81 LAWYER'S PARTICIPATION IN PREPAID LEGAL SERVICE PLANS

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Introduction and Scope

Over the past few years, the Committee has received a number of inquiries regarding the propriety of lawyers' participation in various prepaid legal service plans. It is presently estimated that 13.5 million people nationwide are enrolled in prepaid plans, and of those only 2.3 million people are participants in union or association funded plans. Aggregate Legal Services Plan Statistics, National Resource Center for Consumers of Legal Services, Legal Plan Letter, No. 147 (March 8, 1988); *ABA/ BNA Lawyers' Manual on Professional Conduct*, 81.2505. The purpose of this opinion is to aid Colorado lawyers in assessing the propriety of their participation in prepaid legal plans, or in their representation of clients who are members of such plans. In achieving this purpose, this opinion sets forth criteria for prepaid plans in which it is ethically permissible for an attorney to participate.

Syllabus

A lawyer may not accept employment through a prepaid legal service plan if the lawyer knows or should know that said plan is in violation of applicable laws, rules of court, other legal requirements that govern its legal services operations, or any Disciplinary Rule. DR 2-103(E). A lawyer may accept work from a *non-profit closed panel*[1] provider, so long as a member or beneficiary may select his or her own counsel when representation by the provided counsel would be unethical, improper or inadequate. A lawyer may accept work from a *for profit* panel provider so long as (1) it is an *open panel* plan; *or* (2) it is a *closed panel* plan *and* the organization providing the plan "bears ultimate liability of its member or beneficiary," *and*, further, a member or beneficiary may select his or her own counsel when representation by the provided counsel would be unethical, improper or inadequate. DR 2-103(D)(4)(a) and (e). The plan must provide that the plan member or beneficiary, and not the plan, be recognized as the client. DR 2-103(D)(4)(d). Further, the plan must allow the participating lawyer to exercise independent professional judgment, to maintain client confidences, to practice competently, and to avoid conflicts of interest. Finally, the plan must advertise and solicit plan members within the ambit of DR 2-101.

General Discussion

A. *DR 2-103: Participation in Prepaid Legal Service Plans*

Disciplinary Rule 2-103 permits attorneys to participate in certain types of prepaid legal service plans. That rule provides in pertinent part:

> DR 2-103 Recommendation of Professional Employment
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> . . .
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> (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D) . . .
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> . . .
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> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101. However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use

> of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:
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> . . .
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> (4) Any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries *provided all of the following conditions are satisfied*:
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> (a) *Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised, or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.*
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> (b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate, or affiliated lawyer.
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> (c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
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> (d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
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> (e) Any member or beneficiary who is entitled to have legal services recommended, furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that recommended, furnished or paid for by the organization for the particular matter involved. *The legal service plan of such organization must contain a reasonable procedure enabling a member or beneficiary to obtain alternate counsel, under similar terms, when representation by the counsel recommended, furnished or paid for by the plan would be unethical, improper, or inadequate under the circumstances.*
>
> (f) Such organization has filed in duplicate with the Clerk of the Colorado Supreme Court at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities.

(Emphasis supplied).

B. *Non-Profit vs. For Profit Plans, and Open Panel vs. Closed Panel Plans*

Opponents of closed panel plans (where the plan chooses the members' attorney) argue that such panels foster improper solicitation, threaten attorney-client relationships, result in poorer work quality, and foster a conflict of interest between the client-member and the plan hiring the attorney. *See generally* Comment, *State Prohibition on Closed Panels – the Constitutional Question*, 27 Baylor L. Rev. 590 (1975). *See, e.g.*, Alabama Ethics Opinion 87-104 (1/4/88) (lawyer who is a shareholder, officer or director for a prepaid legal service plan may also represent clients under the plan, but may not sell plan memberships, or use plan as a solicitation tool); Michigan Ethics Opinion CI-1180 (1/18/88) (lawyers may participate in plan which does not select lawyers for clients, and does not exercise control over lawyers' delivery of legal services). At least one court has held that restrictions requiring that for-profit plans be open panel plans *are* constitutional, on the ground that a profit-motivated organization deserves only commercial speech protection, and not the broader associational freedom protection. *Cuyahoga County Bar Association v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 369 N.E.2d 1232, 1236 (Ohio Ct. Common Pleas 1975) (group legal services corporation not constitutionally protected because primary purpose was to "provide monetary profits for the corporation," and "making legal services available to its members was only incidental.").

On the other hand, proponents of for-profit closed panel plans argue that restrictions on such plans violate the freedom of association guaranteed under the First and Fourteenth Amendments to the United States Constitution. *See Student Government, University of North Carolina at Chapel Hill v. Council, North Carolina State Bar*, No. C-C-76-346 (W.D.N.C. 1977) (provision restricting all prepaid plans in North Carolina to open panels found to violate First and Fourteenth Amendment rights of plan members). *See generally, Great Western Cities v. Binstein*, 476 F. Supp. 827, 834 (N.D. Ill. 1979), *aff'd* 614 F.2d 775 (7th Cir. 1979) (association of defrauded lot owners had First Amendment protection to enable its members to engage legal representation).

As DR 2-103(D)(4)(a) now stands, *non-profit closed panel plans are permitted*, so long as a member or beneficiary actually has the opportunity to select his or her own counsel when representation by the provided counsel would be "unethical, improper, or inadequate under the circumstances." However, *for-profit plans must be open panel plans*, except where the organization providing the plan "bears ultimate liability of its member or beneficiary."[2]

C. *Additional Ethical Issues*

A variety of ethical issues confront lawyers who participate in for-profit prepaid legal service plans. It is the participating lawyer's responsibility to insure that the plan complies with the Colorado Code of Professional Responsibility ("Code"). A lawyer who participates in a plan that violates the Code may violate a number of disciplinary rules, including DR 2-103(E), which provides

> (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule or when such lawyer knows or has cause to know that a legal assistance organization (including a qualified legal assistance organization), through which such a lawyer accepts employment, is in violation of applicable laws, rules of court, and other legal requirements that govern its legal services operations.[3]

While this Opinion does not purport to be an exhaustive review of all potential ethical problems associated with for-profit prepaid legal service plans, the following ethical issues arise in many, if not all, plans and must be resolved before a lawyer ethically may participate in the plan. *See* American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 87-355 (12/14/87).

1. Professional Independence

DR 2-103(D)(4)(d) requires that the plan member or beneficiary, and not the plan itself, be recognized "as the client of the lawyer in the matter." Further, DR 5-107 states 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." Thus, a lawyer may not permit a plan to interfere with his or her exercise of independent judgment. Once a legal matter has been referred to a lawyer, the member or beneficiary becomes the lawyer's client, and it would be improper for the plan to oversee, direct or interfere with the legal matter in any way.

The ABA's Formal Opinion 87-355, entitled Lawyers' Participation in For-Profit Prepaid Legal Service Plan, points out potential problems which might arise in the area of lawyers' independence:

> . . . For example, there is certainly the potential for economic control of a lawyer who is sufficiently involved in a plan to become financially dependent upon it. Therefore, the precise relationship between the participating lawyer and the plan sponsor is an important consideration. To the extent that the participating lawyer or law firm's practice is exclusively or predominantly dependent upon the plan, the issue of assuring the independence of the lawyer's professional judgment becomes more serious. It is, of course, a question of fact as to whether the lawyer's financial dependence upon the plan's sponsor is so extensive that it affects the lawyer's judgment

Other requirements in the plan also may present a potential for improper control by the plan sponsor of the lawyer's conduct. No provision may interfere with the lawyer's professional judgment. For example, if the plan undertakes to set limits on the amount of time a lawyer may spend with each client's case, or to fix the number of cases which must be handled by a lawyer, or to require the lawyer to commit to the plan that the lawyer will not represent a client beyond the scope of the agreement in the plan, the plan may interfere with the lawyer's independent professional judgment.

The agreement entered into between the plan and the participating lawyer should be in writing, and make clear that the participating lawyer shall use his or her independent professional judgment, and that the plan sponsor will not attempt to interfere in the exercise of that judgment.

Those plans that limit the amount of lawyer time provided or establish fixed or arbitrary allocations of lawyer time between "trial" time on the one hand and "preparation or pre-trial time" on the other hand, have a serious potential for violation of DR 5-107(B). It is obvious that a lawyer cannot provide "preparation adequate in the circumstances" when the lawyer is limited to two or three hours of preparation in a substantial civil or criminal case. While it is true that the lawyer may spend the necessary preparation time (and not get paid by the plan for the necessary preparation time), human nature is such that a serious question will be raised as to whether under such circumstances, the required "preparation adequate in the circumstances," has been provided. DR 6-101(A)(2).

It may be possible for the participating lawyer to enter into a supplemental fee agreement directly with the client to provide that the client will be liable for the necessary lawyer time that is not paid by the plan. Nonetheless, in cases where the lawyer determines that the legal matter cannot be competently handled under the time constraints of the plan, and the lawyer determines that no satisfactory supplemental fee agreement can be reached, the lawyer must decline the employment.

Finally, certain plans may exclude from coverage claims, defenses, or positions which, in the opinion of the attorney handling the case, or in closed panel plans the "provider attorney,"[4] will not prevail in court. Any such provision creates an obvious conflict between the client's right to zealous representation and the attorney's financial interests. For instance, if in the course of handling a piece of litigation an attorney concludes that he or she has less than a fifty percent chance of prevailing at trial, the lawyer may be inclined to urge settlement in order to insure that he or she will get paid.

2. Competence

DR 6-101(A)(1) requires that a lawyer not handle a legal matter which he or she knows or should know the lawyer is not competent to handle. Further DR 6-101(A)(2) requires that a lawyer not handle a legal matter without adequate preparation. Therefore, a plan must not require a lawyer to take a case which he or she is not competent to handle; and the plan must not be structured in such a way as to encourage or require inadequate preparation (such as by paying for lengthy trial time, but a minuscule amount of trial preparation time). *See* ABA Formal Opinion 87-355; District of Columbia Ethics Opinion 170 (4/15/86) (lawyer may participate in plan, provided any advertising complies with Code provisions prohibiting misleading advertising and solicitation).

3. Confidentiality

DR 4-101 prohibits a lawyer from revealing a client's confidence or secret; using a client's confidence or secret to the client's disadvantage; or using a client's confidence or secret for the lawyer's or a third person's advantage, unless the client consents after full disclosure. Thus, plan quality control mechanisms or other features which would require an attorney to disclose client confidences or secrets would require a lawyer *not* to participate in such a plan.

4. Conflicts of Interest

DR 5-105, DR 5-106 and DR 5-107 require lawyers to avoid conflicts of interest. A lawyer should be wary of plans which impose any restrictions upon a lawyer's ability to represent a member or beneficiary once they become clients. Further, some plans attempt to prohibit a participating lawyer from bringing

certain causes of action against the plan or other plan members. In such a case, an attorney rejecting such a matter should advise the client to consult with other counsel, so that the member-client is not inadvertently misled into believing that the action has no merit. *See* ABA Formal Opinion 87-355.

5. Advertising and Solicitation

A lawyer should not participate in or perform work for a legal services plan which engages in false or misleading advertising, or involves undue influence, intimidation, invasion of privacy or harassing or vexatious conduct. DR 2-101. In particular, DR 2-101(B) provides:

> (B) Without limitation, and by way of example only, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
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> (1) Contains a material misrepresentation;
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> (2) Omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading;
>
> (3) Is intended 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 any disciplinary rule or other law;
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> (4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by rules of the Colorado Supreme Court;
>
> (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
>
> (6) Contains a representation or implication that is likely to cause a reasonable person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive

Thus, a participating lawyer must assure that all advertising is accurate, and that it does not mislead or create unjustified expectations. *See* District of Columbia Bar Ethics Opinion 170 (4/15/86); Kentucky Bar Association Ethics Opinion 312 (8/86).

A plan that advertises that a subscriber may use the services of a lawyer of the subscriber's choice, but fails to establish reasonable and effective procedures to enable the subscriber to do so is misleading. Also misleading is a plan that is advertised as providing adequate legal representation in substantial litigation matters, when the plan limits preparation time to an amount of time that is manifestly insufficient.

Finally, a lawyer may not initiate or promote a legal services plan for the primary purpose of "providing financial or other benefit" to the lawyer, or his or her firm, DR 2-103(D)(4)(b); and a plan may not be operated "for the purpose of providing legal work or financial benefit for any lawyer. . . ." DR 1-103(D)(4)(c). *See Cuyahoga County Bar Association v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 369 N.E.2d 1232, 1236 (Ohio Ct. Common Pleas 1975).

NOTES

1. An *open panel* prepaid legal service plan permits members or beneficiaries to choose their own attorneys. A *closed panel* plan permits members or beneficiaries to use only those attorneys designated by the plan.

2. Rule 7.3 of the ABA Model Rules abandoned the distinction between open and closed panel plans, in order to encourage the development of group legal services. As of 1988, Alaska, Colorado, Iowa, Kentucky, New York, Ohio, Texas and Tennessee retained the distinction in DR 2-103(D)(4)(a). BNA *Lawyers' Manual on Professional Conduct*, 81:2504.

3. This opinion discusses only issues dealing with ethical concerns. It does not discuss other potential legal issues arising out of prepaid legal service plans. For instance, it is not clear whether the plans are, or are not, insurance. At least one court has held that they are not. *Feinstein v. Attorney-General*, 36 N.Y.2d 199, 326

N.E.2d 288 (N.Y. App. 1975) (interpreting New York insurance code). Colorado law is not clear. *See* C.R.S. §§ 10-1-102(7) and 10-3-1102(2) (1973). In 1979, then Colorado Insurance Commissioner Barnes issued a letter to a provider saying that the contract then offered was not insurance. The Committee is informed, however, that the Colorado Insurance Commissioner is presently revisiting the entire issue, but no final decision has been reached. Further, certain potential aspects of setting minimum or maximum fees, the vertical integration of closed panel plans, discrimination or boycotts against competing plans, and exclusive dealing arrangements pose the risk of violation of the antitrust laws. Meeks, "Antitrust Aspects of Prepaid Legal Service Plans," 1976 ABF Research Journal 855; Annot., "Prepaid Legal Services Plans," 93 A.L.R.3d 199.

4. A "provider attorney" in a closed panel plan is the attorney or firm selected by the plan sponsor to perform the members' work.