

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 15-03
THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

Whether a revocable living trust may own stock in a professional corporation authorized to practice law for a profit, if at least one of the trustees is a licensed attorney.

OPINION

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 5.4 – Professional Independence of Lawyer

FACTS PRESENTED

Attorney individually owns 100 percent of the stock in the professional corporation through which Attorney practices law for profit. Attorney and Spouse, a non-attorney, have created a revocable living trust for estate planning purposes. Attorney and Spouse are named as co-trustees of the trust.

Attorney wishes to transfer 100 percent of the stock in the professional corporation to the revocable living trust. Attorney and Spouse would name a North Dakota licensed attorney as the Successor Trustee for the revocable living trust. The trust would specifically provide that Successor Trustee assumes the position upon the death of Attorney, and Successor Trustee is solely authorized to deal with the stock in the professional corporation.

DISCUSSION

Rule 5.4(d)(1), N.D.R.Prof.C., provides in whole:

A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration.

Comment 2 to Rule 5.4 indicates: “This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another. See also Rule 1.8(f).”

Under the above scenario, the co-trustees of the revocable living trust become the legal owners of 100 percent of the stock in the professional corporation upon transfer to the trust. See N.D.C.C. § 59-12-01 (“A trust may be created by transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death”) (Emphasis added). As a result, such ownership is prohibited under N.D.R.Prof.C. 5.4(d)(1) unless the arrangement meets the exception for “a fiduciary representative of the estate” where such representative “hold[s] the stock or interest of the lawyer for a reasonable time during administration.”

The above scenario does not meet such exception. Attorney and Spouse are the original co-trustees. As such, Spouse, as a nonlawyer, owns an interest in the stock of the professional corporation, even if such ownership is in Spouse’s capacity as trustee. Spouse is not a fiduciary representative of Attorney’s estate, nor is Spouse’s ownership as trustee limited to a reasonable period of time during administration of Attorney’s estate.

The structure of the relationship between Attorney, Spouse, and the revocable living trust presents problems that Rule 5.4(d)(1) sought to avoid. Specifically, Attorney and Spouse are “settlers” of the revocable living trust. See N.D.C.C. § 59-09-03(19). While the revocable living trust remains revocable, “the duties of the trustee are owed exclusively” to the settlers. N.D.C.C. § 59-14-03. Attorney and Spouse must therefore administer the trust for the benefit of both Attorney and Spouse, which provides potential for Spouse, a nonlawyer, to direct or regulate the lawyer’s professional judgment in rendering legal services to another.

Furthermore, even if Attorney is the sole original trustee of the revocable living trust, followed by the appointment of Successor Trustee upon the death of Attorney, the arrangement would still likely violate N.D.R.Prof.C. 5.4(d)(1). While the trustees would all be lawyers under

this alternative, if the beneficiaries of the trust are nonlawyers, then nonlawyers would still own an interest in the professional corporation in violation of the rule.¹

Under N.D.C.C. § 59-09-03(3), “[b]eneficiary” is defined as a person that “[h]as a present or future beneficial interest in a trust, vested or contingent” “A trust and its terms must be for the benefit of its beneficiaries.” N.D.C.C. § 59-12-04. Therefore, even where lawyers are the sole trustees, the factual scenario still presents the problems that Rule 5.4(d)(1) sought to avoid, as the administration of the trust for the benefit of its beneficiaries could impact the lawyer’s professional judgment in rendering legal services to another.

CONCLUSION

A revocable living trust may not own stock in a professional corporation authorized to practice law for a profit, even if at least one of the trustees is a licensed attorney.

This opinion was drafted by Sean Foss and was unanimously approved by the Ethics Committee on the 14th day of May, 2015.


Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

¹ The factual scenario does not specify the beneficiaries of the trust either before or after the death of Attorney. Therefore, for purposes of this Advisory Opinion, it is presumed at least one of the beneficiaries is a nonlawyer.