

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-69

Issued: May 1973

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May an attorney represent a member of a group or a prepaid legal services plan?

Answer: Yes.

References: Canon 2, 3; RCA 3.020, 3.475, 3.476, - 3.477; DR 2-101, 2-102, 2-103, 2-104, 3-102, 5-107

OPINION

A request has been received concerning a group legal service arrangement which has been established by a member of the Kentucky Bar Association and a group. The group's primary purposes and activities are other than the rendering of legal services, pursuant to the recently adopted RCA 3.475.

The inquiry is the first to be received by the Committee, and comes on the heels of two Formal Opinions issued by the American Bar Association (Opinion 332 and 333) dealing with the similar concept of prepaid legal services, also recently adopted in Kentucky under RCA 3.476. Although the newly issued Formal Opinions do not directly bear upon the exact type of group legal services plan as herein described, they do provide some insight into the reasoning and ideals of the American Bar Association.

“Group legal services” means a labor union, trade association, professional association or other nonprofit organization, whose primary purposes and activities are other than the rendering of legal services, who offer a plan of payment for legal services to its members. The plans are funded by a portion of dues paid to the organization, specific payment being made by the member for that purpose or payment by another organization for the member.

The group plan as adopted in this particular inquiry is for the Compensation Fund of a District of the United Mine Workers of America, which has engaged a single attorney to act as counsel. This is best described as the “closed panel” arrangement. The arrangement is to provide its members representation regarding Workmen's Compensation claims and to advise members in regard to their Federal Black Lung Claims. This is in accordance with both RCA 3 475(e) and DR 2-103(D)(5)(6), which require the

recommending, furnishing, or paying for legal services pursuant to such a plan to be incidental and reasonably related to the primary purposes of such organization.

The “closed panel” arrangement must be carefully scrutinized and even frowned upon. It tends to pose serious threats to the attorney-client relationship. The client must remain free in his choice of counsel and be able to maintain control over his personal affairs. Should he become dissatisfied with his representation, or should he desire other representation, he must be allowed to do so. This is in accordance with RCA 3.475(a) permitting members to engage legal services, independently of the arrangement, with any attorney of their choice. The group plan as described to the Committee allows this, although in actual practice this may be easier said than done. The “open panel” allowing free choice of counsel, and plans not limited to job related matters and offering a wide range of legal services covering personal problems, is much more attractive. Care must be taken under the “closed panel” situation not to let the group services plan become an automatic “feeder” or solicitor for the private practice of the member of the Association.

Other provisions required by RCA 3.45 appear to be answered. No members of the group, or its agents, directly or indirectly, derive any profit or receive any part of the consideration paid for the rendering of legal services. This is in accordance with DR 3-102, which states that a lawyer shall not share legal fees with a non-lawyer and, also is in accordance with RCA 3.475(c). Only the attorney involved will practice law under the arrangement as required by RCA 3.475(d) and Canon 3, preventing a lawyer from assisting in the unauthorized practice of law.

Two issues arise in which great care must be taken so as to prevent any impropriety or unauthorized conduct.

DR 5-107(B) states:

A lawyer shall not allow another to direct or regulate his professional judgment in rendering legal services for a client, even though the other person recommends, employs or pays him to render the legal services to the client.

And, RCA 3.475(b) requires that the group, its agents or any member thereof shall not interfere with or control the performance of the duties of the member of the Association.

Pursuant to these rules, the group plan must allow complete independent professional judgment on behalf of the attorney involved. The implications and improprieties of any other such situation are clearly evident. A lawyer must remain free to serve the interests of his clients exclusively, and when employed by a third party, he should guard his freedom to do so. He need not and should not feel any responsibility to the organization which is paying him. The professional judgment of the lawyer should be employed, within the law, solely for his client and free of compromise.

The second problem is dealt with in RCA 3.475(f) concerning publicizing and soliciting activities. Only a simple and dignified announcement to members of the group is

to be employed, setting forth the purposes and activities of the group or the nature and extent of the legal services, or both. There is to be no identification of the member of the Association rendering or to render the services, except that the group may answer inquiries from members of the group as to the identity and address of the member of the Association rendering or to render the services.

These rules are in accordance with Canon 2, and, in particular DR 2-103(D) which provides in part:

A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(5) Any other nonprofit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

- (a) The primary purposes of such organization do not include the rendition of legal services.
- (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
- (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
- (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in this matter.

The stated provisions of this rule were adopted by the American Bar Association as a result of the holding of the U.S. Supreme Court in Brotherhood of Railroad Train men v Virginia, 377 U.S. 1 (1964) rehearing denied, 377 U.S. 960 (1964).

In accordance with the above, care must be taken so as not to violate other closely related principles. These include DR 2-102(A)(I) concerning professional cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or other similar professional notices or devices; and, DR 2-101(B), concerning publicity in general through means of the media. Close scrutiny must be shown in the “closed panel” arrangement where situations as presented in DR 2-104 arise. This section deals with a

suggestion of need of legal services. The arrangement as described to the Committee deals only with Workmen's Compensation cases and Federal Black Lung Claims. No provision is made for representation for personal matters of the clients. The member of the Association must abide by DR 2-104 and accept employment only in cases where he is allowed to do so. Of course, this is a factual determination and must be decided on a case by case basis.

Great care then must be taken concerning the publicizing and advertising of the group plan. Pursuant to such rules, there has been one violation in the plan as described, in that the announcement to the members and officers of the group contained the identification of the member of the Association who is to provide the legal services. It is improper to mention counsel by name in such announcements (*See* RCA 3.475(i)). However, we are convinced that the attorney in this instance did not prepare or participate in the preparation of the announcement nor did he have any knowledge that his name would be mentioned.

Other provisions in regard to the requirements of RCA 3.475 have been complied with. A reasonable fee is being charged and there is a provision for a revision of such fee and other arrangements at the end of one year.

The Kentucky Bar Association was advised within sixty days of the proposed adoption of the plan, and was adequately and candidly advised on all matters concerning details of the group services arrangement.

RCA 3.477 holds yet another very important determination to be made. It requires that any member of the Kentucky Bar Association who is actively engaged in the practice of law as defined in RCA 3.020 shall not have any financial interest whatsoever in any group or plan contemplated within RCA 3.475 or RCA 3.476. From information gathered from the arrangement, the member of the Association has no financial interest in the group or plan contemplated.

The use of "group legal services" and "prepaid legal services" will allow ready access to a lawyer's advice and will further the goals of the preventive law concept and resolve many matters before they reach the courts, and, to that extent they are laudable. However, care must be used in their application and the conduct of the members engaged in such activities must meet the high ethical standards imposed by the courts through the adoption of the principles embodied in the ABA Code of Professional Responsibility and the guidance of the Bar. Direction and control of the legal profession by the unified bar and the Court of Appeals is essential for the maintenance of our system of justice.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.