

Nebraska Ethics Advisory Opinion for Lawyers
No. 81-10

AN ATTORNEY MAY NOT DIRECTLY SOLICIT CLIENTS, LIFE INSURANCE AGENTS, OTHER NON-LAWYERS OR OTHER LAWYERS IN ORDER TO HAVE THEM INTRODUCE CLIENTS TO THE ATTORNEY FOR THE PURPOSE OF RETIREMENT OR ESTATE PLANNING. AN ATTORNEY MAY NOT AVOID THE PROHIBITION AGAINST SOLICITATION BY DELEGATING A PORTION OF THE LEGAL WORK ENTAILED IN RETIREMENT AND/OR ESTATE PLANNING WHEN THE ATTORNEY CONTINUES TO ADVISE HIS OR HER CLIENTS AS TO THE TAX AND NON-TAX RAMIFICATIONS OF ADOPTION AND IMPLEMENTATION OF QUALIFIED RETIREMENT PLANS OR ESTATE PLANS. SUCH WORK WOULD INVOLVE THE PRACTICE OF LAW AND THEREFORE SHOULD NOT BE PERFORMED BY AN ATTORNEY ON INACTIVE PRACTICE STATUS.

FACTUAL SITUATION

An attorney would like to directly solicit retirement and/or estate planning business from individual clients or contact other attorneys life insurance agents, or other parties in order to have them introduce clients to the attorney. If a life insurance agent recommended the attorney for estate planning purposes, the attorney would advise the client to purchase insurance as part of the client's estate plan.

The attorney would be willing to delegate the drafting and representation functions entailed in the retirement and estate planning to independent practicing attorneys in an attempt to remove the conduct of the business from the practice of law. The attorney would continue, however, to advise the client as to the tax and non-tax ramifications of adoption and implementation of qualified retirement and/or estate plans.

QUESTION PRESENTED

May an attorney directly solicit clients, life insurance

agents or other attorneys in order to have them introduce clients to an attorney for the purpose of retirement or estate planning.

Would the delegation of the drafting and representation functions entailed in the retirement and estate planning by the above attorney to independent practicing attorneys remove the conduct of the business from the practice of law and thereby allow the attorney to solicit clients.

Would it make any difference if the attorney involved was on inactive status rather than a full time, practicing attorney.

DISCUSSION

DR 2-103 provides:

Recommendation of Professional Employment

(A) A lawyer shall not, except as authorized in DR 2-101 (B), recommend employment as a private practitioner, of himself, his partner, or associate to a layman who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private

practitioner, except as authorized in DR 2-101, and except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal service for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

. . . .

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

The above Disciplinary Rule is quite explicit in prohibiting soliciting by an attorney. DR 2-103 (B) prohibits an attorney from compensating an insurance agent for the referral of a client by advising the client to purchase insurance from the agent. DR 2-103 (C) curtails a lawyer from requesting other lawyers to recommend or promote his employment. The use of a non-lawyer to solicit business for the attorney would also violate DR 2-103 (C).

EC3-5 provides:

". . . Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client"

EC3-1 provides:

"The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession."

From the present factual situation, it appears that the attorney, even after delegating the drafting and representation functions of the retirement and/or estate planning, would still be engaged in the practice of law. Advising a client as to the tax and non-tax ramifications of the adoption of a retirement and/or estate plan would call upon the attorney to exercise his or her legal expertise. Accordingly, an attorney would be unable to avoid an ethical violation for solicitation by delegating the drafting and representation functions of estate or retirement planning if the attorney continued to advise a client as to the proposed adoption and implementation of a qualified retirement plan or estate plan. Likewise, the fact that the attorney was on an inactive status would not avoid the ethical violation.

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