

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-10**

A lawyer has been asked by a financial planning individual to “get involved” with an organization known as The Estate Plan (“TEP”). TEP was founded by Henry W. Abts, III, a non-lawyer who advocates revocable living trusts as an alternative to the probate system. Mr. Abts states that he educates people on “the merits of a living trust to avoid the time, costs and **agony** of probate”, and that he is “passionate in his determination to show the American public how to avoid the onerous probate process using a living trust.” (Emphasis added).

TEP is an organization designed to find clients for attorneys, who then meet with the client, and review documents which eventually are executed by the clients. The documents are prepared by TEP pursuant to certain formats which have previously been prepared. These documents are provided to “cooperating” attorneys in a form book. The local TEP representative compiles client information and data, which is then given to the attorney when he meets with the client. TEP prepares the documents, which the attorney reviews, approves, and then meets with the client to have them executed. There is a fee schedule TEP has developed that involves allocation of the fee between TEP, their representative, and the attorney.

STATEMENT OF ISSUES

WHETHER A LICENSED PRACTICING ATTORNEY IN NEBRASKA CAN BECOME CONTRACTUALLY AND FINANCIALLY ASSOCIATED WITH A BUSINESS SUCH AS “THE ESTATE PLAN” (TEP) WITHOUT VIOLATING THE NEBRASKA RULES OF PROFESSIONAL CONDUCT.

STATEMENT OF APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 1.4 COMMUNICATIONS

- ...
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding their representation.

RULE 1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- ...
- (2) there is a significant risk that the representation of one more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each effected client;
 - ...
 - (4) each effected client gives informed consent, confirmed in writing.

RULE 1.8 CONFLICT OF INTEREST; CURRENT CLIENTS; SPECIFIC RULES

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except . . . (exceptions not applicable).
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) 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.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RULE 7.2 ADVERTISING

- ...
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is a lawyer's pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal or prior professional relationship with the lawyer.

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or to do through the acts of another;
- ...
- (c) engage in conduct involving dishonest, fraud, deceit, or misrepresentation.

DISCUSSION

The facts provided clearly describe potential ethical violations for attorneys involved in business relationships with TEP and other similar businesses which mass produce and/or mass market estate planning kits on a like arrangement.

Advertising

TEP is organized to find clients for the attorney. This invariably leads to the conclusion that TEP is advertising for the lawyers with which it has associated. Presumably, this is occurring through a word-of-mouth referral by TEP "representatives" to potential clients. One of two things appears to be happening. Either the lawyer is

obtaining advertising free of charge from TEP, or the lawyer is the recipient of a direct referral in exchange for something, such as reduced rates for TEP clients. Both scenarios appear to run afoul of Rule 7.2(b)(1) and (2).

Additionally, particular care must be taken by the lawyer to familiarize himself/herself with what is specifically being communicated to the potential client. Is the lawyer being held out as a specialist in the estate planning area of practice? More precisely, what exactly is being told or given to the prospective client regarding the lawyer's qualifications? The failure to investigate the specifics concerning how the referral was made will not excuse ignorance for the failure to conform to Rule 7.1. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with the Rules. Rule 7.2, Comment [7].

A lawyer must pay for the reasonable costs of advertising and the information provided cannot mislead or mischaracterize the lawyer's abilities or the quality of service to be provided. Until and unless the lawyer has direct input and control over this aspect of client or business recruitment, there is the potential for violation of the Nebraska Rules of Professional Conduct.

Attorney Fees – Splitting

TEP finds the client, meets with the client, prepares documents for the client, finds the lawyer to review the documents and meet with the client to execute the documents. There is a fee schedule for the services developed by TEP. The fee which the client pays is "allocated" between TEP, the representative and the lawyer. Rule 5.4 (a) (b) and (c) specifically prohibit this kind of arrangement.

Client Contact

Another risk to which the lawyer is exposed occurs before the lawyer ever meets the client. Rule 7.3 specifically proscribes personal, telephonic or electronic solicitation with a prospective client when a significant motive for doing so is pecuniary gain. This Rule applies when such contact is made by an agent or representative of the lawyer, as well. The Michigan Ethics Committee concluded that a business venture in which non-lawyer agents traveled door to door selling will and trust forms and referring all legal issues to the lawyer violated numerous ethical rules. One of the conclusions of the Michigan Committee was that in-person visits by non-lawyer agents who have *de facto* exclusive referral relationships with the lawyer "violates the ban on in-person solicitation [MRPC 7.3] and would probably violate the prohibition against giving anything of value to a person for recommending a lawyer's services [MRPC 7.2]." Michigan Ethics Opinion, RI-191.

Aiding Another in the Unauthorized Practice of Law

Under the facts provided, a TEP "representative", a non-lawyer, finds clients, presumably by solicitation, and then meets with the client before the attorney has a

chance to meet with the client. The representative obviously discusses the client's estate planning needs and provides some sales technique designed to convince the client of the need to (1) avoid the onerous probate process, and (2) execute some form of living trust document. Upon doing so, the representative obtains personal, financial, and clearly confidential information which is then inserted into the pre-formatted document prepared by TEP. The documents are then given to the lawyer to review with the client before final execution.

A similar factual scenario to the one involving TEP is outlined in Cleveland Bar Ass'n v. Sharp Estate Services, Inc., 837 N.E.2d 1183 (Ohio 2005) (Ohio Supreme Court affirmed the decision of the Ohio Board on the Unauthorized Practice of Law that each respondent (the action was commenced by the local Bar Association against several similar estate planning or probate avoidance packages, including TEP) had engaged in the unauthorized practice of law, that they be enjoined from further unauthorized practice of law, and fined them, jointly and severally, the total amount of \$1,027,260.00). The lawyers involved were disciplined as well in Disciplinary Council v. Wheatley, 837 N.E.2d 1188 (Ohio 2005) (Ohio Supreme Court affirmed the Board of Commissioners on Grievances and Discipline that attorney Wheatley's misconduct in violating provisions of professional responsibility prohibiting the lawyer from sharing legal fees with a non-lawyer, prohibiting a lawyer from aiding a non-lawyer in the unauthorized practice of law, and barring a lawyer from improperly using a person or organization to promote a lawyer's services, warranted sanction of six months suspension from the practice of law). The Wheatley court affirmed misconduct because the attorney facilitated the use of non-attorneys to market estate plans, including living trusts, in a way that encompassed the unlicensed practice of law. Although the lawyer prepared living trust documents using TEP software, the Ohio Supreme Court concluded that the sale of living trusts by "representatives", as opposed to the protection of the client's interests, was the goal of the sales representative. Id. at 1192. Even Mr. Wheatley admitted that "in the client's mind, they are purchasing something before they ever meet [a lawyer] or call [a lawyer] or have anything to do with [a lawyer]." Id. Additionally, representatives were found to have answered legal questions without the aide of the lawyer's input or advice. Such non-attorney representatives were found to have engaged in the unauthorized practice of law when they told customers they needed a living trust or estate plan, when they recommended specific types of living trusts, or estate plans, and when they advised customers of the legal consequences of their choices. Cleveland, supra. This unauthorized practice of law was imputed to TEP and Henry W. Abts, III.

The "respondents" in Cleveland argued that the use of review attorneys to supervise the estate or trust document preparation actually immunized them from the charge of unauthorized practice of law. The Ohio Supreme Court disagreed, however, stating that the evidence revealed that the review attorneys were only tangentially involved in the entire transaction. Id. Additionally, "even if attorneys had been extensively involved in the transaction, they were incapable of acting solely in the interests of their ostensible clients because of their contractual relationship with TEP. Id. at 1185. The court found that the review attorney entered into the relationship too

late, following the Colorado Supreme Court which concluded that review attorneys merely “lend credence and a facade of legality to the product the non-attorney offers.” Id.; People v. Cassidy, 884 P. 2d 309-311 (Colo. 1994).

The core element of practicing law is the giving of legal advice to a client and the placing of one’s self in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left in the hands of the attorney. Tending to the legal problems of a client creates an attorney-client relationship without regard to whether the services are actually performed by the individual undertaking the responsibility or another to whom the task is delegated or subcontracted. In re Perrello, 386 N.E.2d 174 (Ind. 1997). Preparing and drafting a will and giving advice as to the contents and legal effect of a will constitutes the practice of law. State ex rel Pearson v. Gould, 437 N.E.2d 41 (Ind. 1982). Similarly, it has been held that persons engage in the practice of law when they advise others regarding the legal consequences of specific decisions relating to the creation of living trusts and powers of attorney and prepare such documents for others. Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Baker, 492 N.W.2d 695 (Iowa, 1992); In re Deddish, 557 S.E.2d 655 (S.C. 2001).

This Committee is in agreement with the above analysis. It appears that the referral lawyer is allowing non-lawyer representatives to (1) give legal advice to the client regarding specific legal matters, (2) gather confidential information from the client before actually meeting with the client, (3) market and profit from the sale of specific types of estate plans (living trusts) to the exclusion of wills and the general process of probate, and (4) counsel the client on what the estate planning needs are, all before the lawyer meets the client or has a chance to provide input or consult with the client as to the decisions which have been made. It appears that by the time the lawyer enters the process, the unauthorized practice of law has already occurred and anything the lawyer does thereafter only aids in the prohibited conduct.

A Lawyer’s Independence

A lawyer’s relationship with TEP, its representatives, and the timing of their respective roles in the client’s transactions, renders it impossible for the lawyer to fulfill his or her obligations to the client. For example Rule 1.4 requires that a lawyer “explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 2.1 requires that a lawyer “shall exercise independent professional judgment and shall render candid advice.” Here, important estate planning documents are typically prepared on behalf of a client before the attorney ever meets or communicates directly with the client. Relying on non-lawyers to conduct pre-document preparation communications with clients poses an insurmountable risk that the non-lawyer will engage in the unauthorized practice of law, and will operate to deprive the client of the lawyer’s independent judgment and professional services. This is incompatible with a Nebraska lawyer’s professional obligations to the client. It appears to the Committee that the lawyer often does not

have the opportunity to exercise independent professional judgment on behalf of the client, thus committing an ethical violation.

The relationship between the lawyer and TEP creates an impermissible burden on the lawyer's professional independence. The primacy of the lawyer's professional independence underlies many important rules of professional conduct. Referrals given over to a single lawyer cannot help but generate the appearance of a *quid pro quo*. Both the reality and the appearance of this cloud on the lawyer's ability and willingness to exercise independent judgment on behalf of a client renders any such business relationship with an entity such as TEP impermissible. A lawyer's duties of loyalty and independence may be materially affected by the responsibilities contractually undertaken with TEP. Lastly, because TEP will undoubtedly have interests that differ from those of the client, including the sale of specific estate planning documents which avoid the probate process, the lawyer is prohibited from accepting or continuing such contractual relationship unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

CONCLUSION

The Committee believes it to be ethically inappropriate for a Nebraska lawyer to be contractually associated with TEP or similar organizations doing business in the manner of the facts presented. The Committee is neither authorized to render a disciplinary ruling against a Nebraska lawyer, nor to take action against what appears to be illegal conduct on the part of TEP, but one need look no further than the Ohio Supreme Court to obtain valuable legal analysis and guidance from the judiciary on these matters. Contractual associations with organizations such as TEP present Nebraska attorneys with opportunities for multiple violations of the Nebraska Rules of Professional Conduct.