Trust Mills
and the Unauthorized Practice of Law
What is your duty?

By Ellen Sugrue Hyman and William Josh Ard

Fast Facts:

The State Bar of Michigan, its staff, and attorneys throughout the state are engaged in an effort to stop non-attorneys from engaging in the practice of law by the preparation of estate-planning documents.

Dabbling in the area of estate planning may result in a malpractice claim, even for an attorney who is skilled and experienced in other areas of the law.

An attorney's collaboration or association with a trust mill can be disastrous and unethical.

Members of the general public seeking a will or a trust often respond to vigorous marketing from non-attorneys and their companies that promise financial security, minimal document preparation fees, and avoidance of court involvement—often with the opposite results. Countless individuals and entities are engaged in selling estate-planning documents even though they are not authorized to practice law. As a result, many people have been exploited financially or have experienced negative financial consequences. The State Bar of Michigan, its staff, and attorneys throughout the state are engaged in an effort to stop non-attorneys from engaging in the practice of law by the preparation of estate-planning documents.

Non-attorneys engaged in estate planning should be of concern to all attorneys for several reasons: (1) they denigrate the practice of law, (2) they put the public in general and the people they serve at risk for grave financial consequences, and (3) they jeopardize the legal careers of attorneys with whom they associate.

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The Practice of Law in Estate Planning

There is a misconception among the general public that estate planning is merely the process of formalizing who gets a person's money and belongings. There is little recognition that the practice of law in estate planning requires expertise in property law rights, probate, trust, tax, and government benefits, as well as legal skill and discretion to understand how a person's unique situation affects his or her estate-planning needs. Some members of the public have little or no appreciation of the ramifications of not planning or having an estate plan improperly prepared. These potential ramifications impact everyone from the wealthiest individuals seeking to minimize or avoid estate tax to the poorest individuals trying to obtain or maintain Medicaid funding for long-term care. Further, as estate-planning attorneys, we regularly dissuade clients from an estate plan that is too expensive or complex for their legal situation or explain why certain documents, such as powers of attorney, are needed by everyone, regardless of their level of wealth.

Preparation of wills and other estate-planning documents is the practice of the law. In *Detroit Bar Ass'n v Trust Co,* the Michigan Supreme court quoted the Colorado Supreme Court:

> We think the drawing of wills, as a practice, is the practice of law, and this for three reasons; First, because of the profound legal knowledge necessary for one who makes a practice of this work; second, because all these instruments, before they become effective, must be filed in and administered by a court; and, third, because what we consider the weight of authority so holds. *People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Banks,* 99 Colo. 50, 59 P.2d 468, 469.[1]

Dabbling in the area of estate planning may result in a malpractice claim, even for an attorney who is skilled and experienced in other areas of the law. MRPC 1.1 (the rule on competence) essentially provides an attorney with four options: (1) provide service only in areas in which the attorney has demonstrated competence, (2) learn the area of law without billing the client for the time it takes to acquire knowledge and develop competence, (3) associate with an attorney who has expertise in the area, or (4) decline the case and refer it to an attorney with expertise in the area.

Practicing in the area of estate planning requires an understanding of the complexity of property law rights; federal estate, gift, and generation-skipping transfer tax rules; Medicaid rules and regulations; as well as business and creditor laws. Some examples may help demonstrate the pitfalls for an unwary attorney and his or her clients. Not properly planning to minimize estate taxes can result in a large portion of a wealthy individual's estate going to the federal government, rather than the intended beneficiaries. Eligibility for Medicaid is often a greater concern for older clients than is the avoidance of estate tax. For example, a home owned directly by its resident is not a countable asset for Medicaid, but a home owned by a trust is; thus, placing a home in a trust to avoid probate could disqualify an individual from receiving Medicaid benefits. (Yet, in some situations, placing the home in a revocable living trust may be beneficial for the Medicaid applicant's spouse for purposes of determining the community spouse's resource allowance.) The federal Deficit Reduction Act of 2005[2] places draconian penalties on gifting.[3] For example, putting gifting powers in a power of attorney can disqualify the principal from receiving Medicaid for significant periods if these powers are ever used.

Creditor issues are also a concern. The debt carried by older individuals has dramatically increased. Certain estate-planning techniques that might make sense to avoid income or estate taxes may actually increase exposure to creditors during life or after death, and could amount to fraudulent transfers.

Failing to advise clients of these issues and how to plan accordingly can have disastrous consequences. Attorneys who desire to become skilled in the area of estate planning have ample resources to do so. The Institute of Continuing Legal Education (ICLE) and the Probate and Estate Planning, Taxation, and Elder Law and Disability Rights sections of the State Bar provide in-person and online training, comprehensive resource websites, and numerous practice manuals. ICLE also offers a certificate program in probate and estate planning.

Defining the Unauthorized Practice of Law

While preparation of estate-planning documents is clearly the practice of law, the unauthorized practice of law (UPL) must be put in context. Preparing a will is an activity that individuals are permitted by law to perform on their own behalf; however, persons who represent themselves generally do a poor job.

Many courts have held that only licensed attorneys can perform certain tasks on behalf of another person and that any non-attorney who does so is engaged in UPL. MCL 600.916 is the general UPL statute, while MCL 450.681 forbids the practice of law by corporations and voluntary associations.

There is no statutory definition of the practice of law in Michigan. The State Bar of Michigan's definition is:

> When a person or company says or does something on behalf of another person that involves legal discretion or making a decision about legal matters, that is the practice of law. It is the unauthorized practice of law for a person to exercise legal discretion on behalf of another person, or practice law for another person, when they are not legally authorized to do so.[4]

Further, in *Dressel v Ameribank,* the Michigan Supreme Court held "that a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge."[5]

Many individuals and entities have been enjoined from various activities that constitute UPL. These activities include selling living trusts for $3,000;[6] "preparing or typing wills or trust instruments;"[7] "counseling, advising or giving legal assistance in the drafting of wills;"[8] selecting legal forms on behalf of clients;[9] and "offering orally or in writing any explanation, summaries or similar statements and documents containing legal advice."[10]

Despite the successes in the State Bar's effort to stop UPL, difficulties arise in applying a UPL analysis in concrete situations. While selling forms or do-it-yourself estate-planning kits is not UPL, giving advice about which forms to use and how to complete them may constitute UPL. It is often difficult for the State Bar and law enforcement to meet the required burden of proof that advice was given. If the facts demonstrate that a company purporting to offer scrivener services actually gives advice and tailors a document to meet the needs of a particular customer, that is likely sufficient to establish UPL.

Unauthorized Practice of Law and Estate Planning

The explosion of UPL in the area of estate planning stems in part from the once-complicated and convoluted probate procedures (which have now been replaced with much simpler and easier practices in this state) that gave rise to books such as *How to Avoid Probate,* first published by Connecticut Attorney Norman Dacey in 1966. This and subsequent publications have preyed on the public's concerns that they will lose their hard-earned money through the onerous costs of the estate tax or probate. Trust mills and unscrupulous individuals perpetuate the public's misconceptions and use the easy availability of electronic documents through the Internet to position themselves as an alternative to attorneys portrayed as trying to cheat or overcharge the general public.

Ironically, these non-attorneys sometimes charge higher fees than attorneys. In addition, their advice could jeopardize the financial security of clients—in part because these non-attorneys do not have the ethical obligations to safeguard their client's interests or the training in the complex legal and tax issues involved in proper estate planning. The potential legal and financial risks of documents prepared by non-attorneys include, but are not limited to:

- Cookie-cutter trusts that are not individualized to meet the needs of the client.
- Trust provisions that follow the law of a different state and may not comply with the requirements of Michigan law.
- If assets are not transferred into a trust, probate of the decedent's assets is not avoided.
- Free estate planning is a method to entice customers to purchase annuities or other financial products that may jeopardize, rather than safeguard, their financial security.
- Trusts can make low-income individuals ineligible for Medicaid, which they may need to pay for long-term care.
- If not properly drafted, special-needs trusts can cause beneficiaries with disabilities to lose, rather than preserve, essential government benefits such as Medicaid.
- Funding a trust with a personal residence owned in tenancy by the entirety can destroy critical creditor protection.
- Funding a trust with retirement benefits can result in significant income-tax liability.

Many non-attorneys and the businesses they operate have been enjoined from preparing estate-planning documents because these and other practices have harmed their customers. Recently, the State Bar negotiated an injunction in Kent County against a We the People franchise, which advertises itself as a document preparation service.[11] The company prepared a special-needs trust for an individual with a disability, which would have led to significant harm if it had been implemented as written. In the consent decree, the company was enjoined from, among other things, "[p]roviding oral or written legal advice to anyone in Michigan, including without limitation, providing advice regarding law, rules, regulations or practices affecting the legal rights of anyone in Michigan;" "[c]onstruing or interpreting the legal effect of Michigan or federal laws and statutes;" "[s]electing or recommending legal forms or documents;" and "[p]reparing or completing or assisting in the preparation or completion, of legal forms or documents."[12] However, the company and its owner were allowed to provide legal forms to individuals and entities if a variety of legal forms were provided and no guidance was given as to which form to select or how to complete the form.

Traps for the Unwary Attorney

An attorney's collaboration or association with a trust mill can be disastrous and unethical. Many trust mills attempt to protect themselves by hiring an attorney on staff or contracting an attorney for a small fee to "bless" the transaction. An attorney who enters into such an arrangement, but who has no role in preparing documents or advising clients, is almost assuredly engaged in ethical violations. An attorney's ethical duty to zealously represent clients and offer independent advice (MRPC 1.1, 1.3, and 2.1) is impossible to accomplish when an attorney does not meet with the clients individually, ascertain their goals and needs, and examine the documents carefully to determine if they serve the clients' needs.

For a complete discussion of these violations, see Victoria Kremski's article, entitled "Focus on Professional Responsibility—Ethical Ramifications for Michigan Attorneys Involved with Will and Trust Kit Sales Companies," in the May 2000 *Michigan Bar Journal*.

Kremski's article describes the ethical requirements quite well. Ethics opinion RI-128 notes that an attorney must meet with a client and cannot rely on information provided by a non-attorney. While ethics opinion RI-191 addressed a situation in which an attorney was essentially running a trust mill, the opinion addresses the ethical obligations of attorneys who play a smaller role in trust mills. These opinions include the following prohibitions: (1) attorneys cannot engage in activities that encourage the offering of legal advice by non-attorneys; (2) attorneys cannot delegate the formation of attorney-client relationships to non-attorneys; (3) an attorney cannot participate in plans in which clients are solicited in a manner that the attorney could not ethically engage in directly; (4) an attorney cannot pay fees (except actual advertising costs) for solicitation.

It is critically important for attorneys to recognize that they have a legal duty under MRPC 2.1 to examine documents carefully to see if they meet the client's needs and desires.

Ethics opinion RI-128 does not elaborate on the minimum contacts an attorney must have in representing a client. It is questionable if a single phone call (or e-mail exchange) is sufficient. The safest way to avoid ethical problems is to meet with the client before the documents are executed.

It is critically important for attorneys to recognize that they have a legal duty under MRPC 2.1 to examine documents carefully to see if they meet the client's needs and desires. It is likewise important to recognize the risk of malpractice claims. If the documents are unsuitable, the fact that the attorney did not draft the documents is not a defense. See ethics opinion RI-298. If an attorney's name is associated with the document, that attorney remains liable for any deficiency. This, of course, is one reason why many attorneys are loath to prepare amendments to estate plans. It is generally less risky—and more cost-effective for the client—for the attorney to prepare a new plan. An attorney has a duty to examine the entire document, and an attorney who amends a document could be held liable if the remaining portions of the document cause problems for the client.

Identifying and Reporting UPL

Practice in the area of estate planning requires legal discretion and extensive knowledge in many aspects of the law. Non-attorneys are not qualified to provide estate-planning services, and doing so is UPL. The result is individuals who have estate-planning documents that likely don't meet their needs, cost too much, and that may place them in financial jeopardy. "[T]here is growing evidence of widespread scams and other fraudulent activity in this area, particularly aimed at vulnerable low income older people."[13] This exploitation can be stopped by public education and by reporting individuals and entities engaged in these practices to the State Bar and law enforcement authorities.

Attorneys are often confronted with UPL situations when clients come to them seeking a remedy for documents they obtained from non-attorneys. As an attorney, it is a good idea to report or encourage your clients to report a possible UPL situation to the State Bar—even if you do not know all of the facts and cannot be sure that UPL has occurred. Bar staff can compile the information and possibly refer it to other agencies. Typically,

the State Bar Commissioners authorize legal action for an injunction only if there is proof of actual harm to a real victim, but a long string of complaints against a non-attorney or business makes pursuing an action easier. Comprehensive information on UPL is available on the State Bar website at http://www.michbar.org/professional/upl.cfm. ■

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FOOTNOTES

1. *Detroit Bar Ass'n v Trust Co,* 282 Mich 216, 223; 276 NW 365, 367 (1937).
2. PL 109-171, 120 Stat 4.
3. Michigan's implementing rules were not promulgated at press time.
4. State Bar of Michigan, *Unauthorized Practice of Law* <http://www.michbar.org/professional/upl.cfm> (accessed September 2, 2007).
5. *Dressel v Ameribank,* 468 Mich 557, 569; 664 NW2d 151, 158 (2003).
6. See State Bar of Michigan, *Permanent Injunctions* <http://www.michbar.org/professional/injunctions.cfm> (accessed September 2, 2007) (describing the permanent injunction entered against Ronald Bess in the Branch Circuit Court, Case No. 97-12-769). The website also describes other injunctions related to UPL.
7. See *id.* (describing the permanent injunction entered against Christian Memorial Cultural Center in the Oakland Circuit Court, Case No. 76-144703-AZ).
8. See *id.*
9. See *id.* (describing the permanent injunction entered against Garland R. Grazier in the Shiawassee Circuit Court, Case No. 004655-CZ).
10. See *id.*
11. State Bar of Michigan, *State Bar Acts to Protect Public from the Unauthorized Practice of Law* <http://www.michbar.org/news/releases/archives07/sbm_upl.cfm> (accessed September 2, 2007).
12. *State Bar of Michigan v We the People USA, Inc,* unpublished order of the Kent Circuit Court, entered December 18, 2006 (Case No. 06-11883-CZ).
13. Elder Web, *Senate Committee Investigates Living Trust Scams,* <http://www.elderweb.com/home/node/1808> (accessed September 2, 2007).