0&7 w/app

FILED
SID J. WHITE
DEC 18 1991
CLERK, SUPREME COURT
By Chief Deputy Clerk

1-7-92 40pp 53w/app.

IN THE SUPREME COURT OF FLORIDA

IN RE: THE FLORIDA BAR
ADVISORY OPINION -- NONLAWYER
PREPARATION OF LIVING TRUSTS
_______________________________/

CASE NO. 78,358

ANSWER BRIEF OF THE STANDING COMMITTEE ON UNLICENSED PRACTICE OF LAW

Joseph R. Boyd, Chair
Standing Committee on UPL
Fla. Bar #179079
Lori S. Holcomb, Assistant
UPL Counsel
Fla. Bar #501018
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida
32399-2300
(904) 561-5600

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES iii

TABLE OF ABBREVIATIONS v

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. ADOPTION OF THE PROPOSED ADVISORY OPINION IS IN THE PUBLIC INTEREST 5

A. Nonlawyer Preparation Of A Living Trust Constitutes The Unlicensed Practice Of Law 5

1. Gathering the information 7

2. Assembly of the document and review with the client 9

3. The proper execution of the documents 11

4. Funding of the trust 11

B. The Record Contains Adequate Evidence Of Public Harm Upon Which To Base An Opinion 15

1. The record below 15

2. The record contains ample evidence of public harm 18

3. Regulation is in the public interest 23

II. CONSTITUTIONAL RIGHTS ARE NOT VIOLATED BY THE PROPOSED ADVISORY OPINION 28

A. The Proposed Advisory Opinion Does Not Violate An Individual's Right To Contract 28

page

B. Adoption Of The Proposed Advisory Opinion Does Not Violate First Amendment Rights.....29

C. Adoption Of The Proposed Advisory Opinion Does Not Violate The Commerce Clause........31

CONCLUSION.. 33

CERTIFICATE OF SERVICE.................................. 34

APPENDIX.. A-1

TABLE OF ABBREVIATIONS

The following abbreviations will be used in this brief:

CPA(s)	=	Certified Public Accountant or the following interested parties: American Institute of Certified Public Accountants; Florida Institute of Certified Public Accountants; Arthur Andersen & Co.; Coopers & Lybrand; Deloitte & Touche; Ernst & Young; KPMG Peat Marwick; and Price Waterhouse
FALU	=	Florida Association of Life Underwriters
FBA	=	Florida Bankers Association
FLT	=	Family Living Trusts, Inc. of Florida
interested parties	=	the individuals who requested leave to appear
living trust companies	=	nonlawyers who are currently in the business of selling and drafting living trusts
LTA	=	Mid-America Living Trust Associates, Inc.; National Family Trusts; Living Trusts America
opinion	=	proposed formal advisory opinion of the Standing Committee on Unlicensed Practice of Law
Standing Committee or committee	=	Standing Committee on Unlicensed Practice of Law
Trust Law Section or Section	=	Real Property, Probate & Trust Law Section of The Florida Bar

TABLE OF AUTHORITIES

CASES page

Cayned V. City of Rockford. 408 U.S. 104 (1972)............29

Goldfarb v. Virqinia State Bar. 421 U.S. 657 (1975)........31

People v. Macy. 789 P.2d 188 (Colo. 1990)..................7. 10

People v. Schmitt. 251 P.2d 915 (Colo. 1952)...............7

People v. Volk. 805 P.2d 1116 (Colo. 1991).................6.10. 22

State ex rel. Fulton v. Ives. 167 So. 394 (Fla. 1936)......28

State ex rel. The Florida Bar v. Sperry.
140 So. 2d 587 (Fla. 1962)................................ 32

The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselors.
518 So.2d 1270 (Fla. 1988)................................ 18. 23

The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselors.
547 So.2d 909 (Fla. 1989)................................. 20.21. 24

The Florida Bar re: Advisory Opinion -- Nonlawyer Preparation of Pension Plans, 571 So.2d 430 (Fla. 1990)...................5.30. 31

The Florida Bar v. Consolidated Business and Legal Forms. Inc.,
386 So.2d 797 (Fla. 1980)................................. 9. 10

The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980)........29.30. 32

The Florida Bar v. Raymond James & Assoc., Inc.,
215 So.2d 613 (Fla. 1968)................................. 8

page

The Great Atlantic & Pacific Tea Co. v. Cotrell, 424 U.S. 366 (1975) 31

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 30

FLORIDA STATUTES

Fla. Stat. 5454.23 28

RULES REGULATING THE FLORIDA BAR

Rule 10-1.1(b) 25

Rule 10-7.1(a) 4

Rule 10-7.1(e) 3

Rule 10-7.1(f) 4

OTHER

Financial Services Marketing: Proven Techniques for Advertising, Direct Mail and Telemarketing, Hartford Beitman (1990) 26

Florida Ethics Opinion 89-5 12,13

Report of The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida (1991) 25

Report of the Supreme Court Committee on HRS Nonlawyer Counselors (1989) 21,24

STATEMENT OF THE CASE AND OF THE FACTS

Many of the interested parties did not include a Statement of the Case and of the Facts in their initial brief. A few used the opportunity to set forth an argument rather than a statement as to the nature of the case and the course of the proceedings. The Standing Committee therefore sets forth the following Statement of the Case and of the Facts for this Court.

On August 1, 1991 the Standing Committee on Unlicensed Practice of Law filed a proposed advisory opinion with this Court. The opinion addresses the following question:

> Whether it constitutes the unlicensed 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 and the completed documents are reviewed by a member of The Florida Bar prior to execution.

Following the filing of the opinion, this Court granted leave for the following parties to appear and file comments: Family Living Trusts Inc., of Florida; Florida Association of Life Underwriters; Mid-America Living Trust Associates, Inc.; National Family Trusts; Living Trusts America; HALT; Florida Bankers Association; American Institute of Certified Public Accountants; Florida Institute of Certified Public Accounts; Arthur Andersen & Co.; Coopers & Lybrand; Deloitte & Touche; Ernst & Young; KPMG Peat Marwick; Price Waterhouse; Jimmy K & Associates; and The Real Property, Probate and Trust Law Section of The Florida Bar. On or about October 10, 1991 the Standing Committee entered into a

stipulation with the CPAs regarding the scope and application of the proposed advisory opinion. A similar stipulation was entered into with the FBA on or about October 11, 1991. The stipulations are filed with this Court and attached to the briefs of those parties. With the exception of Jimmy K & Associates, all parties filed briefs. In addition to the arguments set forth below, the Standing Committee adopts the brief filed by the Trust Law Section.

SUMMARY OF THE ARGUMENT

The testimony received by the Standing Committee, both at the hearings and through the written testimony, shows public harm and the potential for public harm due to nonlawyer preparation of living trusts. The testimony also shows the need for regulation in this area to protect the public. There can be no doubt that the process involved in the preparation and assembly of a living trust constitutes the practice of law. The public will therefore be protected by a finding by this Court that the preparation of a living trust by a nonlawyer constftutes the unlicensed practice of law and by adoption of the proposed formal advisory opinion.

The record before this Court is more than sufficient to find public harm and to support a finding of unlicensed practice of law. The Standing Committee received testimony from representatives of living trust companies, representatives of customers of living trust companies, a consumer group and attorneys who practice in this area. Specific instances and examples of harm were given as were examples of potential harm had the mistake not been discovered and corrected by an attorney. The harm in this area is still occurring and being discovered. The need for regulation, a need expressed by almost all who testified, can be met by adoption of the opinion or direction by this Court.

The Constitution of the United States does not stand as a roadblock to the adoption of the proposed advisory opinion. Adoption of the proposed advisory opinion would not violate an

individual's right to contract, First Amendment rights or the Commerce Clause.

ARGUMENT

I. ADOPTI N OF THE PR POSED ADVIS RY OPINION IS IN THE PUBLIC INTEREST.

Many of the parties cite this Court's order in The Florida Bar re: Advisory Opinion -- Nonlawyer Preparation of Pension Plans, 571 So.2d 430 (Fla. 1990) and urge the Court to focus on the need for protection and regulation. The Standing Committee also urges this Court to do the same. By focusing on the need for protection and regulation it is clear that adoption of the proposed advisory opinion is in the public interest.

A. Nonlawyer Preparation Of A Living Trust Constitutes The Unlicensed Practice Of Law.

The only parties which attempted to dispute the committee's finding that the activities of nonlawyers as described in the proposed advisory opinion constitute the unlicensed practice of law are those that are currently in the business of selling and drafting living trusts (hereinafter "living trust companies''). Even those parties agree that the trust must be drafted by an attorney. Initial brief of LTA, p. 9; Initial brief of FLT, pp. 10-11. There is some disagreement as to the other steps involved in the process. However, the arguments advanced by the living trust companies do not provide any basis for this Court to find that the activities described in the proposed advisory opinion are not the unlicensed practice of law.

Before discussing the specific steps in the process, the Standing Committee wishes to point out that at least one other court was faced with the same issues currently before this Court although in a different context.

The Supreme Court of Colorado has on several occasions faced the issue of an attorney's involvement with **a** living trust company in the context of **a** disciplinary proceeding. **The** moat recent **case** involved a disciplinary action brought against attorney Volk for her participation in a scheme identical to those considered by the Standing Committee **and** before this Court. People v. Volk, **805** P.2d 1116 (Colo. 1991). Volk **was** hired by a living trust company to review living trusts which were drafted by a suspended attorney. The living trust company used salesmen to sell the trusts door-to-door and at senior citizen centers. The completed application was brought to the home office where the trust was prepared. Attorney Volk then reviewed the trust in light of the application and **sent a** form letter to the customer with the trust, quit claim deeds and instructions on implementation. Volk received $50.00 per trust from the living trust company.

The living trust company for whom Volk worked had been investigated previously by the **Colorado** Unauthorized Practice of Law Committee. In fact, the attorney who **was** drafting the trusts

---

[1]For the convenience of the Court, a copy of the Colorado cases are attached hereto in Appendix "A."

was suspended because of his involvement with the company. People v. Macy, 789 P.2d 188 (Colo. 1990). The UPL Committee found that the creation, counseling and sale of living trusts by nonlawyers constituted the unauthorized practice of law. Volk did not dispute this point. As Volk, like Macy, had aided in the unauthorized practice of law by reviewing the trusts, she was disciplined by the Supreme Court of Colorado.

The Volk case was based on a 1952 case involving charges of unlicensed practice of law against a nonlawyer. People v. Schmitt, 251 P.2d 915 (Colo. 1952). There, the Supreme Court of Colorado agreed with the referee that the nonlawyer was engaged in the unlicensed practice of law by giving legal advice regarding the advisability of having a living trust and providing a trust to his customers. A similar finding is warranted by the record before this Court.

1. Gathering the information.

The first area of disagreement is in the gathering of information. While taking factual information in and of itself may not constitute the practice of law, the taking of the information in this case cannot be viewed in a vacuum. The information is not merely taken by the nonlawyer, it is then used to determine what type of trust the individual should have and to draft the trust. If the proper information is not taken, a practice which is borne out by the testimony, a proper document is not prepared. Tab 5;

Jan. Tr, pp. 34-40. Seeming to recognize the potential for harm if the correct information is not taken or transmitted, the LTA brief states that "when dealing with reputable living trust companies" the information taken by the nonlawyer is reviewed by a local attorney who contacts the client. The testimony of LTA itself shows that this is not the case. At the January public hearing a representative of LTA testified that although the customer is told to seek the services of independent counsel, he receives a completed trust package, and therefore, is not required to do so. Jan. Tr, pp. 11-12, 24-25. Certainly when the information gathered is applied to an individual's specific legal situation and problem, the conduct becomes the practice of law. The Florida Bar v. Raymond James & Assoc., Inc., 215 So.2d 613 (Fla. 1968) (Applying facts to a specific legal situation constitutes the practice of law.)

As to the concerns of FALU, the Standing Committee is unclear as to how the gathering of information necessary to prepare a living trust falls within the scope of a life insurance agent's license. As pointed out by FALU, living trusts are not an insurance product, and therefore, the sale of a living trust is not regulated. Initial brief of FALU, p. 5. As the underwriters may not legally sell a living trust, it is not clear why life insurance agents would be involved in gathering the information necessary to complete a living trust. One concern of the committee, and presumably FALU, is that life insurance agents and other insurance agents are using their license to get their foot in the door and

sell a living trust. Tab 5. Although the use of a license in such a manner would appear to be unethical, the activity is beyond the regulation of the Department of Insurance as the agent is not selling an insurance product. It is this type of conduct that the committee hopes to avoid and/or regulate by this Court's adoption of the proposed advisory opinion.

2. Assembly of the document and review with the client.

Although the living trust companies agree that an attorney should draft and assemble the trust documents and review them with the client, there is some disagreement as to the role of the attorney. LTA argues that the document should be assembled and reviewed by an attorney or someone working under the attorney's supervision while FLT advocates a two tiered system with an attorney for the company and an independent attorney. Initial brief of LTA, pp. 9-10; Initial brief of FLT, pp. 11-12. The Standing Committee has concerns with each position.

As to the position of LTA, it is the concern of the committee that the attorney under whom the nonlawyer is working is an attorney for the living trust company rather than the attorney for the customer/client. Although raising many ethical concerns, the conduct would also be the unlicensed practice of law as the nonlawyer corporation is providing the legal services and dictating the activity of the attorney. The Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So.2d 797 (Fla. 1980). If LTA

is speaking only in terms of a lay employee of a law office independently hired by the customer, the same concerns would not come into play. [2]

The proposal of FLT raises the same problems. If there is a corporate attorney who is providing the legal services for a customer of the corporation, the corporation is involved in the unlicensed practice of law. The Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So.2d 797 (Fla. 1980). The corporate attorney's client is the corporation, The corporation is not the party who is using the trust, and therefore, the attorney is providing legal services to a third party through the corporation. The situation is therefore similar to that in Consolidated Business and Legal Forms, supra and constitutes the unlicensed practice of law. See also People v. Volk, 805 P.2d 1116 (Colo. 1991); People v. Macy, 789 P.2d 188 (Colo. 1990).

Finally, as recognized by FLT, using any attorney is not sufficient. Initial brief of FLT, pp. 10-11. The attorney must be licensed and in good standing with The Florida Bar.

---

[2] LTA argues that "reputable living trust companies" make attorney review their regular practice. The testimony of LTA's representative does not bear this out. Attorney review of an LTA document is optional and up to the customer. Jan. Tr, pp. 24-25.

3. The proper execution of the documents.

The living trust companies argue that execution of the trust documents does not require legal skill. Although the Standing Committee agrees that it is a ministerial act, in somewhat goes hand-in-hand with attorney review of the document. The proposed advisory opinion does not require an attorney's participation in this step but recommends an attorney's supervision. This can easily occur during the review stage with the attorney explaining what needs to be signed and how. Since the attorney will also have some contact with the trust after it comes into existence, the attorney can check the document to make sure that all signatures are in place. As pointed out by FLT, this process also insures attorney review as to the competency of the parties. Initial brief of FLT, p. 15. Therefore, although it does not require legal skill to sign your name to a piece of paper, legal supervision is an additional safeguard for the consumer.

4. Funding of the trust.

One point made throughout the FLT brief is that the decisions in this area are that of the client. The client decides whether a trust is needed, the client executes the documents and the client funds the trust. While the Standing Committee does not dispute this point, in most cases the client is operating upon the advice of someone. It is the position of the Standing Committee that in

all areas, including funding, advice and services which are legal in nature must be provided by a member of The Florida Bar.

At the outset the Standing Committee wishes to stress that the opinion does not foreclose nonlawyer participation in the funding of the trust. Many of the decisions of what assets to use to fund the trust are financial. Consequently, the Standing Committee has no objection to a life insurance agent selling life insurance which may be used to fund the trust. Certainly this is within the activities licensed and regulated by the Department of Insurance. Nor does the committee object to a life insurance agent or other nonlawyer advising that a certain product should go into a trust from a financial standpoint or, as evidenced by the stipulations filed with this Court, to a CPA or bank trust officer providing funding information and advice on funding from a financial standpoint. The opinion of the committee does not stand for the proposition that financial advice cannot be rendered by a financial expert. However, legal advice must be rendered by someone licensed to provide legal advice and services.

The Standing Committee will not reiterate the arguments made by the Trust Law Section in response to the brief of LTA. As stated earlier, the committee adopts the brief of the Section. Nevertheless, the committee does wish to distinguish the Ethics Opinion and case law cited by LTA.

LTA cites Professional Ethics Opinion 89-5 as an opinion issued by the Standing Committee. The opinion was issued by the Professional Ethics Committee of The Florida Bar and involves the

conduct of a Florida attorney. It finds that it would not be unethical for an attorney to allow a salaried nonlawyer employee to oversee a real estate closing in the attorney's office if certain conditions are met. The conditions include full disclosure to the client that a lay employee will be handling the closing and the client's consent, attorney supervision and review of all work up to closing, a determination by the attorney that the closing is only a ministerial act, availability of the attorney to answer any questions and a guarantee that the lay employee will not give legal advice.

Certainly the activity described in 89-5 is distinguishable from the activity proposed and conducted by the living trust companies -- funding of a living trust by a nonlawyer who has no relationship to an attorney or a law office. There is no disclosure and consent, no attorney supervision and no attorney available. The act is not ministerial as decisions as to what to put into the trust must be made. Ap. Tr, p. 50. The making of these decisions involve the giving of legal advice. Id. Moreover, not all of the assets which fund the trust involve real estate. As pointed out by FALU, life insurance is often used to fund a trust. Initial brief of FALU, pp. 3-4.

The arguments of FLT are similarly without merit. FLT argues that the funding is not even necessary for the trust to be in existence and than relates an incident, allegedly set forth in the testimony, of a trust which was left unfunded by an attorney. While it is true that a trust can exist without being funded, it is

a useless document that will not meet any of the expectations of the customer. It is much the same as having a car without an engine. It is still a car but it will not run. **As** to the trust which was left unfunded by the attorney, FLT did not provide a cite to this particular testimony. Assuming that it is true, the Rules Regulating The Florida Bar provide for some recourse against the attorney while no such recourse exists as to the nonattorney.

While the parties have failed to support their statement that the funding of a trust does not constitute the unlicensed practice of law, the opinion of the Standing Committee **sets** forth case law and testimony **as** to why a lawyer's participation is necessary in this area. Proposed Advisory Opinion **pp.** 20-23. [3] Again, the committee wishes to stress that this area is not exclusively that of the lawyer as many financial decisions are involved. However, the attorney may not be shut out of the process entirely. The client is best served when the attorney and nonattorney work together.

---

[3]**On** page **22** of the proposed advisory opinion the Standing Committee quotes written testimony regarding the use of a quit claim deed to make **a** conveyance into the trust. The undersigned has received comments from a few attorneys regarding this quote. Apparently, some attorneys disagree with the statement made by the witness. The Standing Committee informed the individuals, and wishes to stress to this Court, that the quote was included as an example of public harm, not **as** a statement of the law, That there has been some disaqreement and confusion shows the need for an attorney's participation in the funding process.

B. The Record Contains Adequate Evidence Of Public Harm Upon Which To Base An Opinion.

Most of the parties do not dispute the existence of public harm and the potential for public harm in this area although some argue that the evidence contained in the record is anecdotal **and** insufficient. Contrary to these assertions, the testimony shows that the harm is real and the need for regulation immediate.

1. The record below.

Due to the importance of the issue before the committee, two public hearings were held rather than one **as** required by the rules. Rule 10-7.1(f), Rules Regulating The Florida Bar. Notice of the first hearing was published in The Florida **Bar** News and the Tallahassee Democrat and, even though personal notice is not required, sent to various individuals and sections of The Florida Bar. Jan. Tr, **p. 4**. Although the rule only requires publication of the notice in The Florida Bar News and a newspaper of general circulation in Leon County, notice of the second hearing, which was held in Orlando, was published in The Florida Bar News, the Tallahassee Democrat, the Orlando Sentinel, the St. Petersburg Times and the Ft. Pierce Tribune. Ap. Tr, pp. **4**, 90; Rule 10-7.1(a), Rules Regulating The Florida Bar.

Contrary to the assertions of **LTA**, members of the public and individuals representing and working with living trust companies attended the hearings and supplied written testimony. In fact,

half of the witnesses at the hearings, including a representative of LTA, fall within **this** category. This does nat include the volumes of written testimony received by the committee. The industries involved were therefore given an opportunity to influence the decision of the Standing Committee and, more importantly, the decision of this Court. If testimony is lacking on any point, such as the background of living trust representatives as argued by LTA, it is certainly not the fault of the Standing Committee. Moreover, **as** to this point, the testimony received by the committee **shows** that no special background or qualifications are required. Jan. Tr, p. 34.

As the area of living trusts can be complicated, the Standing Committee elicited the assistance of Alan Woodruff to act as voluntary counsel to the committee. Mr. Woodruff has experience in the preparation of living trusts and was able to offer technical assistance. In this regard, Mr. Woodruff prepared **a** memorandum as a backdrop for the question presented. Tab ***8.*** Of the close to 1000 pages of testimony received by the Standing Committee, LTA points to this one memorandum to argue that the record before the committee was based on inaccurate information. Not only would Mr. Woodruff disagree, the memorandum was not used to "influence" the committee. It was merely prepared to educate the attorney and public members of the committee who have little or no experience in the preparation of living trusts. What influenced the committee

was the oral and written testimony which showed the great public harm occurring and about to occur in this area. [4]

After the hearings the committee discussed the testimony and voted to issue the proposed advisory opinion filed with the Court. LTA argues that the committee is operating under a conflict of interest, and therefore, the opinion fails to comply with Rule **10-7.1(e)** of the Rules Regulating The Florida Bar. Initial brief of LTA, **p. 27.** LTA seems to argue that because the committee has a majority of attorney members, any action of the committee would be a conflict. Clearly this argument has no merit. Carried to its logical extreme it would find a conflict of interest any time an attorney was involved in any judicial process, whether **as** advocate, litigant or judge. **As** to the participation of Gregory Keane, following the rules, Mr. Keane made a voluntary election not to vote on the matter although he stated that he would participate in the discussion. Jan. Tr, **pp.** 6-7. The committee did not show any objection to Mr. Keane's participation. As stated on the record, he did not vote although he asked **a** total of nine questions at the January hearing. He did not ask any questions at the April hearing. **As** for Robert Galamaga, he did not attend the January

---

[4] **The** Standing Committee wishes to note that in their argument regarding the inaccuracy of Mr. Woodruff's memorandum LTA discusses placing community property in the trust. Initial brief of LTA, **pp.** 25-26. LTA is obviously unaware that Florida is not a community property state. One can only imagine what the living trusts prepared by these companies contain in this regard.

hearing, elected not to vote at the April hearing and did not ask any questions. Ap. Tr, pp. 5-6. Such limited participation does not violate Rule 10-7.1(e) which states that "no action of the committee will be invalid where full disclosure has been made and the committee has not decided that the member's participation was improper."

2. The record contains ample evidence of public harm.

One issue tangentially before this Court in the present matter is what type of public harm must be shown in the advisory opinion process. The Standing Committee does not dispute the fact that "the paramount concern in defining and regulating the practice of law is the 'protection of the public from incompetent, unethical, or irresponsible representation'." The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselors, 518 So.2d 1270, 1272 (Fla. 1988). However, it is the position of the Standing Committee that advisory opinions differ from prosecutions, and therefore, specific examples of public harm are not necessary. Nevertheless, the record before this Court contains specific examples of public harm and the potential for public harm. Proposed Advisory Opinion, pp. 7-8.

Many of the parties argue that the evidence of public harm is anecdotal, and therefore, does not support the committee's findings. LTA argues that no offending parties were named, the harm was nonspecific in nature, the harm was only related by

attorneys and there was no testimony as to harm caused by attorneys. Initial brief of LTA, p. 23. These arguments are not supported by the record.

While it is true that much of the testimony was relayed by attorneys, the attorneys were not representing themselves. They were there to inform the committee of problems and abuses they have seen as a result of nonlawyer practice in this area. Although counsel for FLT would disagree that there was no testimony regarding mistakes by attorneys, if the record is void in this area it is because the question of attorney conduct was not before the committee.

Moreover, contrary to the assertion of LTA, names were named and specifics were given. For example, Mr. Dunn testified as to the harm suffered by Evelyn Gertrude Lewis because of the actions of William R. Pearson of Patrick Henry Family Living Trust, Inc. Tab 5. As to specific harm, Mr. and Mrs. David Goodman, customers of a living trust company, provided written testimony regarding an improperly prepared trust which contained provisions contrary to those requested (Tab 4, p. 16), Alan M. Gross, an attorney representing a customer of a living trust company, supplied written testimony that the trust prepared for his client would have resulted in the real estate being subject to probate (Tab 4, pp. 37-38), written testimony supplied by Richard A. Leigh relates a trust prepared by Family Living Trusts, Inc. which contained improper provisions as to the successor trustee (Tab 4, pp. 46-48), Louie N. Adcock, Jr. supplied written testimony regarding a trust

drafted for **a** husband and wife when the individuals were not married (Tab 4, pp.53-54), etc. (Although I could go on, I am bound by the **50** page limit. This information is all before this Court in the 996 pages of record submitted by the Standing Committee.) As demonstrated above, specific examples of public harm are contained in the record.

Throughout the brief, LTA states that the record contains only **3** examples of public harm. It is unclear as to how they reached this number as there are many more examples given in the opinion alone. LTA also states that there were no damages suffered because the individuals got a refund or the error was corrected. Initial brief of LTA, **pp.** 13-14. **The** refunds were received and the errors corrected because an attorney intervened and caught the mistake. What about all of the trusts in existence that have not been reviewed by an independent member of The Florida Bar? What about all of the mistakes that will not be discovered until the individual has passed away? Clearly damages have been and will be suffered if living trust companies are allowed to continue engaging in the unlicensed practice of law.

As to the evidence being anecdotal, the Standing Committee is not sure what type of evidence the parties would like. Although involving **a** different factual situation, the testimony of harm received by the Standing Committee at least equals, if not surpasses, that found by the ad hoc committee in The Florida Bar re: Advisory Opinion **HRS** Nonlawyer Counselors, **547** So.2d **909** (Fla. 1989) (hereinafter "HRS II"). There the evidence showed that

children were being harmed due to delays in the dependency process. Report of the Supreme Court Committee on HRS Nonlawyer Counselors, p. 23. Only part of the delay was attributable to nonlawyer representation in dependency matters. Id. Nonlawyer participation resulted in the quality of the pleadings prepared by the nonlawyers being "dismal" and the clients suffering harm through inadequate representation. Id. at 24, 37. Specific names were not given. The reasons for the child being in the dependency process were not revealed. The exact mistakes of the nonlawyers were not detailed. Yet the evidence was found to be sufficient to find that the "current HRS practice fails to provide competent, responsible representation" thereby leading this Court to adapt the Standing Committee's advisory opinion and enjoin HRS lay counselors for engaging in the practice of law. HRS II, 547 So.2d 909, 911 (Fla. 1989).

Like the HRS case, this opinion deals with matters which effect an individual's life. The present case involves children, the elderly, people's life savings and the wishes of an individual being carried out at death. Unlike the HRS case, the evidence here gives names and details the mistakes made by the nonlawyers and the harm that results from the mistakes. Certainly the evidence received by the Standing Committee in the present case is far from

anecdotal and more than sufficient to warrant a finding of public harm.[5]

Finally, the Standing Committee again draws this Court's attention to the decision of the Supreme Court of Colorado in People v. Volk, **805 So.2d 1116** (Colo. **1991)** attached hereto in Appendix **A**. In discussing the finding that the attorney aided the unlicensed practice of law by her association with the living trust company, the court noted that

> [n]o copy of the trust was presented to the board, and there was no expert testimony that the trust was defective or dangerous. There was also no evidence that any purchaser of the trust suffered actual harm. Nevertheless, the hearing board found, and we agree, that the potential for harm existed because of the manner in which [the nonlawyer's] system operated. The purchasers did not have access to competent legal advice with respect to the effects and risks of the living trust. The . . . lawyer apparently approving the trusts, had no contact with the purchasers.
>
> * * *
>
> Participation for profit in schemes by nonlawyess to sell so-called living trusts creates at least the potential for great public harm.

805 P.2d at **1118-1119.**

---

[5] A few parties suggest the appointment of an ad hoc committee similar to that appointed in the **HRS** case to further study the problem. The Standing Committee cannot see any benefit to the appointment of such a committee and seed harm in anything that would further delay regulation in this area.

3. Regulation is in the public interest.

HALT characterizes the proposed opinion **as** anti-consumer. Initial brief of HALT, p. **4**. To **the** contrary, the purpose of the proposed opinion is to seek some regulation in this area to protect the consumer. Currently the area is unregulated and the abuses are rampant. If anything is anti-consumer it is leaving the consumer open to the practices set forth in the opinion without recourse.

Both HALT and LTA attempt to argue that a mechanism for recourse **and** regulation **is** already in place through consumer protection laws and civil action in the courts. These mechanism only come into play after the fact, after the harm has occurred. **As** the harm in this area may not be realized until the statute of limitations on any action has long since passed, the consumer may never be able to take advantage of the limited benefits that exist. Coupled with this is the fact that many of the companies are operating out-of-state and, like the petitioner here, may be out of business by the time the harm is realized.

In The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselors, 518 So.2d 1270 (Fla. 1988) this Court was concerned **as** to whether enjoining the practice of **HRS** nonlawyer counselors appearing in dependency proceedings was the most effective

solution. [6] In the present case, the Standing Committee is not necessarily demanding an injunction although this would be the most complete solution. This Court may find that the practice is the unlicensed practice of law and suggest regulation of another type. The ad hoc committee in the HRS II case hoped that promulgation of an opinion by this Court would lead to legislative changes. Report of the Supreme Court Committee on HRS Nonlawyer Counselors, p. 25. The Standing Committee hopes the same will be true here. By recognizing the problem, the potential for public harm and the fact that the unlicensed practice of law is involved, this Court will be educating the consumer, the living trust companies and the State who may then act to curb the abuses in this area.

The recourse advanced by HALT and LTA puts the burden on the consumer. The regulation advanced by the Standing Committee puts the burden on the seller of the living trust, the one who is making a profit. By declaring the conduct the unlicensed practice of law, the seller is bound to change his practices to conform with the law. This will lead to some protection as many of the abuses seen by the committee and contained it the record will cease to occur. Should this Court decided that regulation of another type is warranted, the burden will again be placed on the living trust companies with all of the benefit falling on the consumer. Surely

---

[6] The practice was subsequently enjoined. The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselors, 547 So.2d 909 (Fla. 1989).

such a result can hardly be characterized as anti-consumer. To the contrary, any regulation in this area, whether from an unlicensed practice of law standpoint or otherwise, is in the public interest.[7]

Although the Standing Committee is advocating regulation, the committee is not advocating the adoption of a Supreme Court approved living trust. Rule **10-1.1(b),** Rules Regulating The Florida Bar; Initial brief of FLT, pp. **23-24.** The Standing Committee agrees with the Trust Law Section that "development of any 'generic' Trust form would be confusing and complicated to the public. The caveats, explanations, disclaimers, and completion instructions attendant to the form would overshadow its use by the public." Tab **3, p. 12. A** review **of** some of the living **trusts** and instruction sheets filed with this Court illustrates this point. Tab **5**, Tab 7, composites 7, 17, 19.

LTA argues that this Court must balance the harm that exists without regulation with the harm that exists with regulation.

---

[7] **HALT** and FLT also argue that the opinion is anti-consumer in that it does not meet the legal needs of the indigent. Although these concerns are valid in another context, they are somewhat inapplicable in the case at bar as very few indigents would have a need for **a** living trust. The report of The Florida Bar/Florida Bar Foundation Joint Commission on the Delivery of Legal Services to the Indigent in Florida (hereinafter "report") which is cited by both parties defines indigent based on the federal poverty level. Report, p. 16. For a family of **four** that amounts to $15,875.00 per year while for **a** single person it is $7,850.00 per year. **Id.** at 17. It is unlikely that these individuals would benefit by having a living trust.

Along these same lines, HALT argues that the committee did not take into account the benefits of nonlawyer involvement in the living trust area. There was no testimony in this regard and, in fact, the testimony is to the contrary. The testimony shows that the fees charged by the nonlawyer are often higher than the fees charged by an attorney. Tab 4, pp. 35-36; Ap. Tr, p. 105. Although nonlawyer involvement in this area does offer the option of a different service provider, if the service is not properly provided, the option is useless. As evidenced by the letter of Mr. and Mrs. Goodman, an individual can get very disgruntled if the services expected are not received. Tab 4, pp. 16-17.

As to the harm resulting from regulation, LTA speaks in terms of preventing living trust companies from "marketing" living trusts. "Marketing is simply the means by which you inform potential customers of the product or service you offer." Financial Services Marketing: Proven Techniques for Advertising, Direct Mail and Telemarketing, Hartford Beitman p. 3 (1990). The opinion does not prevent living trust companies from holding seminars and giving general information and, in fact, recognizes that this can be a benefit to the public if accurate information is given. Proposed Advisory Opinion, pp. 14-15. It is not the marketing that is the problem, it is the product or service offered. How can a nonlawyer sell a document allegedly prepared by an attorney without somehow giving legal advice or being involved in the provision of legal services? Initial brief of LTA, p. 20. How can an attorney ethically engage in such an arrangement? If

the nonlawyer living trust companies did not view the activity as the practice of law, than why would they go through the trouble and expense of involving an attorney in the process? Clearly the answers to these questions support the Standing Committee's opinion.

II. CONSTITUTIONAL RIGHTS ARE NOT VIOLATED BY THE PROPOSED ADVISORY OPINION.

Of all of the briefs filed with this Court, only one raises violation of the United States Constitution (hereinafter "Constitution") as grounds to reject the proposed advisory opinion. Unsupported by case law or example, LTA states that the opinion violates the constitution on several grounds. As demonstrated below, all of LTA's arguments are without merit.

A. The Proposed Advisory Opinion Does Not Violate An Individual's Right To Contract.

LTA's first constitutional argument is that the proposed advisory opinion violates a living trust company's right to contract. LTA makes a broad statement that adoption of the opinion would violate this right without explaining how or what contract. Presumably, the contract to which LTA refers is the contract between the living trust company and the customer. A review of the case law shows that this right is not implicated by the proposed opinion, and therefore, cannot be violated by its adoption.

The right to contract is not absolute and may be limited to prevent individuals from entering into illegal contracts or contracts that are not in the public welfare or against public policy. State ex rel. Fulton v. Ives, 167 So. 394 (Fla. 1936). Engaging in the unlicensed practice of law is a misdemeanor in Florida. Fla. Stat. S454.23. The reason for prohibiting the practice of law by those not licensed is to protect the public from

incompetent, unethical, or irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Therefore, any contract which would provide for activity which is the unlicensed practice of law, such as drafting a living trust, would not only be illegal but would also be against public policy and the public welfare. Hence, the ability to enter into such a contract may be limited without violating the Constitution.[8]

B. Adoption Of The Proposed Advisory Opinion Does Not Violate First Amendment Rights.

LTA's next constitutional argument is that the proposed opinion violates the First Amendment rights of freedom of speech and freedom of association. Both of these arguments have been raised in unlicensed practice of law cases in the past and rejected by this Court.

LTA does not specify whether personal or commercial speech would be violated by adoption of the proposed advisory opinion, however, as we are dealing with a business venture, it is safe to assume that their arguments refer to commercial speech. A similar

---

[8] Along with the statement regarding the right to contract, LTA argues that the opinion is void for vagueness and overbreadth. These standards are inapplicable as the opinion is not a statute or a statement of the law. Gayned v. City of Rockford, 408 U.S. 104 (1972); Rule 10-7.1(f)(3), Rules Regulating The Florida Bar. Moreover, the opinion is neither vague nor overbroad. Rather, it is specific in enumerating the activities involved and merely seeks a finding that the activities constitute the unlicensed practice of law.

argument was made in The Florida Bar re: Advisory Opinion -- Nonlawyer Preparation of Pension Plans, 571 So.2d 430 (Fla. 1990) and rejected by this Court. Just as it was rejected there, it must be rejected here. The commercial speech doctrine developed by the Supreme Court of the United States involves restrictions upon advertising and advertising related services. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The drafting of a living trust is not advertising, and therefore, does not constitute commercial speech. Moreover, the proposed advisory opinion leaves intact advertising or advertising related activities. Proposed Advisory Opinion, pp. 5-6.

LTA's arguments regarding a violation of the First Amendment freedom of association must also be rejected. That argument was raised in The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). In finding the argument without merit, this Court recognized that the decisions of the Supreme Court of the United States interpreting this right (the same decisions relied upon by LTA) speak in terms of the right to hire attorneys. "The [Supreme] Court [of the United States] speaks only to [an individual's] right to retain legal counsel to protect constitutionally guarded rights; at no point does the Court acknowledge a right to unfettered lay representation." 380 So.2d at 416. Therefore, any First Amendment sights which may exist will not be violated by adoption of the proposed advisory opinion.

C. Adoption Of The Proposed Advisory Opinion Does Not Violate The Commerce Clause.

LTA's final argument is that the proposed advisory opinion violates the Commerce Clause. As with the other constitutional arguments, this argument is not supported by the case law.

To support their argument, LTA relies upon Goldfarb v. Virginia State Bar, 421 U.S. 657 (1975). Rather than dealing with the Commerce Clause, Goldfarb involved an attack on antitrust grounds. As found by this Court in The Florida Bar re: Advisory Opinion -- Nonlawyer Preparation of Pension Plans, 571 So.2d 430 (Fla. 1990), adoption of a proposed advisory opinion issued in accordance with Rule 10-7 of the Rules Regulating The Florida Bar would not constitute an antitrust violation as it is state action. Therefore, any reliance on Goldfarb is misplaced.

Reliance on the Commerce Clause is also misplaced. The opinion is not a statute and does not prohibit interstate commerce. The opinion merely delineates activities which constitute the unlicensed practice of law. To the extent that living trust companies are engaging in other activities, they may continue to do so in Florida. Moreover, although the Constitution gives Congress the power to regulate interstate commerce, the States retain authority under the general police powers to legislate protection for their citizens in matters of local concern even if it in some way affects the flow of commerce. The Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S 366 (1975). As the reason for prohibiting the practice of law by those not licensed is

to protect the public, any regulation in this area would be proper under the general police powers for the protection of the public. The Florida Bar v. Moses, 380 So.2d **412** (Fla. 1980); State of Florida **ex** re. The Florida Bar v. Sperry, 140 So.2d **587** (Fla. 1962).

Finally, the Standing Committee wishes to point out that for the majority of their brief LTA argues that the conduct in question does not constitute the unlicensed practice of law. However, in arguing that the Constitution has been violated, LTA characterizes the services provided by living trust companies as legal services. It is difficult to see how it can be one and not the other.

CONCLUSION

The interested parties have failed **to** advance any reason to reject the Standing Committee's proposed advisory opinion. To the contrary, the arguments support **the** need for guidance and regulation. That the public is being harmed by nonlawyer activity in this area cannot be disputed. Harm is occurring now and will continue to occur without action by this Court. For **the** reasons advanced in the proposed advisory opinion and above, the Standing Committee on Unlicensed Practice of Law urges adoption of the proposed formal advisory opinion. Should this Court disagree with one portion of the opinion but agree with others, the opinion may be severed **as** needed. Should this Court decline to adopt the opinion, the Standing Committee on Unlicensed Practice of Law requests that this Court establish **a** regulatory scheme or encourage that one be developed. The need for action cannot be understated or ignored.

Respectfully submitted,

Joseph R. Boyd, Chair
Standing Committee on UPL
Fla. Bar #179079
Lori **S.** Holcomb, Assistant
UPL Counsel
Fla. Bar #501018
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida
32399-2300
(904) 561-5839

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail this 13th day of December, 1991 to the following individuals:

J. Robert McClure, Jr.
Post Office Drawer 190
Tallahassee, Florida 32302

Kenneth R. Hart
Post Office Box 391
Tallahassee, Florida 32302

J. Thomas Cardwell
Virginia B. Townes
Post Office Box 231
Orlando, Florida 32802

Joseph W. Fleece, Jr.
Post Office Box 330
St. Petersburg, Florida 33731

William H. Halker, Jr.
8925 Folsom Boulevard
Suite M
Sacramento, California 95826

Rohan Kelley
3365 Galt Ocean Drive
Ft. Lauderdale, Florida 33539

John C. Konarske
Post Office Box 1166
Zephyrhills, Florida 33539

Deborah M. Chalfie
1319 F Street, Northwest
Suite 300
Washington, D.C. 20004

David R. McCallister
Post Office Box 7343
Wesley Chapel, Florida 33543

Arthur England, Jr.
Charles M. Auslander
Fine, Jacobson et al.
100 Southeast Second Street
Miami, Florida 33131-2130

Lori S. Holcomb

APPENDIX A

Brennan which represents the $388 paid by Brennan to Combs minus the $88 filing fee.

We agree that under the American Bar Association's *Standards for Imposing Lawyer Sanctions,* a suspension in this case is appropriate. *See ABA Standards* 4.42 (suspension generally appropriate when lawyer knowingly fails to perform services for client and causes injury or potential injury). The respondent failed to attend or participate in the disciplinary hearing and presented no evidence in mitigation. No exceptions have been filed concerning the recommended discipline and we find that the proposed 45-day suspension is consistent with our case law. *See, e.g., People v. Chnppell,* 783 P.2d 838 (Colo. 1989) (45-day suspension imposed under similar facts).

Accordingly, we order the respondent Thomas L. Combs suspended from the practice of law in this state for a period of 45 days. The suspension shall become effective 30 days after the date of this opinion. C.R.C.P. 241.21(a). The respondent is further ordered to make restitution to John W. Brennan in the amount of $300 plus statutory interest from May 16, 1988. Within 30 days from the date of this order, the respondent is required to pay $145.84 in costs to the Supreme Court Grievance Committee, Suite 500 S, 600 17th Street, Denver, Colorado 80202-5435.

The PEOPLE of the State of Colorado, Petitioner/Cross-Respondent,

v.

Philip Leslie GALIMANIS, Respondent/Cross-Petitioner.

No. 88SC624.

Supreme Court of Colorado,
En Banc.

Feb. 19, 1991.

Prior Report: Colo.App., 765 P.2d 644.

ORDER OF COURT

Upon consideration of the Record on Appeal, together with the written and oral arguments of counsel, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writs of Certiorari shall be, and the same hereby are, DENIED as having been improvidently granted.

The PEOPLE of the State of Colorado, Complainant,

v.

Marie T. VOLK, Attorney-Respondent,

No. 90SA234.

Supreme Court of Colorado,
En Banc.

Feb. 25, 1991.

In a disciplinary proceeding, the Supreme Court held that aiding nonlawyers in the unauthorized practice of law warrants public censure,

So ordered.

1. Attorney and Client ⚷11(2)

Counseling and sale of living trusts by nonlawyers constitutes the "unauthorized practice of law." Code of Prof.Resp., DR 3-101(A).

See publication Words and Phrases for other judicial constructions and definitions.

2. Attorney and Client ⚷58

Aiding nonlawyers in the unauthorized practice of law warrants public censure. Code of Prof.Resp., DR 1-102(A)(1), DR 3-101(A).

COURT

... ecord on Ap-
n and oral
nd being suffi-
remises,

DERED that said
ition for Writs of
the same hereby
been improvident-

the State of
plainant,

ney-Respondent.

234.

Colorado,

991

ceeding, the Su-
ing nonlawyers in
of law warrants

11(2)

f living trusts by
e "unauthorized
f Prof.Resp., DR

s and Phrases
tructions and

58

he unauthorized
public censure.
1-102(A)(1), DR

Linda Donnelly, Disciplinary Counsel, John S. Gleason, Asst. Disciplinary Counsel, Denver, for complainant.

Alex Stephen Keller, Denver, for attorney-respondent.

PER CURIAM.

A hearing panel of the Supreme Court Grievance Committee unanimously approved the recommendation of the hearing board that the attorney-respondent receive a public censure for aiding nonlawyers in the unauthorized practice of law. The assistant disciplinary counsel has excepted to this recommendation as too lenient. We accept the recommendation of the panel that the respondent be publicly censured and assess her the costs of these proceedings.

I

The respondent was admitted to the bar of this court on May 19, 1982, is registered as an attorney upon this court's official records, and is subject to the jurisdiction of this court. C.R.C.P. 241.1(b).

The complaint filed by the assistant disciplinary counsel charged that the respondent violated DR 3-101(A) (a lawyer shall not aid a nonlawyer in the unauthorized practice of law); as well as DR 1-102(A)(1) (a lawyer shall not violate a disciplinary rule), and C.R.C.P. 241.6(1) (any act or omission which violates the Code of Professional Responsibility constitutes grounds for lawyer discipline). The respondent and the assistant disciplinary counsel entered into a joint unconditional stipulation of facts and admission of misconduct. In addition, the hearing board received exhibits, and listened to testimony presented by both sides on the issues of aggravating and mitigating factors. The board found that the following facts were established by clear and convincing evidence.

After receiving her license, the respondent practiced law in the public sector for four years, first as an assistant attorney general, then as an assistant county attorney. In 1988, the respondent began a solo private practice. In February or March of 1988, Charles J. Taylor, an insurance salesman and president of American National, Inc., hired the respondent to review "living trusts" sold to purchasers by nonlawyer sales representatives. Taylor is not a lawyer. This is not the first time that Taylor's living trusts have surfaced in a disciplinary proceeding before this court. *See People v. Macy,* 789 P.2d 188 (Colo.1990).

Between March and October of 1988, the respondent reviewed a number of living trusts for individuals at the request of American National, Taylor, and other nonlawyer sales representatives. The respondent considered the corporation to be her client, not the individual purchasers of the trusts. Based on what Taylor told her, the respondent believed that American National was an insurance company primarily serving customers in rural areas. The respondent thought that the living trusts she was to review were an ancillary service offered to the insurance company's customers. Taylor told the respondent that the living trusts had been prepared by an experienced attorney, Lloyd Macy, who had decided to retire.[1] Pursuant to a written agreement with Taylor, the respondent billed American National $50 for each trust she reviewed. She hoped and anticipated that she would be doing other legal work far the corporation. The respondent reviewed about twenty-five trusts for which she received approximately $850. Her final bill to American National was never paid.

Taylor hired a number of nonlawyer salesmen. The salesmen sold the trusts door-to-door and at senior citizen centers. A salesman would bring a completed application for a living trust to the office and information from the application would be keyed into the blanks in the living trust form. The customer was charged $400 to

1. Lloyd Macy was suspended from the practice of law for two years for his involvement with Taylor and the sale of these living trusts. See *People v. Macy,* 789 P.2d 188 (Colo.1990). The *Macy* opinion was released on April 2, 1990, after the hearing board in this case made its findings and recommendation.

$500 for the trust. Taylor testified in a deposition that his company made between $10,000 to $15,000 from selling the living trusts. The respondent then reviewed the completed trust, ensured that the information in the trust was consistent with the application, and directed any necessary corrections. The respondent then signed a form letter addressed to the individual purchaser, and enclosed the final trust document and related quitclaim deeds, along with instructions on how the trust should be implemented.?

The Unauthorized Practice of Law (UPL) Committee was investigating Taylor's operation as early as 1987. The respondent learned of the investigation when she was interviewed by the UPL committee's investigator in September 1988. She cooperated fully in that investigation. She questioned Taylor about the investigation and he stated that everything had been taken care of. The respondent severed her connection with Taylor and American National on October 8, 1988, when she heard a process server was in the office serving "supreme court papers." The grievance committee's request for investigation in this proceeding was sent to the respondent ten days later.

No copy of the trust was presented to the board, and there was no expert testimony that the trust was defective or dangerous. There was also no evidence that any purchaser of the trust suffered actual harm. Nevertheless, the hearing board found, and we agree, that the potential for harm existed because of the manner in which Taylor's system operated. The purchasers did not have access to competent legal advice with respect to the effects and risks of the living trusts. The respondent, as the lawyer apparently approving the trusts, had no contact with the purchasers.

II

[1] The respondent admitted that the counseling and sale of the living trusts by nonlawyers constituted the unauthorized practice of law. *See People v. Schmitt,* 126 Colo. 546, 555, 251 P.2d 915, 920 (1952) (the creation and sale of trust documents by nonlawyers constitutes the unauthorized practice of law). In reviewing the living trusts here, the respondent aided a nonlawyer in the unauthorized practice of law, contrary to DR 3-101(A). *Macy,* 789 P.2d at 189; *People v. Boyls,* 197 Colo. 242, 243, 591 P.2d 1315, 1316 (1979) (lawyer suspended for one year for aiding nonlawyer "educators" in marketing trusts similar to the living trusts in this case). Because the respondent violated DR 3-101(A), she also violated DR 1-102(A)(1) and C.R.C.P. 241.. 6(1).

[2] The hearing panel unanimously approved the recommendation of the hearing board that the respondent receive a public censure for her misconduct. As the assistant disciplinary counsel points out, suspension is generally prescribed for this type of conduct. Under the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1986) (*ABA Standards*), absent aggravating or mitigating circumstances, "[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system." *ABA Standards* 7.2. *See Macy,* 789 P.2d at 189.

In reaching the determination that public censure was appropriate, the hearing board found the existence of the following mitigating factors: (1) the absence of a prior disciplinary record, *ABA Standards* 9.32(a); (2) respondent's full and free disclosure to the UPL committee and the grievance committee and a cooperative attitude throughout the proceedings, *ABA Standards* 9.32(e); (3) respondent's inexperience in the practice of the type of law involved in this case, *ABA Standards* 9.32(f); (4) respondent's good character and

2. The form letter provided in part:

> This is a life planning document, It is not an income tax nor an estate planning document. It is designed only to avoid the costs and delay of probate.

The letters were signed "Marie T. Volk, Attorney-at-Law."

FSU LAW LIBRARY

the unauthorized
?eople v. Schmitt,
?.2d 915, 920 (1952)
›f [illegible] documents
›s [illegible] authorized
›viewing the living
›nt aided a nonlaw-
l practice of law,
). *Macy*, 789 P.2d
197 Colo. 242, 243,
)) (lawyer suspend.
g nonlawyer "edu-
ısts similar to the
se). Because the
3-101(A), she also
and C.R.C.P. 241.-

·l unanimously ap-
ion of the hearing
ıt receive **a** public
ıct. **As** the assist-
›oints out, suspen-
ed for this type of
·rican Bar Associa-
mposing Lawyer
Standards), ab-
litigating circum-
generally appro.
wi[illegible] engages in
n [illegible] duty owed
ıses injury or po-
the public, or the
ındards 7.2. *See*

nation that public
the hearing board
ıe following miti-
›sence of a prior
BA Standards
full and free dis-
nmittee and the
ı cooperative atti-
·oceedings, *ABA*
›spondent's inex-
f the type **of** law
4BA Standards
›od character and

ırie **T. Volk. Attor-**

reputation in the legal community, *ABA Standards* 9.32(g); (5) respondent's remorse, *ABA Standards* 9.32(*l*); and (6) respondent's voluntary imposition of an interim suspension by leaving the practice of law in Colorado and taking a paralegal position in Ohio pending the outcome of these proceedings, *ABA Standards* 9.32(k). In aggravation, the board found that the respondent had a selfish motive because she was receiving payments for review of the trust documents and hoped that the relationship would generate more legal business. *ABA Standards* 9.22(b).

The assistant disciplinary counsel reminds us that we suspended the lawyers in *Boyls* and *Macy* for aiding nonlawyers in the sale of trusts. We find those cases distinguishable. The lawyer in *Boyls* was significantly more involved than this respondent in the sale and marketing of the trusts, and there were aggravating factors present in *Macy*, including a prior history of discipline, that are absent in this case. Weighing the factors in mitigation against the seriousness of the misconduct, we conclude that public censure is an appropriate sanction.

III

Accordingly, we accept the recommendation of the hearing panel of the grievance committee and publicly censure the respondent Marie T. **Volk.** Participation for profit in schemes by nonlawyers to sell so-called living trusts creates at least the potential for great harm. Had actual harm to any of the purchasers of the trusts been documented, more severe discipline would have been imposed. We publicly reprimand Volk and assess her the costs of these proceedings in the amount of $553.75. The costs are payable within thirty days after the date of this opinion to the Supreme Court Grievance Committee, 600 Seventeenth Street, Suite 500-S, Dominion Plaza, Denver, Colorado 80202.

Joan Marie LEGO, Plaintiff-Appellant,

v.

Franz X. SCHMIDT Michael Baker; Peter Fryberger; Chris Kelly and John Doe I. John Doe II, John Doe III, whose true identities are presently unknown, Defendants-Appellees.

No. 89CA0733.

Colorado Court of Appeals,
Div. V.

May 24, 1990.

As Modified on Denial of Rehearing
Aug 23, 1990.

Certiorari Denied March 11, **1991.**

Pedestrian who was injured when vehicle knocked her down and ran **over** her foot on park road restricted to pedestrian use brought suit against driver and passengers. The District Court, Arapahoe County, Michael J. Watanabe, J., entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Davidson, J., held that: (1)even assuming that passengers had duty not to distract driver of motor vehicle, plaintiff was not entitled to recover on that basis, in absence of evidence suggesting that any of the passengers in fact distracted driver; (2) passengers had no duty to keep **a** look-out and give warning or intervene to prevent the accident; and (3) passengers were not negligent per se based on violations of municipal code sections restricting roads in mountain parks to pedestrian use.

Affirmed and remanded.

Dubofsky, J., specially concurred with opinion.

1. Automobiles ⚷198(1)

Assuming that passengers had duty not to distract driver of motor vehicle so as to endanger unreasonably the person or property of others, pedestrian who was injured when vehicle knocked her down and

The PEOPLE of the State of Colorado, Complainant,

v.

Lloyd W. MACY, Attorney–Respondent.

No. 90SA9.

Supreme Court of Colorado,
En Banc.

April 2, 1990.

Upon recommendation of hearing panel of Supreme Court Grievance Committee, the Supreme Court held that attorney aided nonlawyer in unauthorized practice of law by aiding nonlawyer in his sale of "living trust" packages, and two-year suspension was justified.

Suspension ordered.

1. Attorney and Client ⚷38

Attorney aided nonlawyer in unauthorized practice of law in violation of disciplinary rule by aiding nonlawyer in his sale of "living trust" packages. Code of Prof. Resp., DR 3–101(A).

2. Attorney and Client ⚷58, 59

Attorney's violation of disciplinary rule governing aiding nonlawyer in unauthorized practice of law by aiding nonlawyer in his sale of "living trust" packages justified suspension from practice of law for two years and assessment of costs; attorney had prior disciplinary record and substantial experience in practice of law, and his conduct involved pattern of misconduct. Code of Prof.Resp., DR 3–101(A).

3. Attorney and Client ⚷11(3)

Creation and sale of trust documents by nonlawyer constitutes unauthorized practice of law.

Linda Donnelly, Disciplinary Counsel, and John Gleason, Asst. Disciplinary Counsel, Denver, for complainant.

Lloyd W. Macy, Northglenn, pro se.

PER CURIAM.

This is an attorney discipline case in which a hearing panel of the Supreme Court Grievance Committee unanimously recommended that the respondent, Lloyd W. Macy, be suspended from practicing law for two years and be assessed the costs of the proceeding. We accept the panel's recommendation.

A hearing board of the grievance committee heard this matter, and a hearing panel approved the findings and conclusions of the hearing board. Macy elected not to file exceptions to the hearing panel's report. *See* C.R.C.P. 241.20(b)(2). The hearing board's findings and conclusions were based on the amended complaint, the allegations of which were admitted by Macy; documentary evidence; stipulations of the parties; and Macy's testimony before the hearing board.

I.

Lloyd W. Macy was admitted to the bar of this court on April 5, 1967. He is therefore subject to the jurisdiction of this court and its grievance committee in all matters relating to the practice of law. **C.R.C.P. 241.1(b).**

In 1986, Charles J. Taylor, who is not a lawyer, approached Macy for advice in connection with Taylor's desire to sell "living trust" packages to customers who wished to use them to avoid taxes or probate. In December of that year, Macy met with Taylor and reviewed a package of "living trust" documents prepared by Taylor for marketing through nonlawyer salespersons.

Taylor began selling "living trust" documents in January 1987. During the next several months, Macy reviewed several "living trust" packages prepared for individuals and answered questions addressed to him by nonlawyer salespersons regarding individual customers' concerns. Taylor paid Macy $75.00 per hour for his services.

II.

[1–3] Macy's conduct violated two provisions of the Code of Professional Respon-

sibility: DR 1-102(A)(1) (violating a disciplinary rule), and DR 3-101(A) (aiding a nonlawyer in the unauthorized practice of law). Aiding a nonlawyer in the unauthorized practice of law is a violation of a duty awed to the legal profession. *See* The American Bar Association's *Standards for Imposing Lawyer Sanctions* (1986) 7.0 (*"Standnrds for Lawyer Discipline"*). The creation and sale of trust documents by nonlawyers constitutes the unauthorized practice of law. ***People v. Schmitt,*** 126 Colo. 546, 251 P.2d 915 (1952). This court has suspended an attorney in the past for aiding a nonlawyer in marketing trusts to the public. *People v. Boyls,* 197 Colo. 242, 591 P.2d 1315 (1979).

The *Standards for Lawyer Discipline* prescribe suspension for this type of conduct when

> a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Standards for Lawyer Discipline 7.2. The *Standards for Lawyer Discipline* also suggest certain factors that aggravate or mitigate an attorney's misconduct and therefore increase or decrease the appropriate sanction. Several aggravating factors are present in this case. Macy has a prior disciplinary record, having received a letter of admonition in 1980 and a private censure in 1985. *See Standards for Lawyer Discipline* 9.22(a). Each was based on neglect in representing a client. Macy has substantial experience in the practice of law. *See id.* at 9.22(i). The evidence suggests that Macy may have acted out of a selfish desire to generate legal business for himself, rather than simply to receive legal fees from Taylor. *See id.* at 9.22(b). Macy's conduct constituted multiple offenses and a pattern of misconduct. *See id.* at 9.22(c) and (d). Finally, Macy's disciplinary record reveals that he has repeatedly made errors of judgment, and that the advice he gave customers of Taylor's "living trust" operation was in part patently erroneous. Both these latter factors reflect adversely on Macy's fitness to practice law, *see Standards for Lawyer Discipline* 9.1, and the grave risk of serious financial harm to purchasers of Taylor's trust documents makes his professional misconduct especially serious. *See Standards for Lawyer Discipline* 7.2.

In mitigation, Macy was very cooperative during the investigation and hearing of these disciplinary proceedings. *See Standards for Lawyer Discipline* 9.32(e). This mitigating factor, however, is outweighed by the aggravating factors already described.

The grievance committee has recommended that Macy be suspended for two years. In *People v. Boyls,* we suspended Boyls for one year for aiding a nonlawyer in the preparation and marketing of a form of trust. *Boyls,* however, was a case of first impression for this court and was decided more than ten years ago. Macy is presumed aware of our decision in that case, and therefore can make no credible claim that he was unaware that his conduct constituted aiding a nonlawyer in the unauthorized practice of law. Furthermore, as noted, a number of aggravating factors, including serious risk of severe adverse legal consequences to purchasers of the trust packages, are present.

III.

After reviewing the findings of the hearing board of the grievance committee and the length of suspension recommended by the committee, we conclude that suspension for two years is appropriate. It is hereby ordered that Lloyd W. Macy be suspended from the practice of law for two years, effective April 25, 1990. It is further ordered that Macy pay costs in the amount of $161.37 within thirty days of the date of this order to the Supreme Court Grievance Committee, 600 Seventeenth Street, Suite 500-S, Denver, Colorado 80202. Macy shall not be reinstated until he has complied with C.R.C.P. 241.22(b) and has paid the costs as ordered.

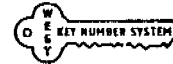
KEY NUMBER SYSTEM

ditch and water therefrom, or that any use was open, notorious, hostile or antagonistic to plaintiffs; that any use of the water from the ditch was wrong; and further, that at the time of the commencement of the injunction suit, S. F. Webster had no right, title or interest in the property involved.

The pleadings show that during the seventeen years or more that the Barrys were the owners, they took water from the ditch in question for more land than that to which the ditch stock applied; and if there was any breach of the covenant or warranty in the deed from defendant sugar company to them, it did not occur during their ownership of the land which they conveyed to the Dreher Pickle Company, to which it was decreed by the injunction suit that the water represented by the ditch company stock was an appurtenance. About one year after the conveyance from the Barrys to the Pickle Company, notice from the irrigation company, as hereinbefore mentioned, to the Barrys was delivered by Webster, one of the plaintiffs in error, to the manager of defendant company. Approximately eight months thereafter, the injunction suit was filed against the Barrys and notice of lis pendens was filed with the clerk and recorder of Larimer county. On July 1, 1946, the Barrys conveyed the balance of their land to Webster, who, it must be said, took with notice.

[1] The pleadings, supported by the affidavits and exhibits, disclose that Webster was not the owner and not in possession during the period when there was a breach of any alleged covenant about which complaint is made. When Webster accepted the deed from the Barrys, and when he conveyed to Williams, and Williams to Webster, with full notice of the pendency of the action and in face of the recorded lis pendens, they assumed the hazards of a possible adverse decree which would be determinative of the water rights in question. Buckhorn Plaster Co. v. Consolidated Plaster Co., 47 Colo. 516, 108 P. 27.

[2] Without further discussing other interesting questions presented, we are of the opinion, and so find, that no genuine issue of fact as to the water rights and the rights to the use of the water conveyed under the deed from defendant sugar company to the original grantees, or the subsequent grantees, remains; and it clearly appears that plaintiffs are barred by the judgment in the injunction suit to which they were parties. The decree in that suit construed and adjudicated defendant sugar company's deed to the Barrys. There being no issue remaining of a material fact to be tried, the motion for the summary judgment was properly granted; therefore the judgment is affirmed.



PEOPLE ex rel. DUNBAR, Atty. Gen. v. SCHMITT.

No. 16856.

Supreme Court of Colorado, en Banc.

Dec. 15, 1952.

Rehearing Denied Jan. 5, 1953.

Original contempt proceeding by the Attorney General charging defendant with unauthorized practice of law. The Supreme Court, Alter, J., held that evidence was sufficient to sustain referee's findings that defendant had engaged in the unauthorized practice of the law.

Defendant adjudged guilty.

Attorney and Client 11

In original contempt proceeding by Attorney General charging defendant with unauthorized practice of law, evidence was sufficient to sustain referee's finding that defendant had engaged in the unauthorized practice of law. '35 *C.S.R.* c. 14, § 21.

Duke W. Dunbar, Atty. Gen., H. Lawrence Hinkley, Deputy Atty. Gen., Frank A. Wachob, Asst. Atty. Gen., William Rann Newcomb, Special Asst. Atty. Gen., and Philip A. Rouse, Special Asst. Atty. Gen., for petitioner.

McDougal, Klingsmith & Rogers, Denver, for respondent.

ALTER, Justice,

This is an original proceeding brought in the Supreme Court of Colorado by the Attorney General in his official capacity, charging the respondent Schmitt, individually and as manager, with a violation of the provisions of section 21, chapter 14, '35 C.S.A., relating to the unauthorized practice of law.

When the charges had been answered and the cause was at issue, it was referred to Hon. Haslett P. Burke as referee to hear and report thereon.

The referee's report contains the following, inter alia:

"It is charged that, not being authorized thereto, defendant 'has hereinafter held and now holds himself out as being ready, willing and able to pass upon the creation of trusts and trust documents and to create such trust or trusts or cause such trust or trusts to be crested as would be legal in all respects and would save the trustor the necessity of making a will as well as the expense incident to the probating thereof, to relieve said trustor from transfer taxes as well as placing him in a more advantageous position in the distribution of profits to members of his family with a consequent reduction in the taxes which the said trustor would otherwise have to pay upon said income and otherwise holds himself ready, willing and able to practice law in the state of Colorado, all of which more fully appears from the printed pamphlets or brochures hereto (in this complaint) attached, marked Exhibits "A", "B" and "C", respectively, and which by reference thereto herein are made a part of this petition. * * * * *

"It is admitted, or overwhelmingly established, that defendant has not been licensed to practice law in this state; that the National Pure Trust Service of Chicago (hereinafter referred to as the Pure Trust) is an organization engaged in Colorado in the business of preparing and establishing certain alleged trusts, and, as such, through defendant, has promoted some fifty of these. The legality of such trusts is not an issue in this proceeding, and the Pure Trust is not a party to any of these trust contracts and has no interest in the corpus thereof. Its sole interest is in the fees charged for the service rendered which are based upon a percentage of the value of the property involved. Defendant has been its sole representative in Colorado since January 1, 1949. As such he has been actively engaged in circulating large amounts of literature * * * containing advice relating to the advisability and legal consequences of the proposed organizations; the relation of partnerships, corporations and other trusts thereto; the advantages thereof, including the obviation of the necessity for the execution of wills; the administration of estates, the saving of taxes, personal liability to creditors, etc. The Pure Trust sells to its customers or clients certain copyrighted forms for the organization of such trusts as it has induced them to establish. It gives advice concerning the use of these forms and guides the trusts so established. It operated in this state through its so-called Rocky Mountain Division, of which defendant was advertised as 'Manager.' He insists he was but its agent or salesman, but on examination he finally and definitely asserted, 'I am the Pure Trust in Colorado.' All the evidence supports that statement. Hence it follows that whatever was done here by the Pure Trust was done by the defendant. The total fees collected from clients to which this scheme was sold run into thousands of dollars, and defendant's 'take' from thirty to fifty per cent thereof.

"The thing that stands out like a mountain peak in all this accumulated mass of evidence is that business men are not lured into disposing of all control over their property, of embarking into unheard of schemes to escape personal liability, taxes, court costs, attorneys' fees, etc., until they are assured by some reputed expert that the whole novel plan has been time-tested

and found legally water
not be doubted that the
the so-called 'purchases
ice' was legal advice, n
it makes no difference w
cago concern was legit
wise, or whether its
were true or false. It
law in Colorado withou
defendant, who was
claims and making rep
his own behalf and his
was doing the same th
rect violation of our
defiance and contempt o

"Section 21, chapter
1935 C.S.A., makes it u
one not having a lic
court as such to 'hold
any manner as an attor
one may so hold himself
cards, signs, stationery
tainly may also, and per
effectively, hold himself
duct. If he engages in
advising others on thos
complicated legal proble
ing within the practice
sion, pretending that h
do so, does it openly
year after year, by co
writing, and charges a
stantial fees therefor, I
way he could more e
himself out' as having
and the necessary auth
It must be borne in mi
legal information and
no means limited to th
of law relating to the c
of the average citizen o
It involved the most te
rules, largely new and
which only a learned a
yer would undertake t
* * * *

"In closing, I call at
original exhibits hereto
I consider vital, indisp
trolling. These are P
'N', 'H' and 'S'. * *

and found legally water tight. It cannot be doubted that the inducement for the so-called 'purchases' of this 'service' was legal advice, nothing else, and it makes no difference whether the Chicago concern was legitimate or otherwise, or whether its representations were true or false. It was practicing law in Colorado without authority, and defendant, who was reenforcing its claims and making representations on his own behalf and his own authority, was doing the same thing, both in direct violation of our statutes and in defiance and contempt of this court.

"Section 21, chapter 14, volume 2, 1935 C.S.A., makes it unlawful for any one not having a license from this court as such to 'hold himself out in any manner as an attorney.' Of course one may so hold himself out by writing, cards, signs, stationery, etc., but certainly may also, and perhaps even more effectively, hold himself out by his conduct. If he engages in the business of advising others on those important and complicated legal problems usually falling within the practice of the profession, pretending that he is qualified to do so, does it openly and constantly, year after year, by conversation and writing, and charges and collects substantial fees therefor, I can think of no way he could more effectively 'hold himself out' as having the knowledge and the necessary authority to so act. It must be borne in mind also that this legal information and advice was by no means limited to those propositions of law relating to the every day affairs of the average citizen or business man. It involved the most technical laws and rules, largely new and untried, through which only a learned and skillful lawyer would undertake to pilot a client.

* * * * * *

"In closing, I call attention to three original exhibits hereto attached which I consider vital, indisputable and controlling. These are People's Exhibits 'N', 'H' and 'S'. * * * * * *

"Finally, I conclude that defendant is overwhelmingly proven to have been engaged in the practice of law over a considerable period of time, dealing with complicated legal problems, in an important field, involving the necessity for profound knowledge. He did this without license from this court and in contempt of its authority, and is hence subject to such discipline as this court, in its wisdom, may impose."

Reference is made by the referee in his report to Exhibits N, H and S which are attached thereto.

It would unduly prolong this opinion to set forth these exhibits; however, in Exhibit N we find the following, written to a certified public accountant and bearing the signature of defendant:

> "A Pure Trust Indenture Contract is a *contract* entered into between a Trust Creator and his selected Trustees, which constitutes a legal entity that can own property, transact business of any kind and nature as can an individual, through the written minutes its Trustees formulate and attach to the Indenture Contract and become a part thereof. The Trustees are the managers of the Trusts business and corpus,
>
> "The Pure Trust Owns the Assets With Which It Deals, and is not an agency holding property for others. No Person has power over it; No One Possesses the Right to revoke it; No One Has a Reversionary Right to its assets. The Trust Indenture Contract is for 25 years.
>
> "Beneficial Certificates It Issues, have no lien on the assets, and cannot, during the lifetime of the Trust, convey any interest in the Trust Corpus. Their possession and ownership award the holder a right to receive Trustees' profit distribution during the lifetime of the Trust, and Distribution of Corpus at the Termination Thereof. Beneficial Certificate holders Have No Voice in the Management of the Trust Affairs Whatsoever.

"If you search deeply into information available to you from a number of sources, you will find a good reason to *want* to change your attitude and your report to the Buckley Brothers. **You** Cannot Challenge the Truthfulness of the Above Three Paragraphs."

Immediately following the last quoted portion of this exhibit the author quotes from an opinion of the United States Supreme Court which, he says, is applicable *to* a pure trust.

Exhibit H pertains to partnerships, is signed by D. W. Schmitt, Manager, and reads as follows:

> "Few people are aware of the *extremely grave hazards* in *Partnership Relationship.* Very few ever think of such hazards in connection with their own Partnership.
>
> "It Will Pay You to Read and Study the Rest of This Message.
>
> "1. Partnership involves personal liability of Partners.
>
> "2. Each Partner may legally bind the Partnership and the liability of the Partnership becomes the legal liability of each Partner.
>
> "3. It matters not whether an obligation arose as a result of commercial, civil or semi-criminal transactions. When Reduced to a Judgment, *It Becomes a* **lien** *on all the property of all the partners.*
>
> "4. Death, insanity, debts and bankruptcy *of* a Partner, or bankruptcy of the Partnership, Can Destroy the Partnership.
>
> "5. *Limited Partnerships* and *Family Partnerships* have become the target *of* a general TREASURY attack and its success in invalidating an overwhelming number of such cases, presents the grave danger that *Such Partnerships Will Not Stand Up.*
>
> "6. Congress will hardly bow to the request of the President for higher taxes. Watch the Treasury Department Step Up Its Frantic Search to Find Needed Revenue.
>
> "7. Estate Probating, Will Contesting, Court Costs, Estate and Inheritance Taxes Federal and State—can materially reduce **and** in many instances almost completely eliminate an **Estate.**
>
> "Our Pure *Trust* Procedure *Guarantees*—Total Family Protection—No deviation After Death—Complete Protection In all Partnership Liabilities—Elimination of Partition Expenses.
>
> "Our Pure Trust Organization Protects *Anywhere in the U. S.* ***Against***—Estate Probating—Will Contests—Judgments—Liabilities—Court Costs—Inheritance and Estate Taxes both State and Federal.
>
> "Your Organization set up as a Pure Trust May **Own** Property and Conduct a Business in Any State Without Permission From Any One. ***No State has any authority to interfere with it.*** No Recording—No State Report. Your Affairs are free **from** outside meddling and snoopers."

Exhibit S consists of *four* pages, and with reference thereto defendant state: that it was a carbon copy of a brief that he prepared for an attorney in The Denver National Bank. This exhibit reads **as follows:**

> "I **ask** your careful examination of the within information on our Pure Trust Organization Procedure. You **will** find a solution **to** your estate **problem** far beyond what you had hoped for, and every word herein contained is as truthful as any man can speak. I am happy to submit it In Writing and Signed, and am hoping that any objections to it will **also** be reduced in writing.
>
> "Laws in each State provide procedure upon the death for dissolution and distribution of all assets. They throw open the estate to bona fide and **unscrupulous** creditors; deductions are made for court costs, publication, **appraisers,** attorneys and **taxes** both state and federal. There may be minor children or grand children; there may be handicapped beneficiaries; there may

be fee-eating representatives with no regard to others' feelings or rights.

"No Government, no business, no activity, not even a religious group can either exist or function without Organization. Why should not the same step be taken to set up a Family Organization to preserve the fruits of an active and successful life?

"What do you wish to accomplish through Your organization? How much estate shrinkage, or how little, do you want to suffer? Do you want your loved ones to gamble needlessly on what the future might hold in store for them?

"A Living Trust *is not* an Organization. If it establishes a complete transfer of title, but withholds 'possession from the beneficiary, A Gift Tax must be paid, plus the trustees' fees and all other services he uses, subject to his interpretation. Such a Trust must not permit any possible reversion, benefit or control by the giver, and that it could not be made in anticipation of death.

"If your *Living Trust,* is revocable and subject to change and control by the grantor, no Gift Tax is paid, but inheritance taxes will be assessed when the Grantor dies, together with all accompaning expenses. Just think a bit on how many serious situations could develope here. You haven't settled a thing only a possibility that you would not suffer quite as much estate shrinkage as you would through a simple will and probating. You have not eliminated any liability. Reserving the power to alter or control makes your estate still liable for your miss deeds or failings. Your designated Trustee or Co-trustees might both die, and calamities that slip in occasionally might take or seriously handicap your grand daughters. Not pleasant things to think of, yet we are dealing with just that kind of a subject.

"A Living Trust can't be ammended from the grave. The Organization we will recommend below is the only organization that can control from beyond the grave. That is the reason we refer to it as The Only Known 100% Family Organization Available Today.

"National Pure Trust Service Pure Trust Organization is U. S. Constitutional Procedure. It is organizational procedure that is first a Contract, and therefore protected by the Constitution in Article I, Section 10, Paragraph 1, as adopted by the Convention, September 17, 1787. If you are ever told, or believe yourself, that the Constitution will be changed to take away this right to enter into a contract for some lawful purpose, then get ready to toss away your, insurance policies, deeds, stock Certificates, check books and any other items involving contractual rights.

* * * * *

"Your Trust Organization must and does own its assets fully and completely, as would any individual. That Means That No One Can Own Any Part of Such Assets at the Same Time the Trust Does. That's the way an individual owns; that is why a Pure Trust has rights equal to any individual. That means also, that No One can have any power over a Pure Trust; no voice in its management or control; no reversionary right to its assets. As a separate and distinct individual, it makes no reports to any state and puts nothing on record. It may own property or conduct business in any State without permission from any one.

"Your Family Trust issues its certificates to you and your son in exchange for the assets you convey to the Trust. Here you have an even exchange, thus no Gift Tax. Now, lets talk about the certificates: Certificates convey no undivided interest in Trust Assets, nor any voice in management or control. Benefits conveyed consist solely in distribution of income as Trustees might make from time to time, and distribution of corpus when the Trust is dissolved. Certificates are non-assessable, non-taxable, and not reachable by creditors as they have no value.

"Every purpose and desire the Trustees may have for the good of the Family Trust Organization may be recorded as Written Minutes which alone can obligate the Trust. If it is not recorded in the Minutes, its not an obligation. Do you see how this might eliminate all Liability? Trustees or certificate holders are not liable for Trust obligations, nor is Trust liable for their obligations.

"The death of the Trust Creator, Trustees or certificate holders has no effect on the Pure Trust which continues to hold to its ownership as before such death. No probating; no expenses.

* * * *

"One generation after another can pass, each receive the benefit of the Trust, and in passing on merely surrender their certificates to their heirs who do likewise, The term of the Trust is for 25 ycats, but may be increased for additional periods by the action of the Trustees. In like manner, the unanimous action of the Board of Trustees may dissolve the Trust at a sooner date.

"Summing up for you the major points, we have: Your Family Organization Trust Will Accomplish Every Purpose or Desire You May Have, All the While Minimizing Taxes While It Serves the Family Free From Liability and the Necessity of Probating. It Will Do the Same for Your Son. It Will Do the Same for Your Grand Daughters. It Makes Orderly Distribution When' Such Is Desired at Which Time a Capital Gain Tax Is Paid Which Is a Minimum. It Is As Sound As the Constitution of the Unit-ed Stares from Which It Derives Its Authority. Its As Free From Outside Interference As It Is Humanly Possible to Make. Constantly Changing Laws Do Not Interfere With It. There Is Nothing Sounder Available to You Today."

Defendant admitted that he had prepared and distributed copies of Exhibits H and S to prospective-purchasers.

The transcript of evidence before the referee and exhibits introduced, as well as the briefs filed, have been read and studied, and we are persuaded that there is ample competent evidence in the record to warrant and support the findings of the referee, and the same are hereby approved.

We find respondent, D. W. Schmitt, guilty of contempt of this court; adjudge and decree that he be fined therefor in the sum of $500; that the sum be paid into the office of the clerk of this court within twenty days from the announcement hereof; and that in default of said payment defendant be incarcerated in the county jail of the City and County of Denver and there held for a period of ninety days or until the fine has been paid.

CLARK, J., does not participate.

BOXBERGER v. STATE HIGHWAY COMMISSION.

No. 16609.

Supreme Court of Colorado, en Banc.

Dec. 8, 1952.

Rehearing Denied Jan. 5, 1953.

The State Highway Commission of the State of Colorado brought action against owner of realty located on portion of highway designated as a "freeway" to condemn his right of egress from his realty onto highway. The District Court of Larimer County, Claude C. Coffin, J., entered judgment for commission, and owner of realty brought error. The Supreme Court, Holland, J., held that it was proper for owner of realty to make motion for order requiring commission to make its petition more definite and certain as to exact nature and extent of rights sought to be condemned.

Judgment reversed, and cause remanded with directions for new trial.

1. Eminent Domain ⚷205

In action by State Highway Commission against owner of realty located on por-

BOXBE

tion of highway designat to condemn his right of realty onto highway, evid to establish that his rig some value, entitling hi for taking of right of e c. 61, § 17.

2. Eminent Domain ⚷16

Rules of Civil Proc in a condemnation pr standing provision in th Act that except for cro party there shall be no and that at hearing court objections touching legal tion or cross-petition. 12.

3. Eminent Domain ⚷19

The respondent in ceedings is privileged t of petition the same as

4. Pleading ⚷367(2)

In action by State sion against owner of portion of highway des way", to condemn his r his realty onto highway owner of realty to ma order requiring Comm petition more definite exact nature and exte to be condemned. '35

5. Pleading ⚷356(1)

In action by State sion against owner of r tion of highway design to condemn his right realty onto highway, entitled to have Com excepting from conden gate located seventeen property line, stricke realty and jury were i of the full destruction '35 C.S.A. c. 61, § 17.

6. Eminent Domain ⚷

In action by Sta sion against owner of tion of highway desig to condemn his right realty onto highway,