to the member. As appears from the facts as stated, the attorney is not present for the execution of the will or has any direct contact with the NPO member.

Arrangements similar to those in the present inquiry have been found violative of professional ethics by this Committee. In ISBA Opinion No. 90-13, the Committee noted that an attorney's preparation of a land trust agreement and deed for a bank's customer, pursuant to the bank's instructions after its consultation with the customer, would aid the bank in the unauthorized practice of law. In ISBA Opinion No. 474, the Committee concluded that an attorney who was 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. In ISBA Opinion No. 261, the Committee determined that an attorney's preparation of a will for a bank customer, at the bank's request and pursuant to the bank's preparation of the necessary information which was transmitted by the bank to the attorney, aided the bank in the unauthorized practice of law. As in these Opinions, the attorney's participation in the instant facts would facilitate the NPO's provision of legal advice to its members, and would thereby aid in the NPO's unauthorized practice of law.

The instant arrangement could also lead to the type of unethical conduct prescribed by In re Yamaguchi, 118 Ill. 2d 417, 515 N.E.2d 1235 (1987), where the Illinois Supreme Court determined that an attorney aided the unauthorized practice of law when he signed, but did not independently review or analyze the factual allegations of, real estate valuation complaints that were completed, filed, and litigated by a non-lawyer. In the fact pattern presented, if the NPO gathers information and completes draft wills, and the attorney simply adds pro forma approval thereto without an independent review and verification of the client's position, the lawyer will have aided the NPO in the unauthorized practice of law under Yamaguchi.

The Committee also considers it appropriate to comment on the extent to which the suggested arrangement may infringe upon the lawyer's duty to provide competent, complete, and confidential legal representation to the NPO member who has requested a will. The Committee assumes that it is the NPO which hires the lawyer and pays for drafting the will on behalf of the NPO member. The NPO's selection

of and payment to the lawyer raises problems relating to confidentiality and privity, i.e., whether the lawyer's client is the NPO or the NPO member. In addition, in the event that the attorney has been negligent in the provision of legal services to the NPO member, a question arises with respect to who has the right to redress against the attorney.

In addition, the present arrangement could compromise the lawyer's provision of legal services to the NPO member. Rule 5.4(c) 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. 87-2, we observed that a "lawyer retained by a broker on behalf of a seller may perform legal services for the seller if the lawyer has verified that the broker has the authority to retain the lawyer. Even when the authority exists, the lawyer should be mindful of exercising his own independent professional judgment to adequately perform the services required." These remarks are equally applicable to the professional, independent judgement that the lawyer must exercise for the NPO member who has requested a will, without regard to or interference from the NPO.

The NPO's plan could also improperly limit the scope of communication between the attorney and the NPO member who has requested a will. Rule 1.4(b) requires that a "lawyer *** explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In the fact pattern presented, the lawyer is deprived of any direct contact with the NPO member; all communication between the lawyer and the NPO member must be transmitted through the NPO itself. The Committee believes that this arrangement could, in certain circumstances, potentially deprive the lawyer of effective communication with the NPO member regarding the nature and extent of the member's estate planning.

Lastly, the Committee notes that the transmission of all communication between the lawyer and the NPO member occurs through the NPO, thereby divulging the NPO member's confidences and secrets to the NPO. This could violate Rule 1.6, which provides that a lawyer "shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure."

For all of these reasons, the Committee concludes that the suggested arrangement presents substantial problems in its potential negative ramifications upon the attorney-client relationship, and also exposes the attorney to a serious charge of aiding the unauthorized practice of law.

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