

Focus on Professional Responsibility

Focus on Professional Responsibility--Ethical Ramifications for Michigan Attorneys Involved with Will and Trust Kit Sales Companies

by Victoria V. Kremksi

The last few years have seen a proliferation of will and trust kit sales companies operating in Michigan. The usual *modus operandi* of these companies is to solicit sales of wills, living trusts, and other estate-planning documents either through the mail, door-to-door, or through seminars. The target of these solicitations is often a very vulnerable group—senior citizens.

Almost without exception, the will and trust kit companies are not owned and operated by licensed Michigan attorneys and utilize nonattorney sales representatives to market the legal documents. Some of the companies are not Michigan companies, having headquarters in other states.

Until recently, many of these companies drafted the legal documents without the assistance of a licensed Michigan attorney, a clear unauthorized practice of law violation. In an attempt to avoid unauthorized practice of law issues, the will and trust kit companies have begun paying Michigan attorneys a small fee to review and/or draft the legal documents and to use the attorneys' name on the legal documents.

On the face of things, such an arrangement may be very tempting for Michigan lawyers, especially solo or small-firm lawyers attempting to build a practice. After all, the company sends the lawyer a healthy number of *pre-paid* clients requesting legal documents each week. However, there are very serious ethical ramifications for attorneys who enter into such an arrangement with a will and trust kit sales company.

MCL 450.681; MSA 21.311, part of the Michigan General Corporation Act, provides:

It shall be unlawful for any corporation...to...make it a business to practice as an attorney at law, for any person other than itself,...or to hold itself out to the public as being entitled to practice law, or render or furnish legal services or advice,...or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law, or not, it has, owns, conducts or maintains a lawoffice or an office for the practice of law, or for furnishing legal advice, services or counsel.

Under the statute, it is not a defense that an officer, trustee, director, agent, or employee is a licensed Michigan attorney. (See also Michigan Rule of Professional Conduct 5.4 (d).)

MCL 600.916; MSA 27A916 states:

It is unlawful for any person to practice law, or to engage in the lawbusiness, or in any manner whatsoever to lead others to believe that he is authorized to practice law or to engage in the lawbusiness, or in any manner whatsoever to represent or designate himself as an attorney and counselor, attorney at law, or lawyer unless the person so doing is regularly licensed and authorized to practice law in this state. Any person who violates the provisions of this section is guilty of contempt of the Supreme Court and of the Circuit Court of the county in which the violation occurred, and upon conviction is punishable as provided by law...

As the will and trust kit sales companies are not law firms or professional corporations duly organized under Michigan law, they may be violating MCL 450.681 and may be engaging in the unauthorized practice of law.

MRPC 5.5 (b) states:

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

A Michigan attorney who agrees to review or draft legal documents for a will and trust kit sales company without meeting the client may be violating MRPC 5.5(b), as they are assisting a nonlawyer engaging in the unauthorized practice of law. The attorney is also assisting a corporation in violation of MCL 450.681.

MRPC 5.4(a) provides that: "A lawyer or law firm shall not share legal fees with a non-lawyer..." In an attempt to circumvent MRPC 5.4(a), the will and trust kit sales companies direct the client to issue a separate check to the attorney to cover costs of drafting and/or reviewing the legal documents. However, given that the client is charged anywhere from \$900 to \$2,000 by the company, and the attorney is usually paid around \$300, a question arises as to what exactly the company is providing the client. Regardless of whether separate checks are issued, the bottom line is that the client is paying both the company and the attorney expecting to receive legal documents in return, which is a prohibited sharing of fees.

The logistical operations of the will and trust kit sales companies also create an ethical trap for Michigan lawyers. The vast majority of the clients of these companies are solicited via mail, door-to-door, or through seminars, where the attorney is not present. The first time the lawyer is involved is when he or she receives a packet of information pertaining to the client, collected by the

nonattorney salesperson, along with the client's check made payable to the lawyer. The lawyer is expected to rely on this information when drafting the legal documents. A nonlawyer sales representative usually delivers the finished documents to the client.

Several Michigan ethics opinions explicitly address will and trust kit sales situations. Michigan Ethics Opinion RI-128 is factually similar to the will and trust kit sales situations. RI-128 involved a legal assistant, employed by an attorney, who collected the information relating to the client's matter and gave the information to the attorney to draft the documents. The lawyer would then draft the documents and return them to the legal assistant for distribution to the client, who the attorney never met with personally.

RI-128 states that such an arrangement would constitute an ethical violation. By failing to meet with the client, a lawyer fails to exercise the requisite professional judgment required by MRPC 2.1, as the lawyer's expertise and professional judgment are an integral part of the services provided to the client. Professional judgment includes decisions as to workload, firm resources, and nonlegal advice that would be in the client's best interest to receive, but that legal assistants may not be competent to make and give. Further, the opinion noted that it would be almost impossible to see how the legal assistant, being the only contact with the law office, could refrain from giving legal advice.

RI-191 provides that a lawyer may not establish a business employing a nonlawyer agent to sell will and trust forms where the agent will most likely provide consultation and/or advice to the clients. The risk is that the lawyer has no effective control over the agent's communications regarding the lawyer, is not involved in the decision whether to form an attorney-client relationship, has no conflict screening mechanism, and may be unaware of the client's confidences and secrets, as well as the very existence of the lawyer-client relationship.

Applying the reasoning of RI-128 and RI-191 to the will and trust kit sales companies, it would clearly be a violation for an attorney to rely on a nonlawyer, nonemployee "runner" to collect the pertinent information from the client, answer the client's questions about the effect of the legal documents, and collect the fee from the client. Calling the clients, or meeting with them, will not insulate the attorney from the earlier discussed ethical violations.

Michigan case law also supports the reasoning of several ethics opinions. *Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56 (1939) holds that counseling, advising, drafting legal documents, including wills, for third parties is the practice of law and may only be carried out by a licensed attorney. *Detroit Bar Ass'n v Guardian Trust Co*, 282 Mich (1938) holds that a lay employee of a corporate fiduciary may not draft probate papers, including wills, trusts, and probate papers for third parties.

A lawyer who is consulted by phone regarding whether he or she is willing to accept referrals of customers from a nonlaw business, and who advises the caller that the proposed enterprise constitutes the unauthorized practice of law, may disclose information about the call to local bar association members. (Michigan Informal Ethics Opinion RI-186.)

Michigan attorneys involved or contemplating involvement with a will and trust kit sales company should proceed very carefully. The Unauthorized Practice of Law Committee of the State Bar of Michigan is taking an assertive stance against these companies, including filing requests for investigation with the Attorney Grievance Commission about attorneys involved in such operations.

Any attorney having knowledge of a will and trust kit sales company should report the matter to the State Bar of Michigan Committee on the Unauthorized Practice of Law and the Michigan Attorney General, Consumer Protection Division.



"Focus on Professional Responsibility" is presented as a monthly feature to address ethics, professionalism, and other regulatory issues affecting Michigan lawyers.

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