

NOVEMBER 2018

ISSUES: Under what conditions may lawyers provide electronic form-based products to customers?

DIGEST: To the extent that lawyers sell form-based solutions, they must either provide an electronic form that the customer customizes without recommendations, or form an attorney-client relationship. A lawyer may offer a form product without creating an attorney-client relationship so long as the lawyer provides no advice, including which form to use or how to complete it.

AUTHORITY INTERPRETED:

STATEMENT OF FACTS

Clients regularly engage Lawyer to provide legal services to them at hourly rates that are typical and customary within Lawyer's geographic region, practice area, and experience level. Lawyer is cognizant of access-to-justice issues and wants to also be a resource to those who cannot afford Lawyer's traditional services.

So, as part of Lawyer's professional website, Lawyer provides "alternative assistance" to persons who cannot afford to engage an attorney, but need help in Lawyer's regular practice area. Through that portal, the website provides the following disclosure which users are required to read and accept before proceeding:

Lawyer provides an online legal portal to give users a general understanding of the law and to provide a form-based solution to individuals who choose to prepare their own legal documents. Lawyer does not review the completed forms for legal sufficiency, to draw legal conclusions, to provide legal advice, opinions, or recommendations about users' legal rights, remedies, defenses, options, selection of forms, or strategies, or to apply the law to the facts of users' particular situations.

Lawyer is licensed to practice law only in the State of California and has drafted documents that address only California law. Lawyer does not agree to represent users of the alternative assistance portal. No attorney-client relationship is formed by use of the portal and Lawyer may represent individuals who are adverse to users of the portal, regardless of the subject matter of the representation and regardless of whether it relates to any forms that the user purchases or creates through the portal. Whereas Lawyer intermittently updates the forms, Lawyer does not guarantee that all of the information on the portal is completely accurate or current. Likewise, Lawyer does not warrant or guarantee that any form is sufficiently tailored to address any particular fact pattern. Users should contact Lawyer directly and enter into a formal engagement agreement if they would like to engage Lawyer to provide legal services.¹

Following the disclaimer, persons accessing the page are able, for a relatively modest fee, to purchase form documents that Lawyer has prepared that are automatically populated with

¹ This opinion does not address any advertising issues that may be associated with offering such forms, or the invitation to contact Lawyer for engagement found in the disclaimer.

information that the user elects to input. The forms address the law in the State of California. Lawyer's website and the forms themselves both make it clear to the consumer that they are applicable only in courts applying California law. Lawyer does not provide forms that address the law in jurisdictions in which the lawyer is not authorized to practice.

First, the users select the nature of the form they would like to use from a menu that is organized by category. Once a selection is made, the users provide credit card information and are immediately charged for access. Next, they then have the option to input their personal information or other relevant data to populate fields. To the extent the user elects to input such information, the data is then substituted into the fields that the user has indicated, and the form document is then displayed line by line on the screen. The users can then select, modify, or deselect each line, and modify the order of the lines, before printing out the finished document. The portal does not provide any artificial intelligence to assist in the selection of forms or their completion. Nor is any of the information that the users input stored on the system.

No conflict check is performed in conjunction with this process. Lawyer periodically updates the forms that are available within the "alternate assistance" portal to comply with changes in the law. But Lawyer does not review, edit, or make recommendations regarding any of the documents that are created through the portal.

DISCUSSION

The vast majority of lawyers' ethical responsibilities are triggered by an analysis of whether they are engaged in the practice of law.² This situation is no different. So, we first examine whether what the webpage portal provides constitutes the practice of law.

*Practice of Law*³

The "practice of law" includes giving legal advice and preparing legal instruments and contracts whether or not in the course of litigation. (*Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct.* (1998) 17 Cal.4th 119, 128; see also *Benninghoff v. Super. Ct.* (2006) 136 Cal.App.4th 61, 68.) This general definition can cover many different types of activities, including some non-lawyers may perform, either by explicit law or by tradition.

Precisely defining what constitutes the practice of law is difficult. (See *People v. Landlords Prof. Services* (1989) 215 Cal.App.3d 1599, 1609 ["any definition of legal practice is ... incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law"], see also *Benninghoff v. Super. Ct., supra*, 136 Cal. App. 4th at p. 68 [ascertaining whether particular activity is practice of law may be "formidable endeavor"].)

Nonetheless, there are activities that very clearly constitute the practice of law:

² Of course, there are exceptions. For example, Business and Professions Code section 6106 proscribes any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise. And regardless of whether such an act is a felony or misdemeanor, its commission constitutes a cause for disbarment or suspension.

³ Some federal proceedings, such as those before the United States Patent and Trademark Office or involving immigration, may have different guidelines regarding what constitutes the practice of law. This opinion does not address such practice areas.

1. appearing in court as counsel for a party;
2. providing legal advice;
3. preparation of legal instruments and contracts by which legal rights are secured (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535);
4. Negotiating on behalf of a client (*In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296, 2014 Calif. Op. LEXIS 1, 21-22 [citing *Morgan v. State Bar* (1990) 51 Cal.3d 598, 603-604.]

The essence of rendering legal advice is the application of the appropriate law to a specific set of facts to reach a conclusion. "In close cases . . . the resolution of legal questions for another by advice and action is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind." (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543.)

Only providing information about what the law is and providing forms falls outside the practice of law. (*People v. Landlords Prof. Services, supra*, 215 Cal.App.3d at p. 1606.) Likewise, filling in the blanks of a form with information furnished by others does not constitute the practice of law. (See, e.g., *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844, 846-847.) But advising others regarding what type of document they should prepare to effectuate their purpose constitutes the practice of law. (*Ibid.*) While the sale of legal forms is not considered an unauthorized practice of law, the question becomes more difficult when detailed instructions for filling out the forms are provided or when the forms are accompanied by advice for how to proceed with particular legal actions. (*People v. Landlords Prof. Services, supra*, 215 Cal.App.3d at pp. 1605-1606.)

In the context of this set of facts, the dividing line about what constitutes the practice of law is what happens in relation to form documents. Services do not amount to the practice of law as long as the service is merely clerical. It is not the practice of law to make forms available for a person's use, even if they filled the forms in at the specific direction of that person and filed and served those forms as directed by that individual. (*People v. Landlords Prof. Services, supra*, 215 Cal.App.3d at p. 1608.) Likewise, providing a manual, even a detailed one containing specific advice, is not the practice of law if the service did not advise regarding that person's specific case. (*Ibid.*)

But providing advice as to which forms to use, which blanks to fill in with what information, or in which courts an action should be filed has been found to be the practice of law. (*People v. Landlords Prof. Services, supra*, 215 Cal.App.3d at p. 1609.) And the likelihood of this conclusion is amplified when the service provider professes to have expertise in the particular area where the forms are being provided. (*Ibid.*)

Here, the website permits users to select the forms that are prepared, relies on the users to customize and select the information included in them, and warns that Lawyer is not providing legal services and that the users are not Lawyer's clients by virtue of purchasing the forms. This general structure does not create an attorney-client relationship in that it, in essence, constitutes an online formbook. As websites incorporate artificial intelligence that assist with the selection or completion of documents, the analysis may change.

Where, as in this example, lawyers are providing forms, there is not necessarily an ethical violation where the forms are accompanied by advice constituting the practice of law. Since the advice is

being provided by a licensed member of the bar, there is not a concern about the unauthorized practice of law. But there are a number of issues that can arise if providing documents through the portal is accompanied by guidance that constitutes the practice of law. Though the hypothetical facts of this opinion do not indicate such a circumstance, we highlight some of the issues that lawyers should consider if they opt to provide legal advice accompanying a form-based product.

Conflicts of Interest

Lawyers generally perform a conflict check before the lawyer provides legal services and before receiving confidential information. Here, the fact pattern does not provide a method for Lawyer to do so. In theory, the reason why the webpage is economical is precisely because it likely requires little, if any, attorney time aside from the initial drafting of the forms and relevant updating.

This approach is improper where legal services are provided. Comment [1] to Rule of Professional Conduct 5.1 provides that lawyers with managerial authority must make reasonable efforts to establish policies and procedures designed to detect and resolve conflicts of interest. Failing to perform a conflict check before providing legal places a lawyer in a position where the lawyer may have a conflict, not know it, and be unable to address it until substantial harm has already been done.

But in addressing a potential conflict with a current client under Rule of Professional Conduct 1.7 or a potential conflict with a former client under Rule of Professional Conduct 1.9, a lawyer would need to, in fact, represent a client for a conflict to arise. In this hypothetical, the offering of forms that the users select and modify would not constitute the practice of law so long as no legal advice accompanies the provision of the forms that a user selects. To the extent that a lawyer offers a form-based solution that does constitute the practice of law and there is a conflict, that lawyer would need informed written consent under either Rule 1.7 (for concurrent clients) or Rule 1.9 (for former clients) to proceed.

The fact that users who purchase forms from Lawyer that may potentially be used in matters where Lawyer represents a party does not, in and of itself, present a situation where Lawyer has a conflict of interest. As a preliminary matter, if there is no attorney-client relationship between Lawyer and the user of the website portal, then Lawyer does not owe any duty of fidelity to the user. (See, e.g., *Raley v. Super. Ct.* (1983) 149 Cal.App.3d 1042, 1044-1050 [concluding that a fiduciary relationship with a non-client, such as an entity for which the lawyer serves as a director, may create a conflict with representing a party who is adverse to that non-client].)

But, a conflict could potentially arise out of the use of a form that Lawyer prepared, even if it is employed by a non-client. Although this would not be a typical issue or positional conflict where a lawyer simultaneously represents two clients taking opposite positions on the same issue in two different matters, it has a similar peril for the client. Because Lawyer has taken a position on at least the propriety of the base contents of a form, that could interfere with arguments regarding the form's efficacy.

As noted in State of Maine Board of Overseers of the Bar Opinion #155, which addressed positional conflicts, a lawyer in such a circumstance must be mindful of the possibility that arguing against the form could impair the lawyer's effectiveness. This is especially true where the legal arguments could turn on the substance of those portions of the form that the lawyer authored. In such a circumstance, the lawyer would effectively have to imperil himself or herself by arguing that the

product sold was defective in some manner. This is only example, however, as it is not possible to define all the circumstances in which a conflict might be implicated. It will depend on the particular facts and circumstances. If the lawyer's efficacy will potentially be impaired, then the lawyer will have a conflict that will require the client's informed written consent before the lawyer may proceed. (See Rule of Prof. Cond., rule 1.7(b) [requiring informed written consent to represent a client where materially limited by relationship's with a third party or the lawyer's own interests].)

Competence/Scope of Engagement

Lawyers have an obligation to employ the learning and skill necessary to provide legal services to a client competently. (Rules of Prof. Conduct, rule 1.1.) In a situation where there is no communication between the lawyer and client, such as where the client exclusively uses a website with automated responses to obtain legal advice, the lawyer has no means to determine whether the lawyer, in fact, has the learning and skill necessary to provide the services, or even to ascertain whether the information provided to the client is complete and appropriate for the client's situation. The potential for the forms to fall below this standard is heightened by the fact that Lawyer only intermittently updates them.⁴

Indeed, Rule of Professional Conduct 1.2 provides that a lawyer may limit the scope of the representation, but only if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent. Here, because there would be no communication between Lawyer and the user, Lawyer would be unable to ascertain whether the limited scope would be reasonable under each client's situation and whether sufficient information was provided to the client to get informed consent.

Handling of Funds

Rule of Professional Conduct 1.15 provides, among other things, that funds collected for advance fees, costs, and expenses must be deposited into the client trust account. Here, users need to pay before they access the portal. Accordingly, to the extent that the documents provided by the portal constitutes the practice of law, the funds would need to be deposited into the client trust account until after the documents are provided to the users, and then withdrawn or transferred to the operating account once earned.

As an alternative, because the fee paid to access a document is a flat fee, it could be deposited into the operating account so long as Lawyer complies with Rule 1.15(b). Flat fees may be deposited into the operating account if a lawyer or law firm discloses in writing that the client has a right under Rule 1.15(a) to require the funds be placed in the client trust account until the fee is earned, and that the client is entitled to the refund of any unearned fee. If the flat fee is over \$1,000, the client must agree in writing to these terms.

This opinion is issued by the San Diego County Bar Association. It is advisory only, and is not binding upon the courts, the State Bar of California, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

⁴ Rule of Professional Conduct 1.1 refers expressly to competence in performing legal services. It does not provide that lawyers may be subject for discipline for incompetence in performing non-legal services. So, Lawyer would not violate the Rules of Professional Conduct only by selling a form with an error to non-clients.

