

PRACTICE OF LAW BOARD STATE OF WASHINGTON

ADVISORY OPINION (Inquiry # 04-18)
August 13, 2004

GIVING ADVICE RELATIVE TO THE SALE OF LIVING TRUSTS OR OTHER TESTAMENTARY INSTRUMENTS BY PERSONS NOT ADMITTED TO PRACTICE LAW IN WASHINGTON

ISSUES:

1. Whether a person, not admitted to practice law in Washington, who gives advice relating to the sale of living trusts or other testamentary instruments for a fee, is engaged in the practice of law.
2. Whether a lawyer, admitted to practice law in Washington, approves the final document, is assisting the unauthorized practice of law.

BRIEF ANSWERS:

1. A nonlawyer may not give advice or counsel to others as to their legal rights or responsibilities whether or not for fees or other consideration. GR 24(a)(1).
2. A lawyer involved in advising persons who were purchasing testamentary instruments from nonlawyers would need to comply with Rule 5.3 and other provisions of the Rules of Professional Conduct.

ANALYSIS:

1. Advising individuals whether or not a particular form of testamentary device is appropriate to protect their legal rights or to meet their intended legal responsibilities is the practice of law. GR 24(1)(a). Only lawyers admitted to practice in this state may practice law in Washington.

In *Perkins v. CTX Mortgage Co.*, 137 Wn. 2d 93, 969 P. 2d 93 (1999), the Washington Supreme Court held that a mortgage lender engages in the practice of law when producing and completing residential home loan documents. Similarly, in *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P. 3d 1068 (2002), the Supreme Court held that actions of an insurance claims adjuster constituted the practice of law when she completed legal forms, advised unrepresented claimants, and advised claimants to sign settlement and release agreements without advising them there were potential legal consequences or referring them to independent counsel.

In *Perkins*, the Supreme Court said,

Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm.

Perkins, at 102. In that case, the Court found that “lenders are authorized to prepare the types of legal documents that are *ordinarily incident to their financing activities* when lay employees participating in such document preparation do not exercise any legal discretion.” Similarly in *Jones v. Allstate*, the Supreme Court held that insurance claims adjusters may prepare and complete legal documents *incidental to the business of claims adjusting*. *Jones* at 305. The Court also held in both cases that the persons engaging in such activities must comply with the standard of care of a practicing attorney.

The marketing of living trusts and other testamentary instruments is unlike the activities in *Perkins* and *Jones*. In those cases, the activities constituting the practice of law were *incidental* to the business of the defendants. In the case of advising individuals on the selection and use of testamentary instruments, that itself is the practice of law, whether or not for a fee or other consideration. It is not “incidental” to anything else. It is the practice of law and may only be engaged in by persons admitted to practice by the Washington Supreme Court.

In *The Florida Bar Re Advisory Opinion--Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992), the Florida Supreme Court held “the assembly, drafting, execution, and funding of a living trust document constitute the practice of law.” also, in *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997), that court said:

Under the untenable guise of "gathering information," nonlawyer ASCA employees answered specific legal questions; determined the appropriateness of a living trust based on a customer's particular needs and circumstances; assembled, drafted and executed the documents; and funded the living trusts The particularized legal advice and services rendered by ASCA's nonlawyer employees clearly constituted the unlicensed practice of law.

We conclude that a person who is not admitted to practice law in Washington, and who gives advice relating to the sale of living trusts or other testamentary instruments, whether or not for a fee or other consideration, is engaged in the practice of law.

2. A lawyer involved in the marketing of living trusts and other legal instruments with a nonlawyer must comply with RPC 5.3 Responsibilities Regarding Nonlawyer Assistants and other provisions of the RPCs, such as those concerning sharing fees with nonlawyers, conflicts of interest, etc. Specific advice on those requirements is beyond the authority of the Practice of Law Board.

The Board notes, however, that this issue was addressed by the Florida Supreme Court in *Florida Bar Re Advisory Opinion, supra*:

The question posed by petitioner also presents a potential conflict of interest for a lawyer employed by a corporation or other entity involved in the sale of living trusts. Loyalty is an essential element in the lawyer's relationship to a client. In advising a client about the disposition of property after death, the lawyer must first determine whether a living trust is appropriate for that client. If so, the lawyer must then ensure that the living trust meets the client's needs. If the lawyer is employed by the corporation selling the living trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised. [*citations to Florida rules nearly identical to Washington RPC 1.7 (b) and 1.8(f) omitted*] In light of this duty of loyalty to the client, a lawyer who assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone.

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