

ADVISORY ETHICS OPINION 87-02

SYNOPSIS:

As a result of the deletion of Disciplinary Rule 2-103(D)(4)(a) from the Code of Professional Responsibility, a lawyer may participate in a for-profit prepaid legal service plan under the Code of Professional Responsibility, provided the plan complies with the guidelines set forth in this Opinion. The lawyer must exercise independent professional judgment on behalf of the client, maintain all client confidences, avoid conflicts of interest, and practice competently. The lawyer also must insure that the plan does not involve improper advertising solicitation or fee sharing.

FACTS:

An Opinion was requested by the Vermont Bar Association's Board of Managers raising ethical issues concerning for-profit prepaid legal service plans and, since then, the Committee has received a number of other inquiries.

The Board's inquiry was the result of activity by Plan-A, a program administered "on behalf of the XYZ Foundation," which, in turn, was administered by Able Insurance Group, Inc. Its soliciting literature indicated that Plan-A was serviced by a network of telephone access and referral attorneys established by Plan-A (a service of Professional Systems, Ltd., a wholly-owned subsidiary of Conglomerate, Inc.). Plan-A was touted by XYZ Foundation as a "low cost employee benefit that can either be implemented by non-contributory or contributory plans."

Plan-A's advertising indicated that a member could pick up the phone and speak directly with the referral attorney at no charge and that such items as reviewing simple legal documents would be furnished free to members. In addition, Plan-A referral attorneys would provide further service, face to face, with an initial half-hour consultation being charged at \$15.00. Membership at that time for a single person required a \$98.00 annual payment.

Similar inquiries were received from other prepaid legal organizations including a non-profit foundation. Its sponsors are employers or union and health and welfare funds, etc. There is a contract between the sponsor and the foundation and contracts between the foundation and attorneys in each state who provide the legal services to the covered parties. The attorneys are paid on the basis of a set fee per month per covered party enrolled in the state and cannot accept any legal work or fee from the covered party beyond that which is covered in the prepaid legal services plan. This foundation has also contracted with Plan-A.

The Committee has also learned that several other for-profit prepaid legal plans are currently operating in Vermont.

DISCUSSION:

A review of the Code of Professional Responsibility indicates that the Amendments to the Rules adopted by the Supreme Court on January 31, 1986, effective February 15, 1986, deleted the specific language of former Disciplinary Rule 2-103(D)(4)(a), which authorized lawyer participation in *not-for-profit* prepaid legal service plans.

The Supreme Court subsequently submitted the issue of participation in *for-profit* plans by Vermont lawyers to its Advisory Committee on Rules of Civil Procedure, which determined that the Court intended to remove the prohibition against participation in for-profit prepaid legal plans and to adopt the approach of the American Bar Association Model Rule 7.2(c), which reads as follows:

“(c) a Lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.”

The Committee recognizes that prepaid legal service plans can offer increased access to legal services, and, for that reason, it offers herein guidelines to assist lawyers in assessing the propriety of their participation in such plans.

The Committee believes that a lawyer may participate in a for-profit legal service plan subject to certain conditions. The participating lawyer must personally determine whether these conditions are met. The lawyer must be able to exercise independent professional judgment, maintain client confidences, avoid conflicts of interest and be able to practice competently. The operation of the plan must not involve improper advertising, solicitation or fee sharing. Disciplinary Rule 5-107(B) specifically provides that “A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”

Once the lawyer-client relationship is created, that relationship must be no different from the traditional lawyer-client relationship. The sponsor's organization should have no further contact with the client regarding the representation.

Further, participation in a prepaid legal service plan assumes that the plan's advertising must not be false or misleading. Disciplinary Rule 2-101 states that a communication is false or misleading if it contains a material misrepresentation or omits a necessary fact or is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Code of Professional Responsibility or compares the lawyer's services with other lawyer's services unless the comparison can be factually substantiated. Therefore, to avoid disciplinary action, a participating lawyer must establish that the plan's advertising is accurate and that it does not mislead or create unjustified expectations.

Another issue considered by the Committee in preparing this Opinion is whether participation in such a plan constitutes improper fee sharing in violation of DR 3-102. The American Bar Association held in ABA Informal Opinion 1409 (1978) that a lawyer could participate in a prepaid legal service plan which deducted a portion of the subscriber's payments to cover administrative costs and which was not operated for profit. This Committee's Opinion 79-11 (1979) also approved of allocating fees to cover the costs of program administration and education.

Formal Opinion 87-355, issued by the American Bar Association December 14, 1987, deals with this subject matter. After noting that the flat prohibition against lawyer participation in for-profit plans formerly set forth in DR 2-103(D)(4)(a) was not carried into the ABA Model Rules, the opinion concluded that none of the evils that the prohibition against fee sharing with non-lawyers was meant to prevent would be present in a typical for-profit prepaid legal service plan provided the participating lawyer's independence of professional judgment and freedom of action on behalf of a client is preserved. The ABA Committee concluded that the retention by the plan's sponsor of portions of the monthly payments from plan members to *cover a profit*, as well as its administrative costs, did not constitute improper fee sharing in violation of the Model Rules, nor did it constitute giving anything of value to a person for recommending the lawyer's services.

CONCLUSION:

Following the elimination of DR 2-103(D)(4)(a), the Committee is of the opinion that a lawyer complying with the directives set forth in this Opinion and in the ABA Formal Opinion 87-355, who participates in a for-profit prepaid legal service plan does not violate the Code of Professional Responsibility although such participation was formerly prohibited by the Code of Professional Responsibility as set forth in ABA Informal Opinion 85-1510 and VBA Opinion 77-2.¹

¹ A plan involving insurance will be subject to regulation by the Department of Banking and Insurance.