

**ATTORNEY PARTICIPATION IN
PREPAID LEGAL SERVICES PLANS**

The Lawyer Disciplinary Board has received inquiries from West Virginia lawyers concerning certain practices of various prepaid legal services plans. In general, prepaid legal services plans are a form of insurance which is marketed directly to potential insureds or to an employer or fiduciary seeking a supplier of legal services for others. Because such plans are usually owned and operated by nonlawyers, the Lawyer Disciplinary Board does not directly regulate them.¹ Instead, the Board exercises its jurisdiction over lawyers to determine whether a lawyer will violate the Rules of Professional Conduct by participating in a particular prepaid legal services plan.

From the material reviewed, the Board has two primary concerns: (1) whether the advertising and solicitation practices of a prepaid legal services plan should conform to West Virginia's Rules of Professional Conduct; and (2) whether the operation of the plan renders it a for-profit referral service. As set forth in greater detail below, the Board has concluded: (1) a lawyer participating in a prepaid legal services plan is ethically responsible for the plan's advertising and solicitation practices in West Virginia; and, (2) plans which pay nothing to the lawyer may be, in effect, for profit referral services in which West Virginia lawyers may not participate.

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The Code of Professional Responsibility, in effect until 1989, set out in detail the circumstances under which a lawyer could be recommended by an organization furnishing legal services to its members or beneficiaries. The organizations were required to file an annual report with The West Virginia State Bar. See DR 2-103(D)(4).

A. Advertising and Solicitation

Rule 8.4(a) of the Rules of Professional Conduct prohibits a lawyer from violating the Rules of Professional Conduct through the acts of another. It is the opinion of the Board that attorneys who garner clients through improper advertising or solicitation by a prepaid legal services plan violate this rule. The harm to the public through misleading advertising about attorney services is the same whether the attorney advertises directly or indirectly through an organization. Attorneys also should not be permitted to profit from violations of the Rules of Professional Conduct by prepaid legal services plans.

For example, a sample brochure from one plan contains a client testimonial which says, "My first attorney sent me a settlement check for \$50,000. I was referred to [the plan's attorney] for a second opinion. [The plan's attorney] negotiated a settlement of my case for \$500,000." This testimonial creates an unjustified expectation about results the lawyer can achieve in violation of Rule 7.1(b) of the Rules of Professional Conduct.

Another plan is actively advertising its services, but currently has no participating West Virginia attorney, which makes the advertising misleading. This particular plan has "independent sales associates" who are permitted to recruit and develop their own sales organization. The plan appears to have problems monitoring its associates' local advertising.

With respect to solicitation practices, the Board notes that the comment section to Rule 7.3 of the Rules of Professional Conduct makes clear that a prepaid legal services plan may personally or telephonically contact representatives of organizations or groups that may be interested in establishing a prepaid legal services plan for its members, insureds or beneficiaries because this form of communication is not directed to a prospective client.

Communications directed specifically to a prospective client would still need to comply with the solicitation rules.

The Board therefore places the burden upon any attorney subject to its jurisdiction who is already participating or intends to participate in a prepaid legal services plan to inquire about and review any marketing and advertising within the State of West Virginia to ensure that the prepaid legal services plan complies, at all times, with the Rules of Professional Conduct. Violations of the Rules by a plan may be imputed to its participating attorneys. Any lawyer who participates in a prepaid legal services plan is responsible for any marketing and advertising which violates the Rules of Professional Conduct and will be subject to sanctions for any such violations by the plan.

B. Operation of Prepaid Legal Services Plans

Rule 7.2(c) of the Rules of Professional Conduct states that 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 advertisements or communications permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization." This Board has previously set forth guidelines to distinguish between a group advertising plan and an impermissible referral service. *See* L.E.I. 90-3, Lawyer Referral/Advertising Programs.

A prepaid legal services plan generally anticipates that the organization will pay all or a portion of an attorney's fee for certain services provided to its beneficiaries or insureds.

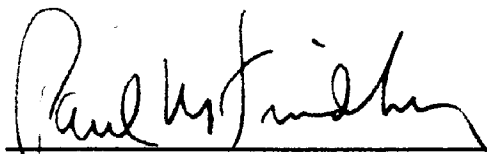
This arrangement is routinely practiced by insurance companies which provide a lawyer to insureds under their home or vehicle insurance policies.

For example, in one plan reviewed by the Board, members are entitled to certain free legal services, such as reviewing a contract, writing a letter, drafting a will, and one 30 minute consultation per year. These services are rendered by a local attorney called a "counseling attorney". The attorney's name is given to members calling a toll free number. The counseling attorney is paid \$2.00 per member in West Virginia monthly for providing these services as needed.

However, if the member has a serious matter which goes beyond the services provided by the counseling attorney, the member is referred to a "panel attorney". The "panel attorney" is a lawyer who has entered into a contract with the organization to give members a 25% discount. The lawyer pays the organization a \$400 administrative fee which ostensibly goes toward the cost of computer and Internet set-up. There is also an annual "administrative fee" of \$200 per area of law in which the attorney wishes to be designated. The organization pays nothing to the participating lawyer.

It is the opinion of the Board that such an arrangement is essentially payment to the organization for referring its insured to a lawyer and is thus impermissible under Rule 7.2(c) of the Rules of Professional Conduct.

APPROVED this 19th day of November, 1997.



Paul M. Friedberg, Chairperson
Lawyer Disciplinary Board
State of West Virginia