

ETHICS OPINION

RO-99-04

Impermissible conflict exists where law firm sells pre-paid legal insurance policies and also provides insureds with legal services required under the policies.

QUESTION:

Your law firm proposes to offer pre-paid legal services directly to clients without involving an insurer. Your firm would, in effect, perform the function of an insurer and sell pre-paid legal services policies to individuals or businesses. When the insured has need of legal services, and, in effect, makes a claim against the policy, your firm would then undertake to provide those services at no additional cost to the insured. The insured then also becomes your client. One of the examples provided in your letter is as follows:

“ABC County has 136 property management companies. If a legal service plan was devised and 76 property management companies paid \$125.00 each per month to an attorney or firm that would gross \$9,500.00 per month and \$114,000.00 per year to provide unlimited Sanderson Act evictions in District Court and unlimited motions for “Relief from the Automatic Stay” in Bankruptcy Court.”

You attached with your request a letter from the Alabama Department of Insurance which states that your proposal is not insurance and therefore not subject to their jurisdiction.

ANSWER:

While your proposal may or may not be the type of insurance which is subject to regulation by the Insurance Department, there is no question that what you propose is to insure individuals and businesses against the cost of obtaining legal services. After extended deliberation, the Disciplinary Commission is of the opinion that there is an inherent conflict of interest in a law firm selling pre-paid legal insurance and then providing the insured with the legal services required under the policy.

DISCUSSION:

The Disciplinary Commission's opinion that your proposal creates a conflict of interest between the attorney and the client is based, in part, on the concern that the proposed arrangement would eliminate the financial incentive the lawyer normally has to provide the client with the best possible representation the lawyer is capable of providing. Under the traditional pre-paid legal services plans offered by the insurance industry, the insured pays a monthly insurance premium to the insurer. When the insured needs legal services, the insured makes a claim under the policy and is referred by the insurer to an approved participating attorney who is paid by the insurer for the services actually rendered. Attorneys who participate in pre-paid legal services plans agree to provide specified legal services to the insured for a set fee, e.g., preparation of a simple will for \$150.00. If the insured needs more than one legal service, the attorney is compensated for each legal service he provides, although obviously he may charge only the fee amount provided in the policy. If the insured wants more or different legal services than those covered by his policy, he must pay the attorney an additional fee, over and above the policy premium he has paid to the insurer. In other words, under traditional legal service policies, the attorney is entitled to be paid by the insurer for each legal service provided pursuant to the policy, and is entitled to be paid by the insured/client for any legal services provided which are not covered by the policy.

In contrast, your proposal requires the attorney to provide an unlimited number of legal services to the insured/client for one set monthly fee. This arrangement creates a conflict of interest between the attorney and the client, in that, once the fee or insurance premium is paid, it is to the lawyer's advantage not to have to provide legal services to the client. Any legal problem the client has is going to cost the attorney time and effort for which he will receive no additional compensation.

Normally, it is to the lawyer's advantage to provide the client with all the legal services the client could possibly need, because the more services the attorney provides, the more he gets paid. Your proposal would result in an attorney-client relationship which is just the opposite. The attorney has already been paid all he is going to be paid for whatever services the insured/client needs. The attorney has already been paid all he is going to be paid regardless of how extensive or how complex the insured's/client's legal needs may be. As a result, instead of having an incentive to provide the client with all of the legal assistance the client needs, the attorney is placed in the position where it is to his advantage to provide the client with as little legal assistance as possible.

The Disciplinary Commission's opinion that your proposal creates a conflict of interest between the attorney and the client is also based on the fact that there is an inherent conflict of interest between the insurer and the insured. Pursuant to your proposal, wherein the insurer and the attorney are one and the same, this inherent conflict between the insurer and insured would permeate the attorney-client relationship.

The policyholders to whom an insurer sells insurance make up a "pool" of insureds. When an insurer issues a policy of insurance the insurer is, in reality, betting or taking the chance that most of the insureds in the "pool" will not need the benefits the insurer has agreed to provide if needed. In pre-paid legal services plans, the insurer is betting that most of the insureds will not need the services of a lawyer.

If so few of the insureds in the "pool" need legal services that the insurer collects more in premiums than it pays out in attorney fees, the insurer wins the bet. But if there are so many insureds who need services that the insurer pays out more in attorney fees than it collects in premiums, the insurer loses and must either raise its premiums or go out of business. But in either event, the participating lawyer to whom the insurer referred the insured is paid for each legal service he provides as long as the policy remains in effect.

However, when the lawyer assumes the role of the insurer, he is both collecting the premium and providing the service for which the premium is collected. When the insured makes a claim on his policy, the lawyer's insured also becomes the lawyer's client. Like the insurance company, the lawyer is betting that most of the insureds/clients in the "pool" will not need his services or will need only minimal services. If the most of insureds/clients do not need legal services or need only services which cost the attorney in time and effort the equivalent of the premium he has collected, then the lawyer wins. But if a large number of the insureds/clients in the "pool" need services which cost the attorney time and effort in excess of the amount of the premium he has collected, the lawyer loses. If the services needed by the insureds/clients cost substantially more than the premium amount, the lawyer loses substantially. And, if a large number of the insureds/clients in the "pool" need services which cost the attorney time and effort substantially in excess of the amount of the premium, the lawyer is facing financial disaster. Under these circumstances the attorney will naturally look for ways to cut his cost, either by providing fewer or lower quality legal services than he would if he were being paid full value for those services, or by taking the position that the services the client needs are not covered under the insurance policy. It conclusively appears that your proposal would create a situation where the interest of the attorney and the interest of the client are clearly and directly adverse.

Mention should also be made in connection with your proposal of the recent formal opinion of the Disciplinary Commission of the Alabama State Bar, RO-98-02. In that opinion, the Commission held that it is ethically impermissible for an attorney to allow the insurer to impose restrictions or limitations on the attorneys representation of the insured. The Commission concluded that such restrictions constitute an interference with the lawyer's independence of professional judgment in violation of Rules 1.8(f) and 5.4(c) of Rules of Professional Conduct of the Alabama State Bar. The concerns expressed in that opinion, and the prohibitions imposed by the Commission in response thereto, are equally, if not more compellingly, applicable where the insurer and the attorney are one and the same.

Finally, a related problem in regard to your proposal has to do with the ethical concerns involved when an attorney uses a second profession as a "feeder" for the attorney's law practice. The Disciplinary Commission has consistently held that an attorney who has a second profession or business may engage in both simultaneously. See, e.g., RO-87-158 (attorney and credit bureau owner); RO-87-80 (attorney and engineer); and, RO-87-161 (attorney and real estate broker), copies attached. For example, an attorney who is also a professional engineer may be a member of an engineering firm and, at the same time, a member of a law firm.

If the attorney has a client who is in need of engineering services, the attorney may refer his client to his own engineering firm, as long as full disclosure is made of the attorney's interests in the engineering firm. The converse, however, is not true.

If the engineering firm has a client who needs legal services, the engineering firm may not refer clients to the law firm. To do so would circumvent the rules against direct in-person solicitation, because, unlike lawyers, professional engineers are not prohibited from directly soliciting customers or clients.

In RO-85-46 and again in RO 86-11, the Disciplinary Commission addressed the ethical implications of an attorney who is also a salesperson for a prepaid legal services plan and held that such dual employment was ethically permissible subject to specific conditions. In RO 85-46, the Commission held, in pertinent part, as follows:

“There would be nothing unethical, per se, in an Alabama attorney acting as an agent for a prepaid legal services company in which such attorney is active in the sale of prepaid legal services policies to persons who may need the future use of any attorney for which the policy would cover the expenses of the future use of an attorney if (1) the attorney does not indicate on his letterhead, office sign, or professional card that he is agent for the legal services company, (2) does not identify himself as an attorney on any publication in connection with his occupation as agent for the prepaid legal services company and (3) does not use his other business or occupation as agent for the legal services company as a cloak for solicitation of legal work or as a feeder to his law practice.

* * *

The Office of General Counsel and the Disciplinary Commission have on a number of occasions held that there is nothing unethical, per se, in an attorney engaging in another business or profession. We are of the opinion, however, that your business as an agent for a prepaid legal services company should be conducted both physically and functionally separate from the operation of your law practice.

We are of the further opinion that the only way in which you could effectively avoid violating Disciplinary Rule 2-103(A)(4) would be to refuse proffered employment from any prospective client who obviously came to you only as a result of the fact that you had previously acted as an agent in selling to him prepaid legal service policies. This is not to say that certain regular clients would not employ you under the circumstances even though you had sold to them prepaid legal service policies. You would be required to exercise your own good judgment in this regard.”

The above cited opinions clearly indicate that your proposal would violate the prohibition against using a second business or profession as a “feeder” for your practice, would violate the admonition that any activity you may engage in as salesperson for prepaid legal services be conducted both physically and functionally separate from the operation of your law practice, and most significantly, would violate the prohibition against representing anyone to whom you had sold prepaid legal services insurance.

RO-99-04
Page Six

In summation, it is the opinion of the Disciplinary Commission of the Alabama State Bar that your proposal to provide pre-paid legal services insurance coverage to your own clients would result in an impermissible conflict of interest between your firm and the client, would be contrary to the prior opinions of the Disciplinary Commission and is therefore ethically unacceptable.

LGK/vf

2/16/2000