

# Advisory Opinion 1984-12

An attorney asks three questions of the Committee:

1. May an attorney have prepaid legal service materials available in his office for public dissemination?
2. May the attorney's secretary act as a representative of the prepaid legal service organization and enroll interested clients?
3. Does the prepaid legal service organization need to register with the Insurance Commissioner or the Securities Bureau?

The attorney informs the Committee that he participates in the program as a provider of legal services. His secretary would receive a commission per person enrolled in the program. As member of the program, enrollees are free to choose their own attorney. of course, the attorney chosen must be willing to accept the employment at the rates paid by the program.

## QUESTION 1:

The Committee sees nothing improper in having information on prepaid legal services available for public consumption. Rule 2-101(B)(15) permits an attorney to disseminate information about prepaid or group legal service programs in which the lawyer or law firm participates. Recent cases have upheld the practice of disseminating information about legal services. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *L.M. v. Disciplinary Board of the Supreme Court of the State of New Mexico, et al*, CV No. 83-0077 H.B. (October 25, 1983).

The mere availability of prepaid legal materials does not create a situation where a person is pressured to accept the legal services nor does it constitute overreaching by the attorney. The Code of Professional Responsibility recognizes that "important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." EC 2-1. Since members of the public may wish to have access to the protection and benefits offered by a prepaid legal service program, lawyers acting under proper auspices may make information about these programs available. See EC 2-2. As long as the attorney's motivation is to inform the public of the availability of this legal service, the Committee believes his conduct conforms to the ethical goals of the profession. The Committee finds no violation of the Code of Professional Responsibility to be implicit in his proposal.

The attorney's participation in the program, however, raises an additional consideration. Rule 2-101(B) is subject to Rule 2-103, which in part provides:

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associates, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in Rule 2-101, and except that:

...

(2) he may cooperate with the legal service activities of any of the offices or organizations enumerated in Rule 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) the person to whom the recommendation is made is a member or beneficiary of such office organization; and

(b) the lawyer remains free to exercise his independent professional judgment on behalf of this client.

By participating in the program, the attorney allows the prepaid legal service organization to recommend the use of his services. Rule 2-103(C)(2) permits an attorney to cooperate with organizations listed in Rule 2-103(D)(1-4). It appears that 2-103(D)(4) is the only subpart applicable to the prepaid legal service organization. Those persons, who enroll in the program and who the attorney will represent, obviously are beneficiaries of legal services under this subpart. The attorney should determine that the listed conditions are satisfied before continuing his participation in the program.

The attorney is cautioned not to encourage or recommend the program to prospective enrollees. Rule 2-103(A) absolutely prohibits in-person solicitation or solicitation by mail directed to a person known to need legal services of the type offered. *L.M. v. the Disciplinary Board, supra*. Because the attorney is a provider/participant in the program, he is recommending employment of himself, at least indirectly. The Committee realizes that enrollees are free to choose their own attorney, but believes the attorney should choose a course of action which avoids the appearance of impropriety. Code of Professional Responsibility, Canon 9.

The Committee does not believe that the availability of the prepaid legal service material in his office constitutes in-person solicitation. *Black's Law Dictionary* defines "solicit" to mean veto appeal for something; ... to ask for the purpose of receiving ... Continuing, *Black's* states that "the term implies personal petition and importunity addressed to a particular individual to do some particular thing." As long as the attorney does not place the material in his office in such a manner which calls undue attention to it, the Committee concludes that having the material available is permissible for the reasons stated above.

#### QUESTION 2:

The secretary has a direct interest in promoting the program actively because her compensation is based upon the number of people enrolled. Her involvement with the prepaid legal service organization conceivably could benefit the attorney, although it is not clear to what extent. It is fairly clear, however, that her involvement would occur in the attorney's office during working hours. As an employee under the control and supervision of the attorney, a question arises whether her activity would fall within the parameters of Rule 2-103(A), which absolutely prohibits in-person solicitation. The New Mexico federal district court in *L.M. v. The Disciplinary Board, supra*, recently upheld the constitutionality of Rule 2-103(A) to the extent that it prohibits in-person solicitation. If the attorney was not a provider/participant in the program or if the secretary's involvement was not connected with her employment with the attorney, then her involvement may not be contrary to Rule 2-103(A). Under the circumstances presented, the Committee sees no real difference between the secretary's involvement and in-person solicitation by the attorney. It therefore concludes that the secretary should not act as a representative for the prepaid legal services organization. Conceivably, the secretary's actual involvement may be such that there is no in-person solicitation. But because the potential for prohibited in-person solicitation exists, the Committee cannot conclude otherwise.

#### QUESTION 3:

The attorney can and should answer this question himself by calling the Insurance Superintendent and the Securities Bureau Chief.