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Attorney Association with Living Trust Marketing Firms: Examining the Legal Issues

Deric James Barnes

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Barnes: Attorney Association with Living Trust Marketing Firms: Examining
**ATTORNEY ASSOCIATION WITH LIVING TRUST
MARKETING FIRMS: EXAMINING THE
LEGAL ISSUES**

I. INTRODUCTION

In recent years, living trust¹ marketing firms² have come under heavy attack by state attorney generals across the nation.³ State bar associations and legal commentators have also spoken out against living trust marketing firms.⁴ As a result of these attacks, several state courts have issued injunctions and other court orders effectively putting such marketing firms out of business.⁵ In 1999, the South Carolina Attorney General's office joined the fight against living trust marketing firms by filing complaints against two South Carolina

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1. Alicia R. Bromfield provides a concise definition of "living trust":

A living trust is a revocable trust which is created during the lifetime of the settlor, in which he or she retains the right to income and principal as well as the ability to revoke or amend the trust at any time prior to death. Upon death of the settlor, the trust becomes irrevocable, and the trust assets are distributed according to the trust instrument. A living trust "essentially becomes a substitute for a traditional will" upon the settlor's death.

Alicia R. Bromfield, *The Florida Bar v. American Senior Citizens Alliance: Is "Gathering the Necessary Information" the Unlicensed Practice of Law?*, 12 QUINNIPIAC PROB. L.J. 523, 524-25 (1998) (footnotes omitted) (quoting Jay D. Waxenberg & Henry J. Leibowitz, *Comparing the Advantages of Estates and Revocable Trusts*, 22 EST. PLAN. 265, 265 (1995)).

2. See *Living Trusts: A Consumer's Guide* (visited Mar. 24, 2000) <<http://www.eriebar.org/publicresources/livingtrusts.html>> (discussing the promotion of living trusts as will substitutes and the problems associated with aggressive marketing by non-lawyers).

3. See *People ex. rel. MacFarlane v. Boyls*, 591 P.2d 1315 (Colo. 1979) (en banc); Gale A. Norton, *Living Trust Scams* (last modified Dec. 12, 1997) <<http://www.ago.state.co.us/consprot/lvtrust.htm>>; Dick Phillips, *State Sues Living Trust Company Sonoma County Retirees Joined in Complaint*, PRESS DEMOCRAT (Santa Rosa, CA), July 31, 1996, available in 1996 WL 11451586; Don Stenberg, *Consumer Bulletin: Living Trust Scams Target Elderly* (visited Mar. 7, 2000) <<http://www.nol.org/home/NDOI/nica/newsltr/98dec/issues.htm>>.

4. See *Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997) (per curiam); *Committee on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695 (Iowa 1992); *Cleveland Bar Ass'n v. Yurich*, 642 N.E.2d 79 (Ohio Bd. Unauth. Prac. 1994).

The marketing and drafting of living trusts. . . . has been the subject of substantial criticism by groups appearing before the Senate Special Committee on Aging. . . . It has also been the subject of criticism by legal commentators. Trust marketing schemes have been rejected repeatedly by court decisions and state ethic opinions as the unauthorized practice of law.

In re Mid-America Living Trust Associates, Inc., 927 S.W.2d 855, 859-60 (Mo. 1996) (en banc).

5. See *American Senior Citizens Alliance*, 689 So.2d at 259; *Mid-America*, 927 S.W.2d at 870.

marketing firms.⁶ The Attorney General based both suits on the South Carolina Unfair Trade Practices Act⁷ (UTPA).⁸ The Attorney General also alleged that the defendant firms engaged in the unauthorized practice of law and made unlawful misrepresentations and omissions regarding estate planning.⁹ Both suits have produced preliminary injunctions against the defendant firms¹⁰ but final resolution of either suit is still pending. Thus, while the Attorney General has had considerable success in the fight to date, the future of living trust marketing firms in South Carolina is still unclear.

A common ingredient in most living trust marketing firm operations is the association of the firms with licensed attorneys. Because only licensed attorneys may draft living trust documents,¹¹ marketing firms must refer their clients to attorneys. Thus, problems arise for drafting attorneys when the marketing firms engage in illegal practices. For example, when a marketing firm engages in the unauthorized practice of law, attorneys associated with the marketing firm may be aiding in the unauthorized practice of law.¹² In addition, other legal problems may confront an associating attorney even when the living trust marketing firm is not engaging in the unauthorized practice of law. For example, associating attorneys may encounter fee-splitting claims, loss of the attorney-client privilege, and claims of improper solicitation or advertising on behalf of the attorney.¹³ Thus, attorneys considering associating with living trust marketing firms should strongly weigh the possible legal consequences such an association may bring.

This Note addresses significant legal issues that may arise when licensed attorneys associate with living trust marketing firms. Part II presents an overview of an actual living trust marketing operation. Part III discusses the following legal concerns and presents a brief analysis of each concern under current South Carolina law focusing on the following: (1) the unauthorized practice of law and aiding in the unauthorized practice of law, (2) loss of the

6. See *State v. Trey Carter Firm, L.L.C.*, No. 99-CP-26-2805 (C.P. Horry County, S.C. Nov. 16, 1999) (order granting preliminary injunction); *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County filed Jan. 15, 1999) (Attorney General's Complaint).

7. S.C. CODE ANN. §§ 39-5-10, -20 (Law. Co-op. 1976).

8. See *Trey Carter Firm*, No. 99-CP-26-2805; *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County, S.C. Feb. 19, 1999) (order granting partial preliminary injunction).

9. See *Trey Carter Firm*, No. 99-CP-26-2805; *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County, S.C. Feb. 19, 1999) (order granting partial preliminary injunction).

10. *Trey Carter Firm*, No. 99-CP-26-2805; *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County, S.C. Feb. 19, 1999) (order granting partial preliminary injunction).

11. In *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), the supreme court held that the preparation of deeds, mortgages, notes, and other legal instruments related to the transfer of real property constitutes "the practice of law" and must be performed by a licensed attorney. *Id.* at 430, 357 S.E.2d at 17.

12. See *infra* Part III.A.

13. See *infra* Part III.

attorney-client privilege, (3) fee-splitting, (4) interference with the professional independence of a lawyer, and (5) improper solicitation or advertising on behalf of an attorney.

II. AN EXAMPLE OF A LIVING TRUST MARKETING FIRM

Several variations of living trust marketing operations exist throughout the United States. They tend to employ similar tactics and are designed to achieve one goal—sell living trusts to seminar participants.¹⁴ For explanatory purposes, a brief description of an actual living trust marketing operation is set forth below.¹⁵

A non-lawyer living trust marketer (Marketer) advertised free informational living trust seminars.¹⁶ The advertisements urged members of the public “to attend and learn ‘how to avoid probate and minimize estate taxes with an estate plan that includes a living trust.’ . . . [In addition, Marketer] condemn[ed] probate as too expensive and time consuming.”¹⁷

At the seminars, Marketer discussed estate planning generally and then explained the benefits of living trusts.¹⁸ Marketer closed each seminar by offering free individual consultations to interested participants.¹⁹ Those who desired a consultation filled out forms, giving their names, addresses, and phone numbers.²⁰ Marketer took the forms and followed up to arrange a consultation with each new client.²¹

Before the consultation, Marketer asked one client (Client) to fill out an additional general information planning form, disclosing family members and assets.²² At the consultation, Marketer reviewed the planning form with Client and discussed Client’s estate planning goals.²³ Generally, one of Client’s main goals was to avoid probate.²⁴ Marketer then discussed Client’s various estate planning options, including an explanation of what a living trust can and cannot do.²⁵ In addition, Marketer discussed how a will works so that Client could understand the differences between wills and living trusts.²⁶ By the end of the

14. See Jeff Modisett, *Living Trusts: A Consumer-Protection Perspective*, 42 RES GESTAE 19 (1998).

15. The living trust marketing operation used here is taken from *Committee on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695 (Iowa 1992) which will be further discussed in Part III.D.

16. *Baker*, 492 N.W.2d at 696-97.

17. *Id.* at 696 (quoting an advertisement submitted into evidence).

18. *Id.* at 697.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

consultation, Marketer and Client decided which non-probate estate plan best suited Client's needs.²⁷

At this point in the consultation, Marketer informed Client that a licensed attorney must prepare the appropriate living trust and estate planning documents.²⁸ If Client had his own attorney, Marketer suggested that Client have that attorney draft the documents.²⁹ If Client did not have his own attorney, Marketer provided Client with a list of attorneys to consider.³⁰ Marketer usually suggested a specific attorney from the list, informing Client that other clients chose this attorney most often because the attorney was competent, his fees were reasonable, and he was prompt.³¹ If chosen, the attorney, having previously agreed to accept referrals from Marketer, met with Client and eventually drafted living trust and associated estate planning documents for Client.³²

III. LEGAL ISSUES ATTORNEYS SHOULD CONSIDER

Several legal concerns arise when a licensed attorney chooses to associate with a living trust marketing firm. If the marketing firm engages in illegal activities or if the relationship between the attorney and the firm is inappropriate, the attorney may soon find him or herself in a precarious position. Before associating with a living a trust firm, an attorney should at least consider the following issues: (1) the unauthorized practice of law and aiding in the unauthorized practice of law; (2) loss of the attorney-client privilege; (3) fee-splitting; (4) interference with the professional independence of a lawyer; and (5) improper solicitation or advertising on behalf of an attorney.³³ Courts in South Carolina and in other states have addressed each of these issues and have pointed out the possible risks to licensed attorneys.³⁴ The courts' treatment of these risks is discussed below.

A. *The Unauthorized Practice of Law*

The South Carolina Attorney General has alleged in pending litigation that two living trust marketing firms in South Carolina have engaged in the unauthorized practice of law.³⁵ If the Attorney General prevails, attorneys who associated with the marketing firms may have aided in the unauthorized

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 697-98.

33. An attorney should consider any and all legal ramifications of his or her association with a living trust marketing firm. The list of legal issues provided herein is not meant to be exhaustive.

34. *See infra* Part III.

35. *See supra* notes 6-9 and accompanying text.

practice of law.³⁶ Thus, an attorney considering associating with a living trust marketing firm must carefully scrutinize the activities of the marketing firm to be certain that the firm's activities do not illegally constitute "the practice of law".

Rule 5.5 of the South Carolina Rules of Professional Conduct prohibits a South Carolina attorney from assisting in the unauthorized practice of law.³⁷ The rule states that "[a] lawyer shall not . . . [a]ssist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."³⁸ The South Carolina Supreme Court recently applied this rule in *In re Reeve*³⁹ where the court sanctioned the assisting attorney with a public reprimand.⁴⁰ In living trust marketing cases outside of South Carolina, assisting attorneys have been sanctioned by having their right to practice law suspended.⁴¹

An attorney associating with a living trust marketing firm should first ask whether the living trust marketing firm engaged in the unauthorized practice of law. If so, the next question must be whether the attorney aided the marketing firm in the actions that constituted the unauthorized practice of law.⁴²

State law determines whether one's activities constitute the practice of law.⁴³ In South Carolina, the practice of law is regulated by the supreme court⁴⁴ and is limited to licensed attorneys.⁴⁵ What constitutes the practice of law in

36. See S.C. APP. CT. R. 407, R. 5.5(b); S.C. Bar Ethics Adv. Comm., Ethics Adv. Op. 91-36 (1992), available in 1992 WL 810416; S.C. Bar Ethics Adv. Comm., Ethics Adv. Op. 91-04 (1991), available in 1991 WL 787735.

37. S.C. APP. CT. R. 407, R. 5.5(b).

38. *Id.*

39. 335 S.C. 169, 516 S.E.2d 200 (1999) (per curiam).

40. *Id.*

41. See, e.g., *People v. Cassidy*, 884 P.2d 309, 311-12 (Colo. 1994) (en banc) (suspending an attorney's license for six months for aiding in the unauthorized practice of law); *People ex rel. MacFarlane v. Boyls*, 591 P.2d 1315, 1316 (Colo. 1979) (suspending for one year an attorney who attended sales presentations and prepared promotional materials for a living trust marketing firm that was found to be engaging in the unauthorized practice of law).

42. See Committee on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Baker, 492 N.W.2d 695, 701 (Iowa 1992).

43. In *Moore v. Supreme Court of South Carolina*, 447 F. Supp. 527 (D.S.C. 1977), the federal district court recognized that:

The states have both a duty and a right to regulate the practice of professions within their borders and federal courts should not interfere with such internal regulation unless the regulations invidiously discriminate against a certain class of citizens or otherwise are in no way reasonably related to ensuring the character and competence of their professionals.

Id. at 529.

44. S.C. CONST. art. V, §4; see also S.C. CODE ANN. § 4-5-10 (Law. Co-op. 1976); *In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992) [hereinafter *UPLR*].

45. See S.C. CODE ANN. § 40-5-310 (Law. Co-op. 1976); *In re Lexington County Transfer Court*, 334 S.C. 47, 50, 512 S.E.2d 791, 792 (1999).

South Carolina is not entirely clear.⁴⁶ This is due, in part, to the supreme court's use of sweeping terms to define the activity:

[T]he practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition conveyancing, *the preparation of legal instruments of all kinds, and, in general all advice to clients, and all action taken for them in matters connected with the law.*⁴⁷

The supreme court later clarified this definition by holding that the practice of law embraced "the preparation of legal documents for others to present in . . . court . . . when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law."⁴⁸ In 1992, the supreme court declined to further define the practice of law in the abstract, opting instead to decide the issue in the context of actual cases or controversies.⁴⁹

46. See *In re Lexington County Transfer Court*, 334 S.C. at 51, 512 S.E.2d at 792-93; see also *State ex rel. Daniels v. Wells*, 191 S.C. 468, 473, 5 S.E.2d 181, 183 (1939) (per curiam) ("There is no statutory provision in South Carolina defining what constitutes the practice of law.").

47. *In re Duncan*, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909) (emphasis added). The court accepted the definition of attorney at law as given by the United States Supreme Court: "Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country." *Id.*

The South Carolina Supreme Court has recognized that the practice of law must be restricted to licensed attorneys in order to protect the public from incompetent legal representation. *State v. Buyers Service Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987). In addition, the court noted in *State v. Despain*, 319 S.C. 317, 460 S.E. 2d 576 (1995), that the restriction was "for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." *Id.* at 320, 460 S.E.2d at 578. Recently, the supreme court noted that "[t]he goal of the prohibition against the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representation." *Renaissance Enter., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 652, 515 S.E. 2d 257, 258 (1999).

48. *Despain*, 319 S.C. at 320, 460 S.E.2d at 578. The *Despain* court added that "instructing other individuals in the manner in which to prepare and execute such documents is also the practice of law." *Id.* at 320, 460 S.E.2d at 578; see also *Wells*, 191 S.C. at 475, 5 S.E.2d at 184 (quoting *Shortz v. Farrell*, 193 A. 20, 21 (Pa. 1937)) ("Where the application of legal knowledge and technique is required, the activity constitutes [the practice of law]. . . . It is the character of the act, and not the place where it is performed, which is the decisive factor.").

49. *UPLR*, 309 S.C. at 305, 422 S.E.2d at 124. The court stated:

We are convinced . . . that it is neither practicable nor wise to attempt a comprehensive definition [of the practice of law] by

Therefore, a careful review of South Carolina case law is required to understand what constitutes the unauthorized practice of law in this state. The following list, though not exhaustive, provides a good starting point for such a review.

The South Carolina Supreme Court has determined that the following practices, among others, constitute the unauthorized practice of law:

- (1) preparing deeds, notes, and other instruments related to mortgage loans and transfers of real property;⁵⁰
- (2) preparing title abstracts and title examinations;⁵¹
- (3) giving advice as to the effect of various real estate closing instruments and advising clients in the manner in which to execute related legal documents;⁵²
- (4) transporting or mailing documents to the courthouse when such activities are part of a real estate transfer;⁵³
- (5) preparing a deed, having it executed, and filing it in the county courthouse for a fee;⁵⁴
- (6) plea negotiations;⁵⁵
- (7) preparing legal documents for others to present in family court;⁵⁶
- (8) instructing other individuals in the matter in which to prepare and execute court documents.⁵⁷

On the other hand, the supreme court has found the following activities do not constitute the unauthorized practice of law:

- (1) investigating circumstances that gave rise to an insurance claim, making a report of the circumstances to the insurance company, filling out forms as required by the South Carolina Industrial Commission, filing the forms with the Commission, and notifying the Commission that the insurance company decided that the claim is not compensable;⁵⁸

way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.

50. *Buyers Service*, 292 S.C. at 431-32, 357 S.E.2d at 18.

51. *Id.* at 432, 357 S.E.2d at 18, 19.

52. *Id.* at 433-34, 357 S.E.2d at 19.

53. *Id.* at 434, 357 S.E.2d at 19.

54. *In re Easler*, 275 S.C. 400, 401-02, 272 S.E.2d 32, 32-33 (1980).

55. *In re Lexington County Transfer Court*, 334 S.C. 47, 49, 512 S.E.2d 791, 792 (1999).

56. *Despain*, 319 S.C. at 320, 460 S.E.2d at 578.

57. *Id.*

58. *Wells*, 191 S.C. at 481, 5 S.E.2d at 186-87.

- (2) representation of a business by a non-lawyer officer, agent, or employee in civil magistrate's court proceedings;⁵⁹
- (3) if authorized by the state agency, representation of clients before the state agency by a layperson;⁶⁰
- (4) rendering professional assistance by CPA's, including compensated representation before agencies and the Probate Court, when such activity is within the CPA's professional expertise and qualifications;⁶¹
- (5) prosecution of traffic offenses by police officers in magistrate's court and municipal court;⁶²
- (6) "general, preparatory case management activities conducted by a non-attorney . . . , provided the solicitor or an assistant solicitor supervises the work and has complete responsibility for the work product;"⁶³
- (7) the activities of a paralegal, "as long as they are limited to work of a preparatory nature, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort."⁶⁴

Unlike South Carolina, several states have already dealt with the unauthorized practice of law issue as it relates to living trust marketing firms, and many of those states have found that living trust marketing firms engaged in the unauthorized practice of law.⁶⁵ In *Cleveland Bar Association v. Yurich*,⁶⁶ the Ohio Board of Commissioners on the Unauthorized Practice of Law found that non-lawyer representatives of a living trust marketing corporation had engaged in the unauthorized practice law during their meetings with clients.⁶⁷ At those meetings, the representatives gathered information from clients and

59. 309 S.C. at 306, 422 S.E.2d 124. *But cf.* Summit Teleservices, 334 S.C. at 651, 515 S.E.2d at 259 (limiting the ruling of *UPLR* to magistrate's courts).

60. *UPLR*, 309 S.C. at 306, 422 S.E.2d at 124.

61. *Id.* at 306, 422 S.E.2d at 124-25.

62. *Id.* at 307, 422 S.E.2d at 125.

63. *In re Lexington County Transfer Court*, 334 S.C. at 49, 512 S.E.2d at 791-92.

64. *In re Easler*, 275 S.C. at 401, 272 S.E.2d at 32-33 (footnote omitted).

65. *See Cleveland Bar Association v. Yurich*, 642 N.E.2d 79 (Ohio Bd. Unauth. Prac. 1994); *People v. Volk*, 805 P.2d 1116, 1118 (Colo. 1991) (en banc) ("[T]he counseling and sale of the living trusts by nonlawyers constituted the unauthorized practice of law."); *People v. Laden*, 893 P.2d 771, 772 (Colo. 1995) (en banc); *see also In re Mid-America Living Trust Assoc., Inc.*, 927 S.W.2d 855, 860 (Mo. 1996) (en banc) ("Court decisions from a number of states have addressed trust marketing endeavors by non-lawyers and consistently have found such activities to be the unauthorized practice of law.").

66. 642 N.E.2d 79 (Ohio Bd. Unauth. Prac. 1994).

67. *Id.* at 83-85.

counseled the clients regarding their need for living trusts.⁶⁸ The board determined:

[T]he representatives not only gathered information but also provided advice to living trust customers relative to their individual legal rights and responsibilities in trust, estate, and tax matters. These representatives answered customers' legal questions about living trusts, estate planning, and tax matters. This advice was unlawful, although the representatives informed the customer to consult an attorney.⁶⁹

In *In re Mid-America Living Trust Associates, Inc.*,⁷⁰ the Supreme Court of Missouri found that a living trust marketing firm engaged in the unauthorized practice of law through both of the following activities: (1) recommending living trusts to clients and advising clients regarding their need for various types of living trusts; and (2) gathering information from individuals for use in determining what type of trust was appropriate for those individuals and preparing trust documents based on that information.⁷¹ In addition, the Missouri court noted that attorneys who participate in such marketing schemes may violate their ethical duties not to assist in the unauthorized practice of law.⁷² The court recognized that "[b]y accepting referrals to draft trust documents sold or recommended by non-lawyers, courts have found attorneys have aided in the unauthorized practice of law."⁷³

Thus, while the South Carolina Supreme Court has not yet determined whether living trust marketing firms engage in the unauthorized practice of law during their seminars and meetings with clients, attorneys should be on guard. A precedent has been set by other state court decisions.⁷⁴ This precedent is clearly in favor of finding that living trust marketing firms engage in the unauthorized practice of law during seminars and follow-up meetings with clients.⁷⁵ As such, South Carolina attorneys who associate with living trust marketing firms may well find themselves aiding in the unauthorized practice of law.

B. Loss of Attorney-Client Privilege

68. *Id.*

69. *Id.* at 85.

70. 927 S.W.2d 855 (Mo. 1996) (en banc).

71. *Id.* at 864-65, 867.

72. *Id.* at 860.

73. *Id.* at 862.

74. *Id.* at 860 ("Trust marketing schemes have been rejected repeatedly by court decisions and state ethic opinions as the unauthorized practice of law . . . All courts that have addressed the issue have held that non-lawyer trust salespeople render legal advice and engage in the unauthorized practice of law when they recommend living trusts to specific individuals.").

75. *See id.*

Attorneys who associate with a living trust marketing firm risk waiving the attorney-client privilege for clients shared with the marketing firm.⁷⁶ Therefore, trust documents drafted for a living trust marketing firm client, as well as other personal information of that client, may be subject to discovery requests in a lawsuit.⁷⁷ This result seems to contradict a major selling point of living trusts which are often touted by marketers as confidential documents not subject to public disclosure.⁷⁸ However, a South Carolina court recently held that attorney-client confidentiality of trust documents may be waived when a client shares protected living trust information with the client's living trust marketing firm.⁷⁹

The risk of losing attorney-client confidentiality may have a detrimental impact on the relationship between an attorney and client.⁸⁰ The attorney-client privilege generally allows an attorney to confidentially discuss personal information with his or her client in order to advise the client on legal issues.⁸¹ If the privilege is waived when the client works with a living trust marketing firm, the client may resist disclosing appropriate information to the attorney.⁸² As a result, the ability of the attorney to counsel that client may be impaired.

76. *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County, S.C. Dec. 14, 1999) (order granting motion to compel production of documents).

77. *See id.*

78. *See* JOHN P. HUGGARD, LIVING TRUST, LIVING HELL: WHY YOU SHOULD AVOID LIVING TRUSTS 33 (1998) ("The proponents of living trusts frequently list as one of the major benefits of having such a trust is that it is a private document. They point out that unlike a will, a living trust need not be filed at the local probate office thereby becoming a public document.").

79. *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County, S.C. Feb. 19, 1999) (order granting partial preliminary injunction).

80. "The rationale for [the attorney-client privilege] is to encourage clients to confide fully in their attorneys without fear of future disclosure of such confidences. This in turn will enable attorneys to render more complete and competent legal advise [sic]." *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977); *see also* Irene Graves, Comment, *Confidentiality and Conflicts of Interest: How Waiver Affects Ethical Duties*, 22 J. LEGAL PROF. 267, 270 (1998) (stating the modern attorney-client privilege's purpose is to foster clients fully confiding with their attorneys).

81. Wigmore defines the attorney-client privilege in the following manner:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (John T. McNaughton rev. 1961).

82. The court in *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980), set forth the basis for the attorney-client privilege:

The privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of law that such confidence should not be abused by permitting disclosure of such communications.

Id. at 59, 271 S.E.2d at 112.

In *State v. Trust Associates*⁸³ the State brought an action against Trust Associates, L.L.C., a firm that markets living trusts.⁸⁴ The State sent subpoenas to the attorneys who drafted estate planning documents for Trust Associates' clients.⁸⁵ The subpoenas requested production of the attorneys' files for those clients.⁸⁶ The attorneys objected to the subpoenas based upon attorney-client privilege.⁸⁷ However, the court ruled that the clients waived attorney-client privilege by sharing communications between the attorney and client with a third party—Trust Associates.⁸⁸ As a result, the court granted the State's motion to compel production of the files.⁸⁹

The circuit court recognized that "in order for [the] attorney-client privilege to pertain, 'the communication involved must relate to a fact of which the attorney was informed by his client *without the presence of strangers* for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding.'"⁹⁰ Applying this rule, the court found that the attorneys failed to establish an attorney-client privilege.⁹¹ The court found that "[t]he presence of . . . non-lawyer Trust Associates employees in these transactions defeat[ed the attorneys'] claims of confidentiality."⁹²

The court also noted that voluntary disclosure of confidential information by a client to a third party waives the attorney-client privilege not only for the disclosed information, but to *all* communications between the attorney and client regarding the subject of the disclosed information.⁹³ Therefore, Trust Associates' clients, by sharing details of their attorney-client communications with Trust Associates, waived the attorney-client privilege for all communications they made with their attorneys regarding estate planning documents.⁹⁴

While only a trial court ruling, *Trust Associates* raises a harrowing risk for clients who share attorney-client communications with a living trust marketing firm. Such disclosure may waive the client's attorney-client privilege, and, as discussed above, this waiver may have a detrimental impact on the ability of an attorney to counsel the client. Thus, the client may be receiving counseling that is, in at least one way, defective.

83. *State v. Trust Associates, L.L.C.*, No. 99-CP-40-0160 (C.P. Richland County, S.C. Dec. 14, 1999) (order granting motion to compel production of documents).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (emphasis added) (quoting *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 47 (1984)).

91. *Trust Associates*, No. 99-CP-40-0160.

92. *Id.*

93. *Id.* See *Marshall*, 282 S.C. at 538, 320 S.E.2d at 46-47.

94. *Trust Associates*, No. 99-CP-40-0160.

C. *Fee-Splitting*

Rule 5.4(a) of the South Carolina Rules of Professional Conduct states that “[a] lawyer or law firm shall not share legal fees with a nonlawyer.”⁹⁵ The general purpose of this provision is to protect a lawyer’s professional independence of judgment.⁹⁶

The South Carolina Bar Ethics Advisory Committee (Ethics Committee) issued a relevant opinion that addresses the fee-splitting issue.⁹⁷ In the opinion’s hypothetical, a service organization offered estate planning packages to clients.⁹⁸ The organization referred clients to associated attorneys for document drafting.⁹⁹ The attorneys then completed estate planning documents for the clients and returned the documents to the service organization for distribution to the clients.¹⁰⁰ The organization charged a single fee to each client and then submitted part of the fee to the attorney in payment for the attorney’s services.¹⁰¹ The Ethics Committee determined that associated attorneys had engaged in unlawful fee-splitting in violation of Rule 5.4(a) when they accepted payment from the service organization.¹⁰²

By analogy, when a South Carolina attorney accepts referrals from a living trust marketing firm, fee-splitting issues may arise when the attorney is paid for his or her services by the marketing firm. This rule was adopted by the California State Bar in an opinion drafted by the Standing Committee on Professional Responsibility and Conduct.¹⁰³ In the opinion’s hypothetical, an attorney received referrals from a living trust marketer¹⁰⁴ The attorney drafted living trust documents for the marketer’s clients.¹⁰⁵ The clients could pay for the attorney’s services in one of two ways: (1) by paying the marketer who would pay the attorney; or (2) by paying the attorney who would withhold his

95. S.C. APP. CT. R. 407, R. 5.4(a).

96. See S.C. APP. CT. R. 407, R. 5.4 cmt. *In re Anonymous Member*, 295 S.C. 25, 26, 367 S.E.2d 17, 18 (1988); *infra* Part III.C.2.

97. S.C. Bar Ethics Adv. Comm., Ethics Adv. Op. 92-28 (1992), available in 1992 WL 810443.

98. *Id.* at *1.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at *2. This opinion also addresses other issues such as: (1) the unauthorized practice of law and (2) interference with a lawyer’s independent professional judgment. *Id.*; see also S.C. Bar Ethics Adv. Comm., Ethics Adv. Op. 91-04 at 2 (1991), available in 1992 WL 810416 (noting that unethical fee-splitting would occur if an attorney who is a member of a community organization is paid by the organization from member fees to render legal services to organization members); S.C. Bar Ethics Adv. Comm., Ethics Adv. Op. 93-24 at 1-2 (1993), available in 1993 WL 851355 (noting that fee-splitting issues arise when a licensed attorney reviews living trust documents that were prepared by an unlicensed attorney and the unlicensed attorney subsequently pays the licensed attorney for the reviewing services).

103. Cal. State Bar Comm. on Professional Responsibility and Conduct, Formal Op. 1997-148 (1997) available in 1997 WL 197169.

104. *Id.* at *1.

105. *Id.*

or her share and give the remainder to the marketer.¹⁰⁶ The Committee found that both methods of payment constituted impermissible fee-splitting because such methods risk “the possibility of control of legal matters by a non-lawyer interested more in personal profit than the client’s welfare.”¹⁰⁷

Thus, South Carolina attorneys should be aware that claims of impermissible fee-splitting may result when they receive payments for services in either of the following ways: (1) a client of a living trust marketing firm pays the attorney for his or her services with the expectation that the attorney will submit the remainder of the payment to the living trust marketing firm; or (2) the attorney is paid directly from the marketing firm for services rendered to a marketing firm client.

D. Professional Independence of a Lawyer

The fee-splitting issue is closely related to a second issue addressed in Rule 5.4—interference with a lawyer’s professional, independent judgment.¹⁰⁸ Rule 5.4(c) states: “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”¹⁰⁹ Therefore, if an attorney accepts money from a living trust marketing firm in payment for services rendered to the marketing firm’s client, the attorney may find his or her professional judgment questioned by a court.¹¹⁰ As discussed below, however, even if the attorney is paid directly by the client, the attorney’s independent professional judgment may still be tainted.¹¹¹

The Supreme Court of Iowa applied Rule 5.4(c) to the activities of an attorney associated with a living trust marketing firm.¹¹² The attorney agreed to accept referrals from the marketer and to draft living trust documents for those referrals.¹¹³ Subsequently, the marketer sponsored seminars touting the benefits of living trusts.¹¹⁴ At the seminars, the marketer provided information regarding living trusts and other types of estate planning devices.¹¹⁵ The marketer then encouraged participants to purchase living trusts.¹¹⁶ After helping interested participants decide what types of trusts to implement, the marketer

106. *Id.* at *1, *5.

107. *Id.* at *5.

108. S.C. APP. CT. R. 407, R. 5.4 cmt.

109. S.C. APP. CT. R. 407, R. 5.4(c).

110. *See infra* notes 119-29 and accompanying text.

111. *Id.*

112. Committee on Prof. Ethics and Conduct of the Iowa State Bar Ass’n v. Baker, 492 N.W.2d 695, 703 (Iowa 1992).

113. *Id.* at 697.

114. *Id.* at 696-97.

115. *Id.*

116. *Id.*

referred them to the attorney.¹¹⁷ As agreed, the attorney drafted the appropriate trust documents for participants.¹¹⁸

The court found that while the attorney had accepted approximately 100 living trust referrals from the marketer, the attorney never counseled against the use of a living trust.¹¹⁹ As such, the court held that the attorney permitted the marketer to influence his professional judgment in providing legal services to the referred clients.¹²⁰ “[The marketer], not [the attorney], exercised professional judgment as to the appropriateness of a living trust and the particular documents necessary to effectuate it . . . [The attorney] permitted [the marketer’s] desires to ‘dilute [the attorney’s] loyalty to his clients.’”¹²¹ In addition, the court noted that the prospect of receiving additional referrals from the marketer constituted compromising influences that may have affected the attorney’s professional judgment.¹²²

Therefore, the court’s ruling warns licensed attorneys to be on guard when they receive referrals from living trust marketing firms. Attorneys should recognize that receiving such referrals may compromise their independence of professional judgment in violation of Rule 5.4.

E. Improper Solicitation

Rule 7.3(a) of the South Carolina Rules of Professional Conduct states the following: “A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”¹²³ The purposes of this provision are: (1) to prevent lawyers from abusing clients with in-person

117. *Id.* at 697-98.

118. *Id.*

119. *Id.* at 702. The court observed that

[The marketer] controlled the whole process from the initial interview to the final meeting when the clients executed the documents in his office. He did so by recommending the living trust, the necessary tailored documents to effectuate it, and a lawyer who he believed would not counsel against his advice. In fact, when [the marketer] sold clients on a living trust, [the attorney] never once counseled against using it.

Id.

120. *Id.* at 703.

121. *Id.* at 703 (quoting IOWA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1996)).

122. *Id.* at 703. In *In re Mid-America Living Trust Assoc., Inc.*, 927 S.W.2d 855 (Mo. 1996) (en banc), the court recognized that “attorneys who regularly receive referrals from trust marketing companies, without being directly employed by them, also have been found to suffer from a conflict of interest. An attorney’s advice may be tainted by his desire to continue receiving referrals.” *Id.* at 862.

123. S.C. APP. CT. R. 407, R. 7.3(a).

solicitation of legal services;¹²⁴ and (2) to prevent false, misleading, deceptive, or unfair solicitation of legal services.¹²⁵

The California State Bar issued an opinion addressing in-person solicitation in the context of a living trust marketing firm operation.¹²⁶ In the opinion's hypothetical, a living trust marketer held informational seminars discussing the advantages of living trusts.¹²⁷ During the seminar, the marketer told participants that a lawyer associated with the marketing firm would prepare the living trusts for them, respond to their questions, and supervise execution of the trust documents.¹²⁸ The marketer also provided participants with questionnaire forms.¹²⁹ The forms requested information deemed by the marketer to be necessary for the creation of living trusts.¹³⁰ The participants filled out the forms and delivered them to the lawyer.¹³¹

The California State Bar held that such activity constituted "impermissible in-person solicitation by a lawyer through the marketer as his agent."¹³² The Bar noted the following:

[T]he marketer cannot do on the lawyer's behalf what the lawyer cannot do. Under the facts, the marketer simply becomes the agent of the lawyer. A lawyer cannot avoid the prohibition against in-person solicitation by associating with a non-lawyer who engages in such prohibited conduct on the lawyer's behalf.¹³³

Thus, South Carolina attorneys should be aware of the possibility that association with a living trust marketing firm, as described in the California State Bar opinion above, may result in intense scrutiny by courts or other

124. S.C. APP. CT. R. 407, R. 7.3 cmt.

125. *Id.* The comment states:

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. . . . The contents of direct in-person or live telephone conversations between a lawyer and a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

Id.

126. Cal. State Bar Comm. on Professional Responsibility and Conduct, Formal Op. 1997-148 (1997) available in 1997 WL 197169.

127. *Id.* at *1.

128. *Id.* at *1, *6.

129. *Id.* at *1, *6.

130. *Id.* at *6.

131. *Id.* at *6.

132. *Id.* at *6.

133. *Id.* at *7.

disciplinary authorities.¹³⁴ Thus, attorneys should be wary of marketing firms that advertise the attorney's services outright or that continually recommend the attorney's services.

IV. CONCLUSION

Living trust marketing firms seek to market and sell living trusts. Their job is to convince potential clients to purchase living trusts. Case law shows that when attorneys associate with such firms, they may be vulnerable to attack with numerous claims, including allegations of aiding in the unauthorized practice of law. By associating with living trust marketing firms, attorneys may also be vulnerable to various legal claims as demonstrated throughout this Note. Thus, before associating with living trust marketing firms, South Carolina attorneys should carefully consider the legal consequences such an association may bring. In addition, attorneys should evaluate their ability to render effective legal counsel to clients referred by living trust marketing firms.

Deric James Barnes

134. *See id.* at *8. The opinion noted:

Arrangements between lawyers and marketers like those described in the facts above, and variations thereof, have received intense scrutiny throughout the country by ethics committees, courts, and disciplinary authorities. Decisions in other jurisdictions uniformly hold them unethical on a variety of bases. Discipline has been imposed in California on an attorney participating in one such arrangement. Practitioners should carefully examine their participation in any arrangement of this sort.

Id. at *9.