Nebraska Ethics Advisory Opinion for Lawyers
No. 80-6

AN ATTORNEY'S PARTICIPATION IN A PLAN FOR FURNISHING PREPAID LEGAL SERVICES WHICH LIMITS ITS MEMBERS, IN THEIR SELECTION OF COUNSEL, TO COUNSEL WHO HAVE BEEN FURNISHED, SELECTED, OR APPROVED, BY THE PLAN, IS UNETHICAL.

FACTS

Your inquiry describes a closely held Nebraska stock corporation which markets policies of legal insurance in the manner of other insurance companies, including by direct mail advertisement to groups or employers. The corporation provides its insureds with legal services through a "Participating Attorney Agreement", whereby Firm A and Firm B have agreed to perform services for insureds of the corporation on a regular hourly fee basis. Of each premium dollar collected, 60% goes into an "Attorney Fee Trust Fund" and 40% goes to the corporation for administrative expenses, marketing, overhead, commissions, etc. The corporation cannot use any of the Attorney Fee Trust Fund for administrative expenses, nor any of the other 40% for attorney fees. If the Attorney Fee Trust Fund becomes depleted, participating attorneys continue to provide services to insureds for a reduced fee or for no fee on cases pending at the time of the depletion, so that legal service provided by the policy is performed, whether the participating attorney is paid or not, on pending cases.

When an insured desires an attorney, the corporation informs the insured of the identity of the participating firms, Firm A and Firm B, and that the insured may choose therefrom. The insured does so, makes an appointment directly with the firm chosen, and is thereafter provided legal services by that firm in the usual manner. Upon completion of the legal services, the firm is paid out of the Attorney Fee Trust Fund up to the benefit limits. We are uncertain from your inquiry as to whether there may be an additional billing to the insured.

Finally you relate that only Firm A and Firm B are participating attorneys at this time, although more may be added in the future. Firms are not identified in any promotional materials, nor are they identified during a sales presentation except upon request. No member of either Firm A or Firm B owns any stock in the corporation, although your inquiry is silent as to whether the corporation was formed by either Firm A or Firm B, and as to whether either acts as its general counsel.

DISCUSSION

Disciplinary Rule 2-103(D) generally proscribes a lawyer's assisting an organization, which pays for his legal services to others, to promote the use of his services. However, an exception appears in that a lawyer is not prohibited from being recommended, employed, or paid by, or cooperating with, certain types of organizations if there is no interference with the exercise of his independent professional judgment in behalf of his client. Among those organizations DR 2-103(D)(4) describes an organization which furnishes legal services to beneficiaries, in the manner apparently described by your inquiry,

subject, however, to compliance with certain further conditions, including:

> "b. Neither the lawyer nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing a financial or other benefit to such lawyer, partner, associate or affiliated lawyer."

Your inquiry is silent as to whether either Firm A or Firm B "initiated or promoted such organization" and, if so, as to whether it did so "for the primary purpose of providing a financial or other benefit to" Firm A or Firm B. The Committee makes no assumptions in either respect, the paragraph being mentioned only for your possible consideration with Canon 9 regarding avoidance of even the appearance of professional impropriety.

A more serious question, it seems to us, is raised by DR 2-103 (D)(4)(e), which provides:

> "e. Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief."

The plan you describe, which limits an insured's choice of counsel to one of the two firms which has entered into a "Participating Attorney Agreement" with the corporation, seems violative of the foregoing paragraph. Nor does the plan which you describe provide relief for an insured who claims that representation by Firm A or Firm B would be unethical, improper, or inadequate, nor any procedure for seeking such relief.

Another concern we have is compliance with DR 2-103(D)(4)(a) which provides in part:

> ". . .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."

Your inquiry does not state specifically whether "the organization is organized for profit". If it is, the rendition of legal services by Firm A and Firm B may be of questionable propriety.

You have kindly furnished the Committee with copies of American Bar Association Informal Opinions 1409 and 1421, at least the latter of which discusses a similar arrangement. That opinion characterizes the plan therein considered (the particulars of which are not described) as "a commercial closed panel prepaid legal services plan". The Opinion appears to deal with concerns other than the "closed panel" feature of the plan (i.e., the concepts

of " running", derivation of profit from legal services, and initiation by the lawyer for financial benefit). It does, however, urge no less than twice the careful compliance with DR 2-103(D)(4)(a thru g), and we fail to see that the plan you describe satisfies subparagraph (e) of our Code.

You have also requested suggestions as to possible corrections for any improprieties found to exist. While the Committee cannot formulate specific provisions for you, you may wish to consider the American Bar Foundation Research Journal, No. 2, Spring, 1977, the entire issue of which is devoted to an article entitled, "Regulation of Legal Service Plans" by Pfennigstorf and Kimball. On page 411 begins a careful consideration of the many problems of closed panel plans and alternative suggestions.

CONCLUSION

An attorney's participation in a plan for furnishing prepaid legal services which limits its members, in their selection of counsel, to counsel who have been furnished, selected, or approved by the plan, is unethical.

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