

FORMAL OPINION NO. 135

LAWYER INVOLVEMENT IN PREPARATION OF LIVING TRUSTS

Introduction

A member of the bar has asked for an opinion concerning the provision of living trusts. Because the question involves both professional responsibility and unauthorized practice considerations, this opinion is issued jointly by the Committee on Ethics and Professional Responsibility ("EPR Committee") and the Standing Committee on the Unauthorized Practice of Law ("UPOL Committee").

The question is posed as follows:

I have been contacted by [Living Trust Company], a company that sells revocable, grantor trusts through the use of sales persons who sell both the trusts and certain insurance and investment products. When they sell the trust, I am told that they ask the questions in order to fill out the enclosed questionnaire, then mail it to a central office in [another state] where the documents are prepared. Prior to their being delivered to the client, the documents are reviewed by a local, Idaho attorney to assure that the documents are properly prepared in a fashion that meets Idaho law in light of the information provided on the questionnaires.

I have been asked to be the Idaho reviewing attorney. I have reviewed the samples of the documents the [Living Trust Company] prepares and find them to be of high quality. I am enclosing a copy of the questionnaire and promotional materials that are used by this company. If I provide this service, I expect that I would rarely have contact with the purchasers of the trust.

The essential issues raised by this question are:

Whether it constitutes the unauthorized practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer. The completed documents are then reviewed by a member of the Idaho State Bar prior to execution.

Whether it is a violation of the Idaho Rules of Professional Conduct for a lawyer to participate in the creation and delivery of living trusts under the circumstances described above.

The general subject of living trusts has been under study by the UPOL Committee for a number of months. The opinion which follows is an adaptation of a pending opinion by the Unlicensed Practice of Law Committee of the Florida Bar, written after a series of hearings on the question. Both Idaho committees commend the Florida Bar for its thorough and well-crafted opinion.¹

The Florida Bar Opinion was written after several days of testimony from witnesses on all sides of this question. The complete text of the Florida proceedings is available on request.

Background

The question presented is one of the most common questions received by the Idaho UPOL Committee in recent months. The Florida UPL Committee contacted each state in the union in researching its opinion, and determined that this is a pressing question in most of those jurisdictions.

An example of how the nonlawyer companies operate their business was presented to the Florida UPL Committee by Kensington Trust, a provider of living trusts in that state. The Idaho UPOL Committee notes that the following procedure is typical of that currently being employed in Idaho.

¹ The Florida Opinion (#91001) is currently pending before that state's Supreme Court. Florida procedure requires that their Court affirmatively adopt such opinions. Because the UPOL and EPR Committees have determined that the reasoning of the opinion has independent validity, we deem it unnecessary to await the ruling of the Florida Supreme Court.

Kensington employs licensed insurance agents, brokers and securities dealers to conduct seminars. The seminars consist of a discussion of the advantages of having a living trust and the use of annuities for tax and estate planning purposes. (If an individual purchases an annuity in excess of \$50,000.00 from Kensington, they receive a free revocable living trust.) If an individual expresses an interest in further information, the agent will do an in-home presentation of the benefits of having a living trust. If the individual wants a trust, the agent will collect the data and fill out an information sheet.

This information is then forwarded to a "Kensington attorney" for review and preparation of the documents. The documents are actually prepared by a paralegal. After the documents are prepared, all communication is with the attorney although the customer may never meet the attorney. The completed trust is sent to the customer who may go to the attorney for execution. As stated by Kensington, "Kensington Trust will use only Florida licensed attorneys for dealing with Florida clients. Though the Trust will be initially prepared in [the] California office by [the] paralegals, the Florida-licensed Kensington attorney will have sole and complete control over the form and content of the Trust, client communications and correspondence concerning the Trust, and any and all other matters relating to the preparation and implementation of the Trust. The California-based Kensington attorney will be responsible for administrative supervision only of the Kensington Florida attorney(s)." Not all companies operate as outlined above. Some companies draft the documents without any attorney involvement, some sell a kit that contains a completed trust or a blank trust and some have attorney involvement in the execution and/or funding of the documents.

In many cases, the nonlawyer company is preparing other documents such as a pour-over will, a durable power of attorney, a living will and various documents of conveyance. Therefore, even though this opinion discusses living trusts, it encompasses the other legal documents which nonlawyer companies are preparing along with the trust.

What most companies have in common is advertising and the holding of seminars, although some companies rely on door-to-door solicitation. Many of the ads and seminars are aimed at the elderly. The ads usually center around avoiding the horrors of probate, including high estate taxes and attorney fees. The information may even give examples of the probate costs in another state as a way of showing how an estate will be eaten away by probate costs and attorney's fees. The material discusses how probate is public, costly, and time-consuming as compared to the relative ease of having a living trust. The consumer is also told about the inherent conflict of interest of attorneys because of the large fees they receive from probate as compared to the small fee the lawyer receives for preparing the trust. The clients are therefore often told not to seek the advice of an attorney.²

Solicitation of agents to sell the products is also an important consideration. In many cases the agent selling the trust is also involved in selling another product. The living trust area is frequently used as a way to gain insight into an individual's finances, thereby giving the salesman an opportunity to sell investments or other products. The companies use this point as a way to enlist nonlawyer agents. For example, evidence before the Florida UPL

² The question of whether such advertisements are misleading is a legitimate concern, but is not within the regulatory authority of the Idaho State Bar. Determination of that question is better left to the Consumer Protection Division of the Attorney General's Office.

Committee showed that one company discusses the "tie-in-sale" to deferred annuities, life insurance, long-term care and disability insurance. Another touts the living trust business as being profitable, timely and a way to obtain information about the customer's estate. Another points out that there is no licensing, knowledge or expertise required. In fact, when a colleague of one of the Florida witnesses inquired about becoming an "advisor," he was told that he could become an advisor by paying a fee; no other qualifications were necessary.

Given the factors discussed above, the committees determine that the provision of living trusts presents a substantial question of protection of the public, and therefore should be examined for unauthorized practice of law considerations.

Public Harm

Whether or not an act constitutes unauthorized practice of law is an important question, but it must also be considered in light of the potential public harm that could result from that unauthorized practice. The Florida committee took considerable testimony on the question of public harm.

One lawyer-witness represented an elderly woman. She was approached at her mobile home by a gentleman purporting to be a medical care specialist. Since the client was having trouble with her health insurance she agreed to talk to the gentleman, hereinafter referred to as Mr. P. Some time into their discussion, Mr. P brought up the desirability of a living will. The client stated that she had heard of those and was interested. Mr. P then started talking about the importance of having a living trust and began asking the client very personal questions. Among the questions was whether the client

had any children. Although the client did not have children, the box was checked "yes." If "no" had been checked, the document would not have fallen into the category of a basic trust. There therefore may have been disincentive to obtain or record the information accurately. The client was also asked about a successor trustee. She specifically informed Mr. P that she did not want her sister named as she felt her sister was too old to handle the estate. However, Mr. P put the sister's name as successor trustee. At the end of the meeting, the client gave Mr. P \$100.00 in cash and a check for \$1,095.00.

Approximately one week after the meeting, the client received a package in the mail which contained her living trust and other documents. The packet contained color-coded tabs explaining how each document should be executed and various blank letters of instruction regarding the funding of the trust. (The client informed the lawyer that she had trouble reading small print, and therefore arguably would not have been able to follow the instructions.) The client received several high-pressure telephone calls and visits from Mr. P until she finally told him that she wanted to take the documents to her attorney. The review by the attorney showed several problems, not the least of which was naming the client's sister as successor trustee. More problematic was the fact that the instruction sheet failed to tell the client that she needed to complete several blanks appearing on her will. If the client had followed the instructions, the "will would have probably partially failed and created a possible intestate situation with unnecessary legal problems and expenses." The client also informed her lawyer that she did not understand the meaning of "settlor" and did not know what a living trust was.

The lawyer wrote to the company selling the living trust and was able to obtain a full refund of the client's money. However, this did not occur until after the client received the visits, telephone calls, high-pressure sales and disclosed her personal finances.

Another witness testified as follows in the Florida hearings. "A trust officer of a statewide bank in an effort to qualify a client . . . for investment in the bank's common trust fund, had a client sign a pre-prepared simple trust and place in excess of \$3 million in the trust. The simple trust provided that on death of the grantor, the assets were to be paid to the grantor's personal representative. The client's lawyer had previously prepared a Declaration of Inter Vivos Trust into which most of the client's assets had been placed in a pour-over will. The cash which the client placed in the 'simple trust' came from the liquidation of some closely-held stock which had been in the inter vivos trust. The effect of this was that the assets were removed from the inter vivos trust and placed into the simple trust and had the client died while this condition continued, \$3 million in assets would have been subject to probate."

A third example of specific harm was provided by yet another witness in Florida, a non-practicing attorney who serves as trust officer for a bank and as such has contact with attorneys and financial planners. He was working with a couple whose estate was approximately \$900,000. They had a joint living trust that did not give them any credit shelter on their taxes. The lawyer advised the couple to see an attorney to take care of this. Instead, the couple went to a financial planner. The financial planner referred them to an attorney he worked with and the necessary changes were made. The attorney sent the documents back to the financial planner with

the understanding that the financial planner would take care of the execution. A year and a half later the banker saw the couple again and asked about the trust. The couple informed him that they had the trust in their safe deposit box. He asked to see a copy. When they brought it to him he noticed that it was not signed. The couple informed him that the financial planner told them to initial schedule B, which they did, and that that would take care of everything. The people thus went for over a year and a half in jeopardy for their tax situation because the document was not executed.

There are also many instances where the individual is not receiving the benefits advertised. For example, one Florida witness reviewed a living trust for a couple which would have resulted in significant unnecessary estate taxes. If improperly executed, the estate could end up in probate. One witness testified that property improperly placed in the trust resulted in the property having to be sold through a guardianship procedure. Another trust prepared by a nonlawyer would have required the trust to be recorded, thereby becoming a public document rather than private. Moreover, in some cases the fees charged by the nonlawyer companies are more than the fees charged by an attorney for creating a living trust. Therefore, the public is not necessarily saving money by using the services of a nonlawyer and may even have to pay for the same services twice if extensive revisions are required. All of these are problems which the nonlawyer companies advertise you can avoid if you purchase their product.

The Idaho UPOL Committee is aware of a number of similar stories in this state. One example is illustrative. A member of the Bar volunteered to give free legal advice to a group of senior citizens. An elderly woman implored the lawyer to draft a living trust, but admitted that she had no money to pay

for the trust. The lawyer asked the woman why she thought she needed a living trust, and was advised that everyone needs a living trust, and that a man had given a seminar on the subject at a senior citizen gathering. The lawyer further inquired about the extent of the woman's property, and learned that she was virtually destitute.

The Florida examples given above are documented in the appendices to their opinion. The committees conclude that nonlawyer provision of living trusts does pose a threat of harm to the public.

Unauthorized Practice of Law

The leading case in Idaho defining "practice of law" is In Re Matthews, 58 Idaho 772, 79 P.2d 535 (1938). That case offers the following definition:

The practice of law as generally understood is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure. But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. Matthews at 776. [Citing other cases, emphasis in original].

The Idaho Supreme Court distinguished "filling out of skeleton blanks" from creation of legal documents by holding:

But where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of a layman is required. . . . Matthews at 780 [Emphasis in original].

As will be discussed below, when the Matthews definition is applied to the preparation of living trusts, it is clear that the practice constitutes the practice of law, and therefore, must be performed by a member of the Idaho State Bar.

A living trust may be generally described as an instrument which holds title to property for the benefit of the grantor during his or her lifetime and which provides for the management and administration of the estate of the grantor outside of probate after his or her death. The property in the trust is managed by a trustee for the benefit of the named beneficiaries. The trust creates a relationship with respect to the property and imposes a fiduciary duty on the trustee to manage the trust in favor of the beneficiaries. 1 W. Fratcher, *Scott on Trusts*, sec. 2.3, (4th ed. 1991); *Restatement (Second) of Trusts* sec. 2 (1952). It establishes a legal relationship between several parties and controls the disposition of the individual's estate at death. See generally G. Turner, *Revocable Trusts*, sec. 1 (2nd ed. 1991). Therefore, the preparation of a living trust necessarily involves the giving of legal advice and the preparation of a legal instrument by which legal rights are obtained, secured and given away.

Before discussing the process of drafting a living trust, it is necessary to discuss the seminars and home presentations done by the nonlawyers. As discussed above, nonlawyer companies offer their services through a general seminar or an in-home presentation. While it is conceded that the seminars conducted by the nonlawyers are valuable for public education if accurate information is given, the question remains whether this is the practice of law. The answer is dependent upon what information is being given at the seminar or the home presentation.

There are no specific Idaho cases discussing whether a nonlawyer may give general legal information and the circumstances under which the information may be given. A persuasive Florida opinion holds that it is the unlicensed practice of law for a nonlawyer to advise an individual "concerning the

quality or advisability of the use of various devices for disposing of his . . . property upon death" and to sponsor or appear at meetings for the purpose of discussing the legal aspects of wills and trusts. However, it is not the unlicensed practice of law for a nonlawyer to "discuss general principles of law in a general manner without applying, directly or indirectly, such general principles to a factual situation." The Florida Bar v. Raymond, James & Assoc., Inc., 215 So.2d 613 (Fla. 1968). Using the Raymond reasoning, it is fair to say that nonlawyers may hold seminars as long as all options are being discussed in a general manner. In other words, the option of having a will must at least be mentioned although the nonlawyer must be careful not to give legal advice.

The creation of a living trust can be broken down into six steps, all of which are interrelated: 1) Deciding whether a living trust is necessary at all; 2) the gathering of the necessary information; 3) the assembly of the document; 4) review with the client; 5) the document's proper execution; and 6) the funding of the trust document.

The first step is the often-overlooked threshold question of whether a client even needs a living trust and if so, what type. Living trusts, like any other agreement, are good for some, needed for others and absolutely inappropriate for some. This initial determination is being routinely overlooked by nonlawyers. If a seminar participant desires more information, he is invariably sold a living trust. This may be due to the fact that the nonlawyer has a vested interest in selling a living trust as this is how he earns his commission. Some companies give bonuses if a certain number of trusts are sold. One Florida witness testified that he met with a client after she was solicited by a trust company. The purpose of the call was to

compare fees. As it turned out, the attorney's fees were less than what the nonlawyer company was going to charge. However, upon further review it was determined that the client only needed a simple will to meet her estate planning goals. Once the nonlawyer recommends a specific product to a customer as fulfilling all of his legal needs, he has stepped over the line and is engaging in the unlicensed practice of law. At that point, he is shaping that "mass of facts", in contravention of the Matthews decision. Therefore, the initial determination of whether a person needs a living trust, what type is needed and whether any additional documents are needed must be made on the advice of an attorney.

The next step involves the gathering of information. Although there could be some disagreement on this point, it is the opinion of the committees that an attorney must be involved in this process, as the decision as to what information is to be gathered or not gathered is a legal decision which could lead to harm if the necessary questions are not asked. Moreover, the attorney's participation is necessary in order to assess the individual's needs and goals as well as his competency. Again, the nonlawyer is doing more than the perfunctory gathering of facts, and is exercising a legal judgment about that "mass" of facts. Inevitably, the information also goes to the customer's testamentary intent, and therefore, necessarily involves giving legal advice. For example, the questionnaire of one company asks whether the individual would like their estate to be distributed per capita or per stirpes. It is virtually impossible to imagine that this question can be answered without giving legal advice. Therefore, although the nonlawyer may gather facts about an individual's assets, an attorney must meet with the individual to make any legal determinations, answer questions and gather additional information as needed. A cold review of the information gathered

by the nonlawyer is not sufficient. Nothing herein is intended to prohibit a nonlawyer from gathering the information for another purpose such as giving financial advice.

As to the assembly of the document, there can be no doubt that this is the practice of law. Matthews specifically identifies the preparation of instruments as the practice of law. Although it can be generally stated that portions of a living trust are standard, the document is not boilerplate. Some of the trusts being distributed by nonlawyer companies contain clauses which are totally inapplicable in Idaho or which contain gaping holes. Each trust must be individually drafted to meet each client's special needs. As one Florida witness testified, "there cannot be standardized documents because just as each client is unique, so is his living trust." What is appropriate for one estate is not necessarily appropriate for another. The same is true for the other documents which the nonlawyers are drafting along with the trust. Documents as basic as a "simple will" involve a variety of considerations unique to each individual. Even the determination of whether the individual needs, or wants, these documents involves legal advice. Therefore, nonlawyer preparation of a living trust and the ancillary documents constitutes the unlicensed practice of law.³

Just as the attorney should meet with the individual at the information-gathering step and assemble the documents, the attorney should also review the documents with the client. It is at this point that the documents are explained to the client and questions and concerns are addressed. This step will also involve advice on whether to execute the documents or whether a

³ Nothing herein is intended to limit an individual from preparing his own living trust.

different estate plan is more appropriate. Even the nonlawyer companies involved in this business seem to recognize that attorney involvement is necessary, as many offer attorney review after the documents have been drafted. However, as will be more fully discussed below, attorney review alone without attorney participation in the other steps is ineffective and does not convert the work of the nonlawyer into attorney work product.

Perhaps the most ministerial step involved in drafting a living trust is the execution of the documents. However, even the execution can be fraught with problems if not done properly. If the trust is not properly executed, it is invalid. It has no meaning. Therefore, to avoid any problems and protect the public, an attorney must at least supervise the execution of the documents if he does not conduct the execution himself.

The last step, the funding of the trust, is perhaps the most important and the step most overlooked or neglected by the nonlawyers. The funding of the trust is the process whereby assets are placed into the trust so that the assets may pass through the trust at the individual's death. It is an ongoing process as each time a new asset is purchased it must be titled in the name of the trust. It is also something which the average lay citizen may not be able to complete without assistance. However, some nonlawyer companies do not participate in the funding of the trust. Others merely gloss over it by including instructional documents in their materials. Therefore, an individual may be left without a properly funded trust. A trust that is not properly funded defeats the whole purpose as the assets must then pass through probate.

Perhaps the most problematic are the companies that are handling the funding of the trust, who may be unaware of the peculiarities of Idaho law, especially

in the area of homestead. The titling of a home to the trust could result in problems with the homeowner's exemption.⁴ However, these determinations are not being made by the nonlawyer. Instead the nonlawyer is advising the person to place, or actually placing, the assets into the trust which may result in a court proceeding to properly dispose of the assets at death. In some cases the nonlawyer also advises how the assets should be transferred. For example, one Florida witness contacted a company which was advertising to prepare living trusts. The company informed him that conveyances to the trust are best made by quitclaim deed. However, "the use of a quitclaim deed for this purpose could have disastrous consequences. Where the grantor has title insurance insuring his interest in the real property, which is nearly universally the case, the act of quitclaiming the property out of the grantor destroys the right of either the grantor or the trustee to enforce the coverage of the title insurance; in simple terms, the title insurance protection is destroyed."

Similarly, instructions regarding what assets to leave out of the trust have the potential for harm. For example, one company instructs the individual to omit life insurance annuities from the trust. However, by so doing the individual is creating a situation where the successor trustee cannot get to that valuable asset. Deciding which assets go into or are excluded from a living trust is a legal decision, and that decision determines what clauses a living trust should have or should not have. Consequently, a nonlawyer engages in the unlicensed practice of law when he gives legal advice regarding the funding of a living trust or drafts the deeds of conveyance to

⁴ At least one Idaho county has taken the position that homes included in a living trust do not qualify for the Idaho homeowner's exemption.

the trust. The nonlawyer may give advice of a financial nature and transfer documents which may be in his area of expertise. For example, a stock broker could discuss the transfer of securities into the trust. As the attorney is involved in the actual drafting of the trust and the initial and continuing funding, he will be able to advise the individual from a legal standpoint regarding the desirability of placing these assets into the trust. Although nonlawyer participation may be valuable in this area, to avoid the unlicensed practice of law an attorney should supervise the funding of the trust.

From an unlicensed practice of law standpoint, it is the opinion of the UPOL Committee that attorney review as proposed does not render the document that of the attorney so as to remove the activity from the unlicensed practice of law. In the question presented, the nonlawyer is rendering all of the legal services. Unlike the typical law office situation, the nonlawyer is not working under the direct supervision and control of the attorney. In some cases the situation is quite the opposite with the attorney working for the nonlawyer. In fact, through advertisements and seminars, the nonlawyer holds himself out as having the expertise in this area and often discourages the customer from initially seeking the services of an attorney.

Several companies offer attorney review of the completed trust documents. Some merely suggest that you have an attorney review the trust, while others have an employment arrangement with an attorney, many of whom are newly admitted attorneys with little experience in estate planning. As the Florida testimony showed, an independent attorney often catches many mistakes. In one instance the attorney reviewing a trust which had been drafted for a husband and wife learned that the individuals were not married. In another,

an attorney representing a trust company caught a mistake where the nonlawyer drafting the trust left out a termination of a trust for a grandchild in the amount of \$50,000.00. Had the mistake not been found and corrected, a construction proceeding would have been required to determine when the trust terminated. Although attorney review can be beneficial, in many cases it is ineffective, as the attorney cannot determine whether the document is adequate unless he meets with the client to determine their goals and objectives. A document which may look adequate within its four corners may be totally ineffective for that client. For example, had the lawyer discussed in an earlier example not sat down with his client to discuss the trust he would not have learned that she did not want her sister named as successor trustee. A cold review of the document would have reasonably led him to believe that this was the election she wished to make. A Florida witness put it bluntly: "Having a lawyer merely review and sign off on living trusts is a farce which affords the public no protection, and in fact lulls the client into the false impression that his living trust will work for him in his particular situation."

Moreover, where the attorney review is optional there is no guarantee that the customer will seek the review. Even where the review is part of the package purchased by the customer, the review is only meaningful if the attorney begins the process at square one, a process which will cost as much as if the customer came in to the attorney without the prepared package. It is highly unlikely that the attorney hired by the company to review the documents at \$75.00 or \$100.00 a trust is doing the type of review that would detect all mistakes. Therefore, for each mistake that is found, one must wonder how many others have gone undetected.

Distinguished from the situation where the nonlawyer hires the attorney is the situation where the attorney hires the nonlawyer. Clearly a nonlawyer may assist the attorneys of customers or attorneys of prospective customers in planning the disposition of the client's estate specifically, and carry out the attorneys' instructions relative to those plans without engaging in the unlicensed practice of law. As the formulation and drafting of a living trust involves the provision of legal services, it is the opinion of the Standing Committee that the attorney must have direct supervisory control and authority over the nonlawyer thereby rendering the attorney answerable to the client and the Supreme Court for any breach of ethics or professional competence. While the rules prohibit an attorney from practicing in an area in which he lacks competence, no such prohibition or regulation exists for the nonlawyers.⁵

Based on the foregoing, it is the opinion of the UPOL Committee that the question posed presents an instance of unauthorized practice of law.

Ethical Considerations

This now brings us to the issue of attorney review, which involves several questions of ethics. The fundamental ethics consideration is found at IRPC 5.5(b), which states:

⁵ The committees recognize that not every attorney has the expertise to draft a living trust. It is an everchanging field that is becoming increasingly more complex. Many attorneys practicing in this area do nothing but estate planning. A client is well advised to inquire as to the qualifications of the attorney before hiring him or her to do his estate plan.

Rule 5.5 Unauthorized Practice of Law

A lawyer shall not:

* * *

- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Because it is the opinion of the committees that nonlawyer preparation of living trusts, as described above, constitutes the practice of law, it is also the EPR Committee's opinion that a lawyer would be in violation of IRPC 5.5(b) by participating in such an arrangement.

A second ethics question is less obvious, but just as important. Who does the lawyer represent in these transactions? Some participants in the living trust ventures claim that the lawyer represents the living trust company. If that is true, then the company truly is practicing law. How can a "client" receive legal advice when they do not have a lawyer? The primary purpose of retaining the lawyer in these transactions appears to be to assure the purchaser that the documents fulfill legal requirements. If the lawyer represents the company, that fact is obscured from the consumer. IRPC 4.3 states, in part:

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Most clients would probably not agree to pay the extra \$400-\$500 that is denominated as "attorney fees" if they know that the lawyer does not actually represent them.

For the living trust ventures who claim that the lawyer does represent the consumer, a different set of problems is presented. First, the lawyers are asked to prepare a living trust document for a client, typically without even consulting with that client. As noted above, living trusts are not merely boilerplate documents. It is the EPR Committee's opinion that preparation of such a document without consulting with the client is a violation of IRPC 1.1, which requires a lawyer to render competent advice. As noted by the Florida witnesses, if a lawyer were to invest the time needed to properly prepare a living trust document for a client the value of the nonlawyer to the process would be questionable.

Further, there are serious conflict of interest questions left unanswered in these circumstances. Presumably the same lawyers are employed routinely by the living trust companies. This would seem especially true where the companies are choosing the lawyer, which seems to be most of the time. IRPC 1.7 requires a lawyer to fully explain to a client any personal interests of the lawyer which might conflict with zealous representation. As discussed above, the threshold question is always whether a client needs a living trust at all. Certainly a lawyer who repeatedly advised clients that they did not need a living trust could expect to see a dramatic decrease in referrals from the living trust company. That consideration alone would require notice and consultation with living trust clients. There is no indication of compliance with IRPC 1.7 in that respect.

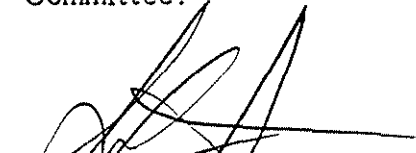
Given the above considerations, it is the opinion of the EPR Committee that participation by a lawyer in the living trust ventures described above would be a violation of the Idaho Rules of Professional Conduct.

Conclusion

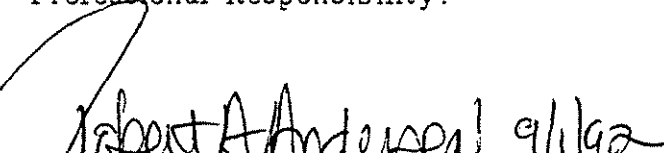
Having considered the question presented, it is the opinion of the Unauthorized Practice of Law Committee that nonlawyer preparation of living trusts under the circumstances presented constitutes the unauthorized practice of law. It is the opinion of the Committee on Ethics and Professional Responsibility that lawyer involvement in such ventures violates the Idaho Rules of Professional Conduct.

Unauthorized Practice of Law
Committee:

Committee on Ethics and
Professional Responsibility:




Stephen C. Rice 8/24/92
Date



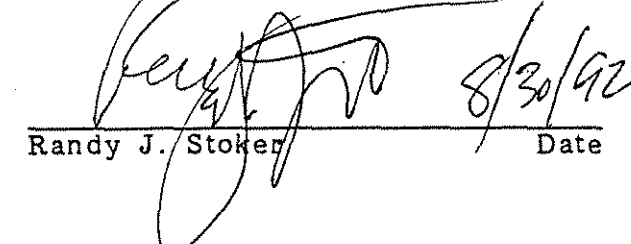
Robert A. Anderson 9/1/92
Date




Scott P. Eskelson 8-14-92
Date



Lowell D. Castleton 9-8-92
Date



Randy J. Stoker 8/30/92
Date



Georgia Yuan 9.11.92
Date