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Attorney at Law

Re: Request for Ethics Opinion 92-19

Dear

You have requested an opinion from this Committee concerning the propriety under the South Dakota Rules of Professional Conduct of becoming involved in a program called Consolidated Legal Concepts, Inc. ("CLC").

According to the materials provided to this Committee by you, CLC is a manufacturer and administrator of various forms of legal benefits programs. You have been asked to participate in one of the programs referred to as the CLC Revocable Living Trust Program. CLC is offering this Revocable Living Trust Program to members of a large national organization at a special fee.

According to the materials provided, CLC would pay you up to \$300 per trust prepared which would include a pour over will for husband and wife, a revocable living trust, one deed transfer document, a health care power of attorney, an asset management power of attorney, life support physician instructions, trust funding instructions, and specific gift provisions. CLC would provide you with a completed client questionnaire which would enable you to begin developing the trust. After reviewing the questionnaire, you are authorized to contact the member of CLC for additional information or to have questions answered. CLC looks to the attorney to also advise the CLC member should they need additional trust documents. Under the arrangement with CLC, any additional trust documents are to be made available by you to the CLC member at a 25% discount from your normal fee. As mentioned above, one deed transfer is included in the original fee and should the CLC member have other property to transfer, the fee you can charge is

set at \$50 per transfer. That fee would be paid directly to you by the CLC member.

According to the materials provided, upon completion of the trust you are to mail the trust document to CLC along with your cover letter to the CLC member with funding and execution instructions. CLC packages the trust in an "Estate Planning" binder and delivers it to the CLC member. You will receive 50% of your fee with the completed questionnaire and the balance of the fee as soon as CLC receives the completed trust document from your office. In conjunction with the program, CLC has also contracted with an out-of-state attorney to oversee all trust work.

To participate in the program, you have been asked to execute an "Agreement To Include Services In A Revocable Living Trust Program." Some of the relevant provisions of this agreement provide that:

1. "Attorney is specifically qualified in the planning and preparation of Revocable Living Trust . . . ."
2. Attorney will ". . . prepare certain documents for a fixed and pre-determined fee. Further services delivered by the attorney will be at a 25% reduced fee from the usual and customary fee."
3. "Attorney agrees to prepare RLT's for members . . . for a flat fee of \$300 per RLT for the first 100 RLT's within a one month period, \$250 for the next 50, and \$200 beyond 150 within that month."
4. ". . . Attorney shall not offer any similar services through a membership group or to any other administrator or marketer of legal plans without the written consent of CLC . . . ."

#### OPINION

It is the opinion of this Committee that participation in the CLC program described above is not proper under the South Dakota Rules of Professional Conduct. First, under Rule 7.2(c), a lawyer shall not give anything of value to a person for recommending the lawyer's services. The CLC program requires the lawyer to give something of value (i.e., a reduction of fee, non-compete agreement) to CLC in exchange for CLC recommending the lawyer's services. Secondly, under Rule 5.4(c), 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. This Committee is concerned with the arrangement outlined above in that it appears that CLC and not the attorney has determined what types

October 28, 1993  
Page 3

of estate planning is needed by the CLC member. Such an arrangement would direct or regulate the lawyer's professional judgment and run afoul of Rule 5.4(c). Third, under Rule 5.4(a) and (b), a lawyer shall not share legal fees with a non-lawyer and shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. The CLC program appears to also run afoul of those rules. Fourth, this Committee also has concerns regarding the attorney-client privilege and the waiver of that privilege through the arrangement outlined above. According to the materials provided, CLC provides the attorney with a completed client questionnaire which enables the attorney to begin developing the trust documents. Such an arrangement may very well constitute a waiver of the attorney-client privilege. Finally, there is no indication in the materials provided regarding how CLC intends to market this program in South Dakota. This Committee is concerned with the references in the documents provided to the attorney being "specifically qualified" and other references to the "specialized" nature of the attorney's services. Putting aside all other concerns with the CLC program, this Committee would not approve participation in this program without first knowing how the program was to be marketed in South Dakota so that this Committee could be satisfied that Rules 7.2, 7.3, and 7.4 were being followed.

It should be emphasized that this opinion pertains only to the CLC program outlined above and should not be construed as expressing an opinion on any other legal services plans.

Thank you.

Sincerely,

Michael S. McKnight, Chairman  
Ethics Committee