

BEFORE THE SUPREME COURT OF OHIO

Columbus Bar Association,

Relator,

-vs-

American Family Prepaid Legal Corporation,
et al.,

Respondent.

Supreme Court Case No. 2005-0422

Case No. UPL 02-10

From the Board of Commissioners on
the Unauthorized Practice of Law of the
Supreme Court of Ohio

**ANSWER BRIEF OF AMICUS CURIAE OHIO STATE BAR ASSOCIATION IN
OPPOSITION TO RESPONDENTS AFPLC, HMISI AND JEFFREY NORMAN AND IN
SUPPORT OF OBJECTIONS OF THE RELATOR, THE COLUMBUS BAR ASSOCIATION,**

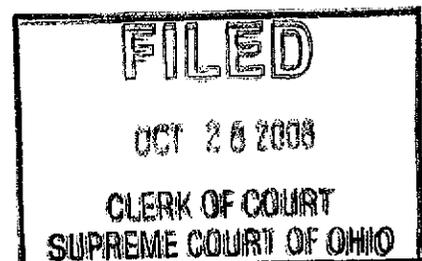
John N. MacKay, Esq. (0002801)
(Counsel of Record)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43604-5573
Telephone: (419) 321-1234
Facsimile: (419) 241-6894
E-mail: jmackay@slk-law.com

Andrew R. Bucher (0082931)
(Counsel of Record)
REINHEIMER & REINHEIMER
208 Madison Street
Port Clinton, Ohio 43452
Telephone: (419) 734-1723
Facsimile: (419) 734-3620
E-mail: andrew.bucher@hotmail.com

Eugene P. Whetzel, Esq. (0013216)
General Counsel
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43204
Telephone: (614) 487-2050
Facsimile: (614) 485-3191
E-mail: gwhetzel@ohiobar.org

Attorney for Respondents American
Family Prepaid Legal Corporation,
Heritage Marketing & Insurance Services,
Inc., and Jeffrey Norman

Attorneys for Amicus Curiae – Ohio State
Bar Association



Joyce D. Edelman (0023111)
(Counsel of Record)

Aaron M. Shank (0069414)
J. H. Huebert (0078562)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2000
Facsimile: (614) 227-2100
E-mail: jedelman@porterwright.com
ashank@porterwright.com
jhuebert@porterwright.com

Attorneys for Relator Columbus Bar
Association

James P. Tyack, Esq. (0072945)
(Counsel of Record)
Tyack, Blackmore & Liston Co., LPA
536 S. High Street
Columbus, Ohio 43215
Telephone: (614) 221-1341
Facsimile: (614) 228-0253
E-mail: jpryack@tblartorneys.com

Attorney for Respondent Adam Hyers

Jeff Alton
25302 Wolf Road
Bay Village, Ohio 44140

Pro Se Respondent

Tim Clouse
6188 South State St. Rt. 587
New Riegel, Ohio 44853

Pro Se Respondent

Joseph Ehlinger
127 19th Street
Findlay, Ohio 45840

Pro Se Respondent

Christopher J. Moore, Esq. (0065330)
(Counsel of Record)
MOORE & SCRIBNER
3700 Massillon Road, Suite 380
Uniontown, Ohio 44685
Telephone: (330) 899-0475
Facsimile: (330) 899-0476
E-mail: attorneychrismoore@yahoo.com

Attorney for Respondents Joseph Hamel
and Timothy Holmes

Stanley Norman
12 Bordeaux
Coto De Caza, California 92679

Pro Se Respondent

Paul Chiles
1117 Forest View Court
Westerville, Ohio 43081

Pro Se Respondent

William Downs
1682 Lexington Drive
Lancaster, Ohio 43130

Pro Se Respondent

Luther Mack Gordon
3420 Sodom Road
Casstown, Ohio 45313

Pro Se Respondent

Steve Grote
4941N. Arbor Woods Court, Apt. 302
Cincinnati, Ohio 45248

Pro Se Respondent

Samuel Jackson
7789 Windward Drive
Massillon, Ohio 44646

Pro Se Respondent

Chris Miller
295 Laurel Lane
Pataskala, Ohio 43062

Pro Se Respondent

Eric Peterson
5014 Marigold Way
Greensboro, North Carolina 27410-8209

Pro Se Respondent

Richard Rompala
19559 Echo Drive
Strongsville, Ohio 44149

Pro Se Respondent

Vern Schmid
1024 Josiah Morris Road
London, Ohio 43140

Pro Se Respondent

Jerrold Smith
152 Elm Street Ravenna, Ohio 44266

Pro Se Respondent

David Helbert
195 Beachwood Avenue
Avon Lake, Ohio 44012

Pro Se Respondent

Dennis Quinlan
1367 Pine Valley Court
Ann Arbor, Michigan 48104-6711

Pro Se Respondent

Harold Miller
4083 Guston PL
Gahanna, Ohio 43230

Pro Se Respondent

Paul Morrison
8580 State Route 588
P.O. Box 361
Rio Grande, Ohio 45674

Pro Se Respondent

Jack Riblett
952 South Brinker Avenue
Columbus, Ohio 43204

Pro Se Respondent

Daniel Roundtree
1273 Serenity Lane
Worthington, Ohio 43085

Pro Se Respondent

Alexander Schlop
2090 State Route 725
Spring Valley, Ohio 45370

Pro Se Respondent

Anthony Sullivan
1587 Ringfield Drive
Galloway, Ohio 43119

Pro Se Respondent

Patricia Soos
3037 Lisbon-Canfield Road
Leetonia, Ohio 44431

Pro Se Respondent

* * *

Table of Contents

	<u>Page</u>
Statement of Facts.....	1
Statement of Facts.....	1
Argument	1
Summary.....	1
1. Proposition of Law No. 1	3
2. Proposition of Law No. 2	7
3. Proposition of Law No. 3	8
4. Proposition of Law No. 4	8
5. Proposition of Law No. 5	10
Conclusion	10

Table of Authorities

STATE CASES

<i>Cincinnati Bar Association v. Kathman</i> , 92 Ohio St. 3d, 92, 2001 Ohio 157 (no ¶ reference available)	1, 9
<i>Cleveland Bar Association v. Sharp Estate Serv., Inc.</i> , 107 Ohio St. 3d 222	1, 9
<i>Columbus Bar Association v. Fishman</i> , 98 Ohio St. 3d 172	1, 2, 4, 6, 9
<i>Columbus Bar Association v. Willette</i> , 117 Ohio St. 3d 433	4, 5

RULES

D.R. 3-102(A)	1
D.R. 1-102(A)(4)	4
D.R. 2-103(B)	5
D.R. 3-103(A)	7
D.R. 2-103(D)(4)(c)	8
Gov. Bar R. XVI	2, 9
Gov. Bar R. XVI Section 5	2
Gov. Bar R. XVI Section 5(A)	8
Gov. Bar R. XVI Section 5(G)	9
Gov. Bar R. XVI Section 5(H)	2
Prof. Cond. Rule 1.0(f)	5
Prof. Cond. Rule 5.4 and 7.2	8
Prof. Cond. Rule 5.4(a)	1
Prof. Cond. Rule 5.4(b)	7
Prof. Cond. Rule 7.2(b)	5
Prof. Cond. Rule 8.4(c)	4

OTHER

Ethics Adv. Op. 2001-4	3
Ethics Adv. Op. 2002-11, p. 5-6	8
Formal Opinion 87-355, American Bar Association Standing Committee on Ethics and Professional Responsibility	2, 8, 10
UPL Adv. Op. 2002-1	7

Statement of Facts

The non-attorney Respondents, AFPLC,¹ HMISI,² and Jeffrey Norman, in their Statement of Facts and statements of fact throughout their brief, admit (or do not contest) facts that establish that their sale of annuities and other insurance products as an integral part of the delivery of estate planning services by an attorney constitute the unauthorized practice of law under circumstances justifying significant penalties and remedial action. The specific facts are listed under the first Proposition of Law, and, for brevity, will not be repeated here.

Argument

Summary

Unfortunately for their victims, the Respondents' have continued their predatory conduct notwithstanding clear warning from this Court in an earlier case involving one their attorneys.³ In the *Fishman* case, this Court stated that selling annuities and other insurance products in connection with an attorney's rendering estate planning services is prohibited conduct⁴ thereby warning Respondents and all others not to do so. But this is exactly the conduct before the Court in this case.

This Court has repeatedly condemned such enterprises because attorneys merely “ ‘lend[] credibility and a façade of legality to the product the non-attorney offers.’ Id. at 97, 748 N.E. 2d 1091, citing *People vs. Cassidy*, (Colo. 1994), 884 P 2d 309, 311.”⁵ The conduct is a violation of the Disciplinary Rules and the Professional Conduct Rules.⁶ Notwithstanding this clear law, the principal behind the enterprise in *Fishman* and the successor to the Fishman enterprise is before

¹ American Family Prepaid Legal Corporation.

² Heritage Marketing & Insurance Services, Inc.

³ *Columbus Bar Ass'n v. Fishman*, 98 Ohio St. 3d 172, 2002 – Ohio – 7086.

⁴ Id., at 98 Ohio St.3d at 175; 2002-Ohio-7086 at ¶16.

⁵ *Cleveland Bar Assn. v. Sharp Estate Serv., Inc.*, 107 Ohio St. 3d 222, 2005-Ohio-6267, ¶10 (quoting from *Cincinnati Bar Assn. v. Kathman*, 92 Ohio St. 3d, 92, 97, 2001 Ohio 157 (no ¶ reference available).

⁶ DR 3-102(A); Prof. Cond. Rule 5.4(a).

the Court for the same offense. This is the same case as *Fishman*, perhaps with a repainted façade. Respondents must have concluded that the Court's warning applied only to attorneys, and did not apply to non-attorneys.

The heart of this beast is the payment in kind by the attorney to the non-attorney Respondents to get referrals. In return for referrals, the attorney gives (pays in kind) the non-attorney Respondents access to the attorney's defenseless clients and to confidential information about the clients. The attorneys have insurance sales agents deliver planning documents to their clients and share confidential client information with the sales agents. There is no question that the non-attorneys have used this enterprise, with full knowledge of the illegality, to insert themselves intentionally into the delivery of legal services and that they are unauthorized to render such legal services. Therefore, enjoining these non-attorney Respondents from such conduct and punishing them severely is consistent with this Court's clear warnings, is consistent with the law, and is essential to establish that non-attorneys cannot use the practice of law to sell non-legal products and services at a profit.

Because the non-attorneys have so intertwined themselves with the legal services, the profit from the annuities and insurance products constitutes the improper sharing of fees.

Respondents have voluntarily submitted to the jurisdiction of this Court by having one member of the enterprise register as a legal services plan under Gov. Bar R. XVI. They claim that registration insulates them from their illegally harmful conduct. In fact, registration does no such thing. Instead, a prepaid legal service plan "must be in compliance with other applicable law."⁷ A prepaid legal service plan registered under Gov. Bar R. XVI Section 5(H) is not

⁷ Formal Opinion 87-355, American Bar Association Standing Committee on Ethics and Professional Responsibility; See, Gov. Bar R. XVI, Section 5.

excused from complying with the law regulating the practice of law and with the law prohibiting the unauthorized practice of law.

1. **Proposition of Law No. 1.**

Non-attorneys engage in the unauthorized practice of law when they sell annuities and other insurance products as part of the delivery of an attorney's estate planning services.

This case presents the non-attorney side of attorney discipline cases involving sales of annuities with estate planning services. As such, the case presents a unique opportunity to address directly the problems created by non-attorneys who sell annuities and other financial and insurance products as part of an attorney's estate planning services, and to state clearly that the non-attorneys have engaged in the unauthorized practice of law. Although the prohibition against combining insurance products with estate planning services is well-established and its evils well-known to this Court and responsible attorneys, the problem recurs with such frequency that a clear holding applying directly to non-attorneys is needed. Therefore, this case can establish that non-attorneys are also responsible for prohibited conduct and must bear the consequences.

The prohibition against combining the sale of annuities and other insurance products with estate planning services is well-established, and its evils are clearly defined. For example, Ethics Adv. Op. 2001-4⁸ states as follows:

“It is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of a lawyer. A lawyer's interest in selling an annuity and a client's interest in receiving independent professional legal counsel free of compromise are differing interests. *Even if full disclosure and meaningful consent may be obtained*, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a

⁸ “Ethics Adv. Op.” refers to an opinion rendered by the Board of Commissioners on Grievances of The Supreme Court of Ohio. “UPL Adv. Op.” refers to an opinion rendered by the Board of Commissioners on the Unauthorized Practice of Law.

licensed insurance agent are subject to inspection by the State Superintendent of Insurance under §3905.19 of the Ohio Revised Code.”

The following quotation from the *Fishman* case against the attorney for predecessors to these Respondents states that Respondents’ conduct is prohibited, describing the evils.

“Respondent violated DR 4-101(D) [Prof. Cond. Rule 5.3] by failing to reasonably protect his clients from the improper use of their confidences and secrets by associates and others whose services he engaged. Respondent facilitated the arrangement through which a client’s private information was disseminated to insurance agents whose primary purposes was to sell annuities on commission. He then obtained the client’s permission to be solicited without first exercising any real independent judgment as to whether the solicitation was for the client’s benefit. Again, despite Respondent’s arguments to the contrary, this practice is simply not analogous to the use of copier or courier services, as is practical and necessary, in furthering the best interests of the client.”⁹

In fact, the Court has addressed selling annuities with estate planning more than once. In *Willette*,¹⁰ a case almost identical to this case and to *Fishman*, the attorney arranged for an insurance sales agent to visit his clients to get estate planning documents witnessed and signed. The attorney never told the clients that he had a contract with the non-attorney business enterprise to pay them a fee. He failed to disclose to his clients that the person who would be advising them on funding the trusts was an insurance broker who would try to sell them insurance. This Court found that clear and convincing evidence existed that he violated D.R. 1-102(A)(4) [Prof. Cond. Rule 8.4(c)]. In other words, the Court found dishonesty, fraud, deceit, or misrepresentation in that case.

This case is not different from *Willette*. This is what was not disclosed in this case, and how the clients were misled.

1. The attorneys providing estate planning services make a payment in kind to the enterprise selling insurance products, including annuities. The attorneys would

⁹ Id., at 98 Ohio St.3d at 175; 2002-Ohio-7086 at ¶16.

¹⁰ *Columbus Bar Assn. v. Willette*, 117 Ohio St. 3d 433, 200-Ohio-1198.

receive valuable referrals from the multi-headed enterprise.¹¹ In exchange for the referrals, the attorneys would have insurance sales agents from the enterprise deliver the attorneys' estate planning documents to the attorneys' clients to give the insurance agents an opportunity to sell annuities and other insurance products. In fact, the business cards of the sales agents conveyed the impression that they were not insurance sales agents. (See 4.(a) below.) This gave the sales agents full access to the clients to sell unnecessary products or, worse, products contrary to the best interests of the clients. The resultant sales demonstrate that this had significant value to the enterprise.

2. Respondents do not contest that the attorneys also delivered confidential client information to the insurance sales agent as part of the enterprise to put insurance sales agents in clients' homes.
3. Annuities were sold that were unneeded or contrary to the interests of the unfortunate clients.
4. The "disclosures" used to get "informed consent" to get insurance sales agents in clients' homes were incomplete, misleading, dishonest, fraudulent, or deceitful¹² such that there was never any informed consent.¹³

(a) Respondents admit that the insurance salesmen were misrepresented to be "asset preservation specialist[s]". (Respondent, p. 10).

¹¹ This is a violation of DR 2-103(B) and Prof. Cond. Rule 7.2(b); *Willette*, 117 Ohio St. 3d at 434; 2008 – Ohio – 1198 at ¶13.

¹² See, *Columbus Bar Assn. v. Willette*, 117 Ohio St.3d 43; 2008-Ohio-1198.

¹³ See Prof. Cond. Rule 1.0(f).

- (b) There is no disclosure that the attorneys received referrals in exchange for allowing insurance sales agents to deliver estate planning documents, or that this was a conflict of interest.
- (c) There was no explanation of the conflict of interest between the insurance sales agents and the clients, how this put the clients at risk, or how the clients could protect themselves.
- (d) There is no disclosure that the attorneys allowed insurance sales agents to have access to confidential client information in exchange for receiving more referrals, the potential consequences of such disclosures, or that the disclosures involved a conflict of interest for the attorney.
- (e) There was no explanation of alternatives available to clients.
- (f) There was no explanation to any client that many of the insurance products offered were not only unneeded, but in many cases, contrary to the client's best interests. There was no suggestion of where to get advice or help.
- (g) Respondents do not contest that some clients were incapable of giving informed consent.

Thus, this is the appropriate case to apply sanctions and remedies to the non-attorney side of cases such as *Fishman* and *Willette*.

2. **Proposition of Law No. 2.**

Non-attorneys engage in the unauthorized practice of law when they combine with attorneys to form a business enterprise that furnishes legal services delivered by the non-attorneys who, in delivering the legal services to the attorney's clients, also solicit the clients to purchase annuities and other insurance products.

In this case, the clients get delivery of the attorneys' estate planning services from insurance sales agents who solicit the clients to purchase annuities and other insurance products. The insurance sales agents constitute the delivery vehicle for the legal services, and use this role in providing legal services to sell non-legal services at a profit to themselves and the non-legal business enterprise.

There is no question that the arrangement between the attorneys and the Respondents in this case constitutes a prohibited, illegal partnership between an attorney and a non-attorney. This very issue of what constitutes a partnership for such purposes was faced by the Board of Commissioners on the Unauthorized Practice of Law in UPL Adv. Op. 2002-1. The Board explained that "the real estate agency labels the agreement as a 'strategic partnership agreement' even though there is no joint ownership of a business, nor is there an agreement to share the business profits or losses. Nevertheless, while the agreement may not be a partnership in the true legal sense of the word, the proposed agreement between the lawyer and the real estate agency is a business agreement that involves the practice of law and is prohibited under D.R. 3-103(A) [Prof. Cond. Rule 5.4(b)]." [emphasis added] There is no legal requirement for a formal written partnership agreement to be found anywhere in the Ohio Revised Code, but there is conduct in this case showing the characteristics of a partnership under the precedent of the UPL Adv. Op. 2002-1.

3. **Proposition of Law No. 3.**

The profits received by non-attorneys from the sale of non-legal goods and services as part of an enterprise that also provides estate planning services is an impermissible sharing of fees.

The enterprise of the non-attorney Respondents and the attorneys providing estate planning services under which the profit received by the non-attorneys for the annuities and the insurance products is a sharing of fees derived from legal services in violation of D.R. 2-103(D)(4)(c) and Prof. Cond. Rule 5.4 and 7.2.¹⁴ The insurance sales agents are not compensated for delivery of the legal documents. They get their compensation for participation in the delivery of such legal services from commissions on the sale of annuities and their employer gets the profits from the sale of annuities. This is not a case where fee sharing is appropriate. The conflict of interest is palpable and has actually caused harm.

4. **Proposition of Law No. 4.**

An entity registered as a legal service plan under Gov. Bar R. XVI, Section 5 is not a legal service plan under the laws of Ohio if the entity operates in violation of Gov. Bar R. XVI.¹⁵

Respondents argue that one or more of them is a legal service plan under Gov. Bar R. XVI because they have registered as such. However, none of them are legal service plans under Gov. Bar R. XVI because none of them are in compliance with Gov. Bar R. XVI.

Gov. Bar R. XVI Section 5(A) prohibits any profit by the legal services plan from being derived by the rendition of legal services by lawyers. In this case, Respondents and their combined enterprise derive profit from the sale of annuities sold as an integral part of the delivery of legal services by the lawyers.

¹⁴ Ethics Adv. Op. 2002-11, p. 5-6; ABA Formal Opinion 87-355, pp. 1-2, 3-4.

¹⁵ It is also clear that none of the Respondents, individually or collectively, operate as a legal service plan, and that the registration under Gov. Bar R. XVI is part of an illegal façade to appropriate the credibility of the legal profession to the Respondents' unneeded or harmful insurance products.

Gov. Bar R. XVI Section 5(G) requires that the lawyer involved not have “cause to know that the organization is in violation of applicable laws, rules of court, and other legal requirements that govern its operations.” In this case, the multi-headed enterprise of Respondents and their attorneys are in clear violation of numerous Professional Conduct Rules and other prohibitions. These violations have been explained by this Court in previous opinions, by the Board of Commissioners on Grievances and Discipline, and by the Board of Commissioners on the Unauthorized Practice of Law, including the authorities cited above. These Respondents are no strangers to the Court’s holdings in such cases. The *Fishman* case includes the sale by non-attorneys of insurance in connection with estate planning services by an attorney for a predecessor enterprise operated by the principals involved in this case. Accordingly, it is simply impossible to believe that any attorney involved in delivering legal services in connection with the enterprise before the Court in this case would not have actual knowledge that the enterprise was in violation of numerous rules. Therefore, it is impossible to avoid a violation of Gov. Bar R. XVI, Section 5(G), which means that Respondents cannot be a legal services plan under Ohio law.

Finally, as the factual statements of the parties make clear, the legal services plan is merely a façade to “lend [credibility and a façade of legality] to the product the non-attorney offers”¹⁶, a point which this Court has made more than once. It is not a true legal service plan.

¹⁶ *Cleveland Bar Assn. v. Sharp Estate Serv., Inc.*, 107 Ohio St. 3d 222, 2005-Ohio-6267, ¶10 (quoting from *Cincinnati Bar Assn. v. Kathman*, 92 Ohio St. 3d, 92, 97, 2001 Ohio 157 (no ¶ reference available)).

5. **Proposition of Law No. 5.**

A legal services plan is not excused from complying with Ohio law regulating the practice of law.

AFPLC's registration as a legal services plan does not excuse it from compliance with Ohio law. It is required to follow this Court's rules and decisions, which it has failed to do as outlined above.¹⁷

Conclusion

This case is but the other side of the coin of an attorney associating with non-attorneys in a common business enterprise to deliver legal services. By inserting themselves into the delivery of legal services, the non-attorneys practice law without the authorization of this Court. This case presents an excellent opportunity to make clear that this unauthorized practice of law by non-attorneys is forbidden and sanctionable.

Respectfully submitted,

John N. MacKay by Michael J. O'Callahan
John N. MacKay, Esq. (0002801) (0043874)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43604-5573
Telephone: (419) 321-1234
Facsimile: (419) 241-6894
E-mail: jmackay@slk-law.com

Eugene P. Whetzel by Michael J. O'Callahan
Eugene P. Whetzel, Esq. (0013216) (0043874)
General Counsel
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43204
Telephone: (614) 487-2050
Facsimile: (614) 485-3191
E-mail: gwhetzel@ohiobar.org

¹⁷ Formal Opinion 87-355, American Bar Association Standing Committee on Ethics and Professional Responsibility.

CERTIFICATE OF SERVICE

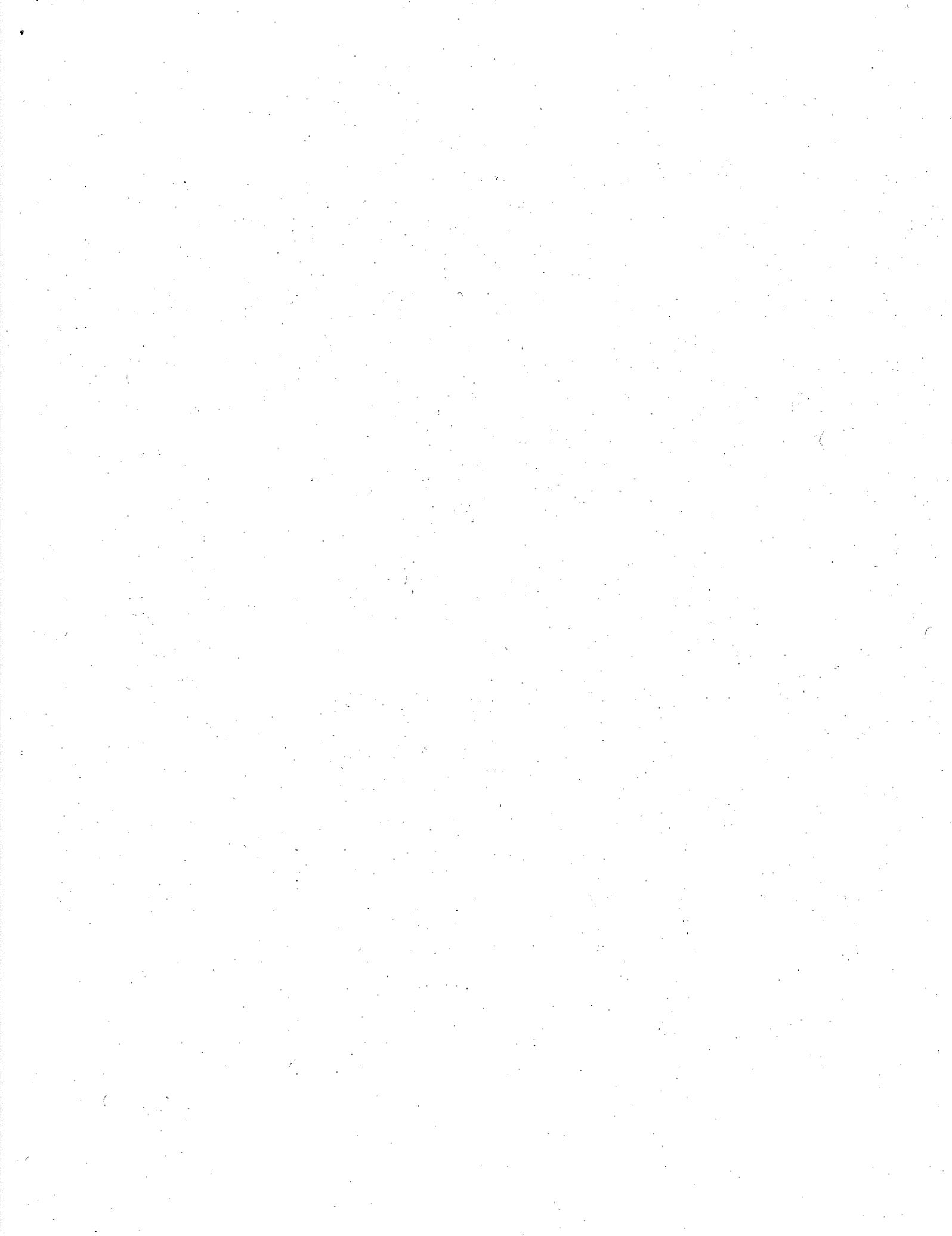
The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served via U.S. mail this 28TH day of October, 2008, upon the following:

<p>Bruce A. Campbell, Esq. Columbus Bar Association 175 South Third Street, Suite 1100 Columbus, Ohio 43215</p>	<p>D. Allan Asbury, Esq. Secretary Board on the Unauthorized Practice of Law The Supreme Court of Ohio 65 South Front Street, 5th Floor Columbus, OH 43215-3431</p>
<p>Andrew R. Bucher, Esq. Reinheimer & Reinheimer 208 Madison Street Port Clinton, Ohio 43452</p> <p>Attorney for Respondents American Family Prepaid Legal Corporation, Heritage Marketing & Insurance Services, Inc., and Jeffrey Norman</p>	<p>Christopher J. Moore, Esq. Moore & Scribner 3700 Massillon Road, Suite 380 Uniontown, Ohio 44685 (330) 899-0475 (330) 899-0476 (fax) attorneychrismoore@yahoo.com</p> <p>Attorney for Respondents Joseph Hamel and Timothy Holmes</p>
<p>James P. Tyack, Esq. Tyack, Blackmore & Liston Co., LPA 536 S. High Street Columbus, Ohio 43215</p> <p>Attorney for Respondent Adam Hyers</p>	<p>Joyce D. Edelman Porter Wright Morris & Arthur 41 S. High Street Columbus, OH 43215</p> <p>Attorneys for Relator Columbus Bar Association</p>
<p>Jeff Alton 25302 Wolf Road Bay Village, Ohio 44140</p>	<p>Paul Chiles 1117 Forest View Court Westerville, Ohio 43081</p>
<p>Tim Clouse 6188 South State St. Rt. 587 New Riegel, Ohio 44853</p>	<p>William Downs 1682 Lexington Drive Lancaster, Ohio 43130</p>

Joseph Ehlinger 127 19 th Street Findlay, Ohio 45840	Luther Mack Gordon 3420 Sodom Road Casstown, Ohio 45313
Steve Grote 4941 N. Arbor Woods Court, Apt. 302 Cincinnati, Ohio 45248	David Helbert 195 Beachwood Avenue Avon Lake, Ohio 44012
Samuel Jackson 7789 Windward Drive Massillon, Ohio 44646	Harold Miller 4083 Guston Pl. Gahanna, Ohio 43230
Chris Miller 295 Laurel Lane Pataskala, Ohio 43062	Paul Morrison 8580 State Route 588 PO Box 361 Rio Grande, Ohio 45674
Eric Peterson 5014 Marigold Way Greensboro, North Carolina 27410-8209	Jack Riblett 952 South Brinker Avenue Columbus, Ohio 43204
Richard Rompala 19559 Echo Drive Strongsville, Ohio 44149	Daniel Roundtree 1273 Serenity Lane Worthington, Ohio 43085
Vern Schmid 1024 Josiah Morris Road London, Ohio 43140	Alexander Scholp 2090 State Route 725 Spring Valley, Ohio 45370
Jerrold Smith 152 Elm Street Ravenna, Ohio 44266	Patricia Soos 3037 Lisbon-Canfield Road Leetonia, Ohio 44431
Anthony Sullivan 1587 Ringfield Drive Galloway, Ohio 43119	Dennis Quinlan 1367 Pine Valley Court Ann Arbor, Michigan 48104-6711
Stanley Norman 12 Bordeaux Coto De Caza, California 92679	

John N. MacKay by Michael J. Callahan
John N. MacKay

Appendix



AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 87-355

December 14, 1987

LAWYER'S PARTICIPATION IN FOR-PROFIT PREPAID LEGAL SERVICE PLAN

Participation of a lawyer in a for-profit prepaid legal service plan is permissible under the Model Rules, provided the plan is in compliance with the guidelines in this opinion. The plan must allow the lawyer to exercise independent professional judgment on behalf of the client, to maintain client confidences, to avoid conflicts of interest, and to practice competently. The operation of the plan must not involve improper advertising or solicitation or improper fee sharing and must be in compliance with other applicable law. It is incumbent upon the participating lawyer to ensure that the plan is in compliance with the model rules.

The Committee has received a number of inquiries raising ethical issues concerning for-profit prepaid legal service plans. In view of the wide-spread interest in this area and the proliferation of diverse plans, and recognizing that prepaid legal service plans can offer increased access to legal services, the Committee in this opinion sets forth guidelines under the ABA Model Rules of Professional Conduct (1983, amended 1987) to aid lawyers in assessing the propriety of their participation in for-profit legal service plans. These guidelines identify criteria for prepaid legal service plans in which it is ethically permissible for a lawyer to participate. The Committee also addresses ethical problems which require special attention. [FN1]

Most for-profit prepaid legal service plans are owned and operated by plan sponsors which, for a modest monthly charge, offer subscribers certain 'covered' legal services for no additional cost and other specified services at reduced fees. The covered legal services are provided by participating lawyers and usually include such services as unlimited telephone consultations and letter writing, and the preparation of simple wills. The reduced fee services usually cover court representation at a fixed hourly rate and contingency fee arrangements, both for less than fees customarily charged by lawyers for similar services. Certain matters are explicitly excluded, such as matters where the interests of two plan members are in direct conflict, suits against the plan's sponsor and complex matters.

The Committee is of the opinion that a lawyer may participate in a for-profit legal service plan under the Model Rules, provided the plan is in compliance with the guidelines in this opinion. The plan must allow the participating lawyer to exercise independent professional judgment on behalf of the client, to maintain client confidences, to avoid conflicts of interest, and to practice competently. The operation of the plan must not involve improper advertising or solicitation or improper fee sharing and must be in compliance with other applicable law. It is incumbent upon the lawyer to investigate and ensure that the arrangement under the plan fully complies with the Rules before the lawyer participates in the plan. Where the plan or the plan sponsor is in violation of the Rules, the lawyer who participates in the plan may violate Rule 8.4(a) by assisting the plan sponsor or by violating the Rules through the acts of the plan sponsor. [FN2]

I. Professional Independence.

At the outset and of primary importance, it is essential that neither the plan nor the participating lawyer permit the sponsoring entity to interfere with the lawyer's exercise of independent professional judgment on behalf of a client or to direct or regulate the lawyer's professional conduct. Rule 5.4 deals with the professional independence of a lawyer and contains traditional limitations on nonlawyer involvement in the practice of law, which include the prohibition against division of fees with nonlawyers [Rule 5.4(a)] and the prohibition against lawyer partnerships with nonlawyers [Rule 5.4(b)]. Rule 5.4(c) specifically states that a lawyer is prohibited from permitting 'a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's

professional judgment in rendering such legal services.' That section states duties implicit in Rules 1.2(a), 1.7(b), and 1.8(f). These Rules together undertake to ensure that the lawyer will abide by the client's decisions concerning the objectives of representation and will serve the interests of the client and not those of a third party. [FN3]

The plan sponsor should have no dealings with plan subscribers on legal issues after their matters have been referred to a lawyer. Once the lawyer-client relationship exists between the plan member and the participating lawyer, that relationship must be no different from the traditional lawyer-client relationship. The plan member becomes a client of the lawyer providing the services, and there should be no interference with that relationship by the plan sponsor. The agreement between the plan and participating lawyer should make clear this basic relationship. This agreement should be in writing.

Although prepaid plans most likely do not involve explicit outside direction or regulation of lawyers' professional judgment in rendering legal services in direct contravention of Rule 5.4(c), there is potential for violation of this Rule inherent in these plans. For example, there is certainly the potential for economic control of a lawyer who is sufficiently involved in a plan to become financially dependent upon it. Therefore, the precise relationship between the participating lawyer and the plan sponsor is an important consideration. To the extent that the participating lawyer or law firm's practice is exclusively or predominantly dependent upon the plan, the issue of assuring the independence of the lawyer's professional judgment becomes more serious. It is, of course, a question of fact as to whether the lawyer's financial dependence upon the plan's sponsor is so extensive that it affects the lawyer's judgment.

Other requirements in the plan also may present a potential for improper control by the plan sponsor of the lawyer's conduct. No provision may interfere with the lawyer's professional judgment. For example, if the plan undertakes to set limits on the amount of time a lawyer may spend with each client's case, or to fix the number of cases which must be handled by a lawyer, or to require the lawyer to commit to the plan that the lawyer will not represent a client beyond the scope of the agreement in the plan, the plan may interfere with the lawyer's independent professional judgment.

Since prepaid plans may have elements of referral services, insurance plans and direct providers of legal services, there may be issues of the unauthorized practice of law, particularly to the extent the plan is deemed to be delivering legal services through its own employees and perhaps even through independent counsel paid by the plan. Whether any aspect of the operation of such plans would constitute the unauthorized practice of law will depend upon the facts of the particular plan and is a matter of state law. The Committee notes that if the plan constitutes the unauthorized practice of law in a particular jurisdiction, Rule 5.5(b) would prohibit a lawyer from participating in the plan in that jurisdiction. *See also* Rule 8.4(a).

II. Confidentiality.

Another serious concern about the ethical propriety of a lawyer's participating in a prepaid legal service plan involves the potential detrimental impact on lawyer-client confidentiality. The participating lawyer must ensure that client confidences are preserved in accordance with Rule 1.6. For example, plan quality control mechanisms and other features are unacceptable to the extent that they lead to disclosure by the lawyer of information relating to the representation in violation of the Rules. A lawyer should not participate in a plan which requires the lawyer to disclose information relating to the representation except in compliance with Rule 1.6.

III. Conflicts of Interest.

The plan must contain no requirement which would interfere with the lawyer's compliance with the conflicts of interest provisions of Rules 1.7, 1.8, 1.9 and 1.10. Some plans attempt to prohibit a participating lawyer from bringing certain causes of action against the sponsor or other plan members. Because the lawyer's rejection of a matter in such circumstances may mislead the client into believing that the action has no merit, the lawyer must be able to advise the client to seek other counsel. Care also should be taken that the sponsor does not impose restrictions upon a lawyer's ability to represent a member once the member becomes a client of the lawyer. *See, e.g.,* Rule 5.6.

IV. Competence.

Regardless of how the plan is structured, a participating lawyer must ensure that the lawyer is competent in the covered areas of law to handle referrals in those areas and has the ability to limit the volume of matters to a volume that the lawyer can competently handle in conformity with the requirements of Rule 1.1. A plan must permit the lawyer to reject matters outside the lawyer's area of competence or which overextend the lawyer's existing workload.

V. Advertising and Solicitation.

Another concern relates to the manner in which potential subscribers are solicited. For example, it would constitute improper solicitation for a lawyer to participate in a plan in which the plan sponsor engages a sales force that would solicit members by telephone or in person. Rule 7.3; *see* Rule 8.4(a), *supra* note 2, and accompanying text. [FN4]

In addition, the plan's advertising must not be false or misleading. Rule 7.1 states that a communication is false or misleading if it contains a material misrepresentation or omits a necessary fact, is likely to create unjustified expectations about the results or compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. A participating lawyer must assure that all advertising is accurate and that it does not mislead or create unjustified expectations. Rules 7.1(a), 7.1(b) and 7.1(c). For example, the advertisement should make it clear that legal services for a plan subscriber will be rendered by a lawyer, not by the plan sponsor.

VI. Fee Arrangement.

An issue remains whether a lawyer's participation in a for-profit prepaid legal service plan constitutes improper fee sharing in violation of Rule 5.4 or giving anything of value to a person for recommending the lawyer's services in violation of Rule 7.2(c). [FN5] Typically, for-profit prepaid legal service plans provide for plan members to pay a monthly fee, part of which is kept by the plan sponsor to cover its overhead and profit and part of which is paid by the plan sponsor to the participating lawyer for those services which the plan offers at no additional cost. [FN6] The members ordinarily begin the monthly payments before representation by a lawyer commences. The lawyer gives nothing of value to the plan sponsor other than the lawyer's agreement to provide legal services to subscribers in accordance with the plan provisions. Under these circumstances, the plan sponsor is compensating the lawyer; the lawyer is not compensating the plan.

The Committee has held in analogous circumstances that a lawyer may participate, under the Rules, in a for-profit lawyer referral service so long as the lawyer does not pay a fee to or share the lawyer's fees with the referral service. ABA Informal Opinion 85-1510 (1985); *see also* ABA Informal Opinion 1409 (1978) (under the predecessor Model Code of Professional Responsibility (1969, amended 1980), a lawyer may participate in a prepaid legal service plan which deducts a portion of the subscribers' payments to cover administrative costs and which is not operated for profit).

Although the Rules do not expressly address the question of whether a lawyer may participate in a prepaid legal service plan where the plan sponsor retains a portion of the subscriber's payment in excess of administrative costs of the plan to provide a profit for the plan sponsor, the legislative history of the Rules and the rationale for the provisions of Rule 5.4 support the conclusion that a lawyer may participate in a for-profit prepaid legal service plan. Significantly, the flat prohibition against a lawyer participating in for-profit plans in DR 2-103(D)(4)(a) of the Model Code was not carried into the Model Rules. In addition, the proponents of amendments now contained in Rule 5.4 explained that the restrictions the Rule imposes on the practice of law specifically 'allowed for experimentation in methods of delivering legal services.' ABA, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 160 (1987). Furthermore, the fee sharing prohibition, which was in the unauthorized practice Canon of the Model Code, was placed in Rule 5.4, which is principally directed towards the maintenance of lawyers' professional independence.

An analysis of the rationale for the prohibition against sharing of fees in Rule 5.4(a) also leads to the conclusion that the participation of a lawyer in a for-profit legal service plan is permissible under the Rules. None of the evils that the prohibition against fee sharing with nonlawyers is meant to prevent are present in a typical for-profit prepaid legal service plan, provided the participating lawyer's independence of professional judgment and freedom of action on behalf of a client is preserved. Two important reasons for the fee-sharing prohibition are: first, to avoid the possibility of a nonlawyer being able to interfere with the exercise of a lawyer's independent professional judgment in representing a client; and second, to ensure that the total fee paid by a client is not unreasonably high. For a lawyer's participation in a legal service plan to be permissible, the independence of the lawyer's professional judgment and client confidentiality must be assured in accordance with the guidelines already outlined in Parts I and II of this opinion. It is likely that the total fee will not be unreasonable in light of the goal of prepaid legal service plans to make legal services more widely available at a lower cost to persons of moderate means. Prepaid legal service plans are seen by many to be a way to deliver legal services in noncomplex matters to an underrepresented client community.

For all of these reasons, the Committee concludes that the retention by the plan sponsor of portions of the monthly payments from plan members to cover a profit as well as its administrative costs does not constitute improper fee sharing in violation of Rule 5.4. Nor does it constitute giving anything of value of a person for recommending the lawyer's services in violation of Rule 7.2(c).

In sum, the Committee concludes that a lawyer who participates in a for-profit prepaid legal service plan does not violate the Rules provided the plan comports with the guidelines in this opinion. The plan must be structured to ensure that participating lawyers can comply with all applicable provisions of the Rules. Participating lawyers are cautioned, however, to investigate the ethical rules governing their practice, since these may differ from the Model Rules. In addition, since this Committee does not comment on questions of law, participating lawyers should consult state laws, court rules and court decisions in effect in their own jurisdictions. [FN7]

Model Code of Professional Responsibility

Under the predecessor Model Code, a lawyer's participation in a for-profit legal service plan is prohibited. DR 2-103(D)(4)(a). See ABA Informal Opinion 85-1510 (1985). However, the Committee recognizes, as it did in that opinion, that constitutional questions may be involved. [FN8] Lawyers are again cautioned to review the rules of their jurisdiction, which may differ from the Model Code.

FN1. Similar issues, concerning professional independence and preservation of confidences, were discussed in a different setting, that of government funded legal services offices, in ABA Formal Opinion 334 (1974).

FN2. Rule 8.4 provides that "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . ."

FN3. Rule 5.4(d) contains the only restriction in the Rules specifically placed on a for-profit professional corporation or association authorized to practice law. Although paragraph (d) of Rule 5.4 deals with issues analogous to those considered here, it does not directly apply to prepaid legal service plans which, as the Committee understands, are sponsored by entities not authorized to practice law.

FN4. The Committee notes that it is permissible for a plan sponsor to pay to advertise legal services provided under its auspices as long as the advertisement is truthful. Rule 7.2(c). A lawyer may also contact "representatives of organizations or groups that may be interested in "establishing a group or prepaid legal plan for its members . . . for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or the lawyer's firm is willing to offer." Comment to Rule 7.3.

FN5. Rule 5.4(a) says "[a] lawyer or law firm shall not share legal fees with a nonlawyer," with exceptions not pertinent here. Rule 5.4(b) prohibits a lawyer forming a partnership with a nonlawyer "if any of the

activities of the partnership consist of the practice of law." Rule 7.2(c) states: "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 advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization." The Comment to Rule 7.2(c) explains: "This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices."

FN6. The monthly fee is paid in order to insure that the specified legal services will be available for no additional cost or at reduced fees. A subscriber may, however, never need to consult a participating lawyer during the period of the subscriber's membership in the plan.

FN7. For example, whether a prepaid legal service plan is a form of insurance subject to state regulation is a matter of state law.

FN8. Commentators have noted that the distinction in DR 2-103(D)(4)(a) between profit and non-profit plans may be subject to constitutional challenge on First Amendment, equal protection, and right to counsel grounds. See, e.g., Billings, *Legal Expense Insurers: Winning the Battle Against Indifferent Insurance Laws and Hostile Ethics Rules*, 19 Forum 142, 155-58 (1983-84); Comment, *Group Legal Services: From Houston to Chicago*, 79 Dickinson L. Rev. 621, 640-41 (1974-75). See also *Student Government v. Council, North Carolina State Bar*, No. C-C-76-346 (W.D.N.C. Aug. 17, 1977) where a provision restricting all prepaid plans in North Carolina to an open panel format was found to violate the First and Fourteenth Amendment rights of those covered in the plan.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 2001-4

Issued August 10, 2001

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer's interest in selling an annuity and a client's interest in receiving independent professional legal counsel free of compromise are differing interests. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance under Section 3905.19 of the Ohio Revised Code.

OPINION: This opinion addresses whether it is ethically proper for a lawyer to sell annuities to estate planning clients of the lawyer.

Is it proper for a lawyer, who is also a licensed insurance agent, to sell annuities, for a fixed commission, through the law firm to estate planning clients of the lawyer?

This Board previously advised that "[t]he Ohio Code of Professional Responsibility does not prohibit an attorney from providing financial planning services through the law firm to business and estate planning clients of the law firm when the law-related services are provided in connection with and are related to the provision of legal services." Ohio SupCt, Bd Comm'rs on Grievances and Discipline, Op. 2000-4 (2000). It is of no surprise that the Board is now asked to advise upon the ethical propriety of a lawyer selling annuities to estate planning clients.

The Ohio Code of Professional Responsibility through its disciplinary rules and ethical considerations warns lawyers to limit business relations with clients. DR 5-104(A) is the rule that regulates business transactions wherein the lawyer and client have differing interests.

DR 5-104(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his [her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

"Differing interests" is defined in the Ohio Code of Professional Responsibility as follows:

"Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Ethical Consideration 5-3 states that "[a] lawyer should not . . . make improper use of his [her] professional relationship to influence his [her] client to invest in an enterprise in which the lawyer is interested."

A client in need of estate planning reasonably expects his or her lawyer to use independent professional judgment in all matters related to the client's estate plan. The value of professional independent judgment is not to be underestimated, for it very well may be one of the primary reasons a client seeks legal advice in estate planning matters.

A lawyer who sells annuities has a significant interest in each sale. The lawyer receives commissions from each sale. The more sales the more commissions. The sale of products creates a "differing interest" between an estate planning client and his or her lawyer.

When a lawyer is responsible for both the estate plan and the sale of annuities or other products to fund the estate, the lawyer's financial interest may adversely affect the independent professional judgment and loyalty of the lawyer to the client. The lawyer's financial interest in the sale of annuities competes with the client's interest in receiving independent judgment regarding his or her estate plan.

The Board acknowledges that DR 5-104(A) provides that a lawyer may enter a business transaction in which there are "differing interests" when the client consents after full disclosure. However, when the lawyer is legal counsel, estate planner, and seller of insurance products to fund the estate, the Board questions whether full disclosure and meaningful consent ever could be achieved.

The Board is not alone in expressing concern regarding consent as a cure to the conflict. Both New York and Rhode Island advise that an attorney may not sell insurance to estate planning law clients. See New York State Bar Ass'n, Op. 619 (1991); Rhode Island SupCt, Op. 96-26 (1996).

The Committee on Professional Ethics of the New York State Bar Association expressed its concern in the following manner.

We recognize that both DR 5-101(A) and DR 5-104(A) permit a client to remit such disqualification of the lawyer if the client consents to the conflict after full disclosure of the circumstances. Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind. Since

the client is entitled to rely upon the lawyer's independent professional judgment, the opportunity for overreaching by the lawyer is too great to be tolerated. We do not believe that a lawyer can, consistent with the duty of competent representation under Canon 6, solicit or accept a client's consent to a direct and substantial conflict between the client's and the lawyer's interests.

New York State Bar Ass'n, Op. 619 (1991).

Citing New York State Bar Ass'n Op. 619 (1991), the Ethics Advisory Panel of the Rhode Island Supreme Court stated: "As a practical matter, consultation and disclosure which are properly and fully carried out would not in most cases result in the client's consent. Aside from the practical considerations, however, the Panel does not believe that there could be meaningful consent by the law client where the estate planning lawyer has a separate interest in selling insurance." Rhode Island SupCt, Op. 96-26 (1996)

A number of ethics committees do permit attorneys to sell insurance to legal clients, but with various conditions as to disclosure, consent, confidentiality, and other ethical concerns, such as whether the transaction is fair and reasonable. State Bar of Arizona, Op. 99-09 (1999); Illinois State Bar Ass'n, Op. 90-32 (1991); Kansas Bar Ass'n, Op. 95-17(a) (1997); Michigan RI 135 (1992); New Hampshire State Bar, Op. 1998-99/14 (2000), North Carolina State Bar Ass'n, Op. RPC 238 (1996); State Bar Ass'n of North Dakota, Op. 98-07 (1998); Utah Sate Bar, Op. 146A1, (1995). Each opinion sets forth caveats that a lawyer must comply with. For example, North Carolina permits an attorney to sell financial products such as annuities but adds the condition that no commission or fee may be earned by the law firm or any lawyers with the firm on any financial product purchased by a client upon the recommendation by the lawyer. See North Carolina State Bar Ass'n, Op. RPC 238 (1996). New Hampshire concludes its advisory opinion by listing conditions that a lawyer must meet to sell life insurance to estate planning clients.

- The transaction and terms must be fair and reasonable to the client.
- The lawyer must believe the representation will not be adversely affected.
- Such belief must be reasonable.
- The lawyer must consult with the client before entering into the transaction.
- The client must be given an opportunity to consult another attorney.
- The client must understand the consequences of the transaction.
- The client must consent in writing to the terms of the transaction, and to the conflict of interest.

New Hampshire State Bar, Op. 1998-99/14 (2000)

Satisfying such conditions may be difficult if not impossible, because many of the conditions are subjective, not objective. In addition, the conditions are burdensome, not only to the lawyer, but also to the client. For example, seeking consultation from another attorney will take more of the client's time and more of the client's money.

In this Board's view, a lawyer who sells annuities to his or her estate planning clients is setting his or her foot into a certain ethical trap. The lawyer's independence of professional judgment will always be questioned when a problem arises with regard to the representation. The lawyer's motives will be scrutinized. Was the purchase of the annuity really in the best interest of the client or was it in the best interest of the lawyer?

Even if full disclosure and meaningful consent were obtainable, an appearance of impropriety would still exist. By providing estate planning and selling products to fund the plan, the lawyer creates an appearance of impropriety, for such conduct casts doubt upon the independence of the lawyer's professional legal judgment in the estate planning matter. Further, a lawyer selling annuities to his or her estate planning clients may jeopardize the duty to preserve confidences and secrets under DR 4-101, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance under Section 3905.19 of the Ohio Revised Code.

In conclusion, this Board advises that it is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer's interest in selling an annuity differs from a client's interest in receiving independent professional legal counsel free of compromise. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance under Section 3905.19 of the Ohio Revised Code.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 2320, COLUMBUS, OH 43215-6104
(614) 644-6800 (888) 664-8345 FAX: (614) 644-6804
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2002-1

Issued February 1, 2002

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper under DR 2-103(B), DR 2-103(C), DR 3-103(A), DR 5-101(A)(1), and DR 5-104(A) of the Ohio Code of Professional Responsibility for a law firm to enter a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program.

OPINION: This opinion addresses the propriety of a law firm entering a business agreement with a real estate agency to promote the law firm as a service provider in a real estate benefits program.

Is it proper under the Ohio Code of Professional Responsibility for a law firm to enter a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program?

A law firm has been approached by a real estate agency to enter a business agreement to participate in a real estate benefits program. Under the agreement, the real estate agency would agree to market and advertise the law firm as a service provider in its real estate benefits program. To become a service provider in the real estate benefits program, the law firm would agree to pay the real estate agency an annual fee and to offer a discount of certain legal services to customers of the real estate benefits program. The company labels the agreement as a "strategic partnership agreement" between the real estate agency and the law firm.

A variety of service providers would enter into similar agreements with the real estate agency and would be listed in the agency's service provider directory. The categories in the service provider directory include appliances, appraisers, automobile, contractors, designers, home products, home services, inspections, legal services, lenders and financial, movers and storage, outdoor products, outdoor services, personal services, pest control, temporary housing, title companies, travel, and utilities. It is anticipated that one or more law firms would participate as providers of legal services.

The real estate benefits program is comprised of a concierge program, a relocation program, and employee benefits program. The real estate agency promotes the law firm and other service providers through service provider directories, through informational mailings, and through live presentations offered through the real estate benefits program.

Through its concierge program, potential or actual customers who contact the real estate agency or visit the agency's Web site are given access to a printed or online service provider directory. The directory lists the name and address of the service providers and gives a description of the discount, if any. Access to the service provider directory appears to be a free service offered by the real estate agency to potential and actual customers of the real estate agency.

Through its relocation program, the agency mails relocation packages to individuals moving to the geographic area of the real estate agency and includes a copy of the service provider directory. The agency also makes presentations to corporate relocation executives and in the presentations includes information about the service providers.

Through its employee benefits program, the agency sells an employee benefits program to companies. Companies purchase the program from the agency as a way of offering employee benefits. To market the program, the real estate agency makes presentations to the companies and to human resource benefits personnel. The presentations include information about the service providers. The agency invites service providers to participate in employee seminars for member companies who have purchased the program.

In addition, the real estate agency agrees to invite service providers to attend a minimum of one meeting of the real estate agency per year to distribute materials and inform agents of special promotions. The agency agrees that its staff will distribute literature or promotional items of the service provider to the real estate agents' mail boxes. The real estate agency agrees that the benefits of the real estate benefit program would be available to employees of the service providers at no charge.

The proposed agreement between the real estate agency and the law firm does not obligate the law firm to use the services of the real estate agency, nor does it obligate the law firm to recommend law firm clients to the real estate agency. The law firm and other service providers must agree not to enter other programs that offer services at discounts to local companies as part of a benefits package.

Under the proposed agreement, the law firm would offer \$100 off attorney fees in real estate closings for customers in the concierge program. The law firm would offer \$100 off attorney fees in real estate closings or free initial consultation for other legal services to recipients of the employee benefits program.

It is the Board's view that a lawyer's participation in the proposed agreement would violate DR 2-103(B), DR 2-103(C), DR 3-103(A), DR 5-101(A)(1), and DR 5-104(A).

DR 2-103(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in

the lawyer's employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D) [a legal aid office or public defender office; a military legal assistance office; a lawyer referral service that complies with DR 2-103(C), or any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries and satisfies the conditions in DR 2-103(D)(4)(a through g)].

DR 2-103(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, except that: [a lawyer may request referrals from and participate with lawyer referral services that conform to the conditions in DR 2-103(C)(1)(a through j) and a lawyer may cooperate with legal service activities of offices or organizations enumerated in DR 2-103(D)].

DR 3-103(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

DR 5-101(A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.

DR 5-104(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his [her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

First, the proposed agreement violates DR 2-103(B) and DR 2-103(C). Under DR 2-103(B) a lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client. The only exceptions to the rule are that lawyers may pay fees and dues to a legal aid office or public defender office; a military legal assistance office; a lawyer referral service that complies with DR 2-103(C), or any bona fide organization that satisfies the conditions in DR 2-103(D)(4)(a through g). A real estate agency does not fit within the exceptions.

Under DR 2-103(C), a lawyer is prohibited from requesting that an organization promote the lawyer's services. The only exceptions to the rule permit participation and cooperation with a lawyer referral service that complies with the rule, a legal aid office or public defender office, a military legal assistance office, or any bona fide organization that satisfies the conditions in DR 2-103(D)(4)(a through g). A real estate agency does not fit within the exceptions.

An agreement by a law firm to pay an annual fee to a real estate agency for promoting the law firm as a service provider in its real estate benefits program is the giving of a thing of value to an organization to recommend or secure a lawyer's employment. Likewise, a law firm's agreement to reduce attorney fees for certain legal services to customers of the real estate benefits program is the giving of a thing of value.

This view is consistent with the Board's view in Op. 88-012 (1988). In Op. 88-012, the Board advised that DR 2-103(C) prohibits an attorney from providing a free consultation to a surviving spouse or surviving children as part of a funeral package offered by a funeral director. The Board stated that even if the lawyer did not request the funeral director to recommend his or her services, the lawyer's one hour of free consultation was compensation to the funeral director for recommending the lawyer's services because the legal services add to the value of the funeral package.

Further, the recommendations by the real estate agency of the lawyer's services are not disinterested recommendations for the law firm has paid for inclusion as a recommended service provider. As noted in Ethical Consideration 2-8, disinterested recommendations do not serve the public.

EC 2-8 Selection of a lawyer by a layman often is the result of advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his [her] employment. A lawyer should not compensate another person for recommending him [her], for influencing a prospective client to employ him [her], or to encourage future recommendations.

Second, the proposed agreement violates DR 3-103(A). Under DR 3-103(A), a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. The Board has consistently interpreted DR 3-103(A) to apply not only to partnerships formed in accordance with state law, but also to business relationships and associations between lawyers and non-lawyers. *See e.g.*, Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 2000-1 (2000). The real estate agency labels the agreement as a "strategic partnership agreement" even though there is no joint ownership of a business, nor is there an agreement to share the business profits or losses. Nevertheless, while the agreement may not be a partnership in the true legal sense of the word, the proposed agreement between the lawyer and the real estate agency is a business agreement that involves the practice of law and is prohibited under DR 3-103(A).

Third, the proposed agreement violates DR 5-101(A)(1). DR 5-101(A)(1) prohibits a lawyer from accepting employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests. A law firm that pays a real estate agency for promoting the services of the law firm as a recommended service provider has a business interest that may reasonably affect the lawyer's independent professional judgment. The law firm may perceive subtle pressure to perform legal services to clients in a manner that pleases the real estate agency to avoid any risk of being excluded as a service provider.

Fourth, the proposed agreement violates DR 5-104(A). DR 5-104(A) prohibits a lawyer from entering a business relationship with a client when there are differing interests therein. As proposed, the law firm enters an agreement with a real estate agency. The real estate agency offers a real estate benefits program to customers of the agency and to companies that provide employee benefits. The customers of the real estate agency and the employees of companies that purchase employee benefits are eligible for discounted services from the law firm. Circuitously, the law firm is entering a business relationship with clients. Differing interests exist. The client expects the lawyer to exercise independent professional judgment free of compromise, but the lawyer may have business or financial interests that influence his or her independent professional judgment. The lawyer may be influenced by his or her interest in receiving as many referrals as possible or in making enough money from the referrals to cover or exceed the annual membership fee paid by the law firm to the real estate agency.

Both DR 5-101(A)(1) and DR 5-104(A) provide an exception when there is client consent after full disclosure. Neither DR 2-103 nor DR 3-103 provides a similar exception. Since all four rules apply to the question raised, the ethical conflict cannot be alleviated through full consent and disclosure.

In addition to the above ethical issues, the lawyer's participation might also violate rules regulating lawyer advertising. This would depend upon the type and content of the publicity provided. This issue is not addressed further herein.

In conclusion, the Board advises that it is improper under DR 2-103(B), DR 2-103(C), DR 3-103(A), 5-101(A)(1), and 5-104(A) of the Ohio Code of Professional Responsibility for a law firm to enter a business agreement to pay an annual fee to a real estate agency and to offer discounted legal services to customers of the real estate agency in exchange for the real estate agency promoting the law firm as a service provider in a real estate benefits program.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 2320, COLUMBUS, OH 43215-6104
(614) 644-5800 (888) 664-8345 FAX: (614) 644-5804
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2002-11

Issued August 9, 2002

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper under DR 2-103(D) and DR 5-107(B) of the Ohio Code of Professional Responsibility for a lawyer to participate in a group legal services plan paid for by a church to provide estate planning services at no cost to church members, but which contains a provision that if a church member needs a self-trusteed revocable trust, the church will bear the cost only if the lawyer prepares the trust with a provision that upon the member's death the church will receive a minimum of \$20,000 or 20% of the distributable trust, whichever amount is greater.

OPINION: This opinion addresses a question regarding a lawyer's participation in a group legal services plan.

Is it proper for a lawyer to participate in a group legal services plan paid for by a church to provide estate planning services at no cost to church members, but which contains a provision that if a church member needs a self-trusteed revocable trust, the church bears the cost only if the lawyer prepares the trust with a provision that upon the member's death the church will receive a minimum of \$20,000 or 20% of the distributable trust, whichever amount is greater?

Under the facts presented, a non-profit religious organization [herein referred to as a church] wishes to sponsor a group legal services plan to provide estate planning services to its church members. Church members interested in estate planning services would contact the planned giving department of the church. The planned giving department would refer the church member to a law firm for consultation. The law firm would prepare the necessary and appropriate estate documents for the church members. The church would pay the law firm its standard hourly rates for the legal services. The church members would receive the estate planning legal services at no cost, with one exception. The exception is that for a church member to receive a self-trusteed revocable trust at no cost, the church's group legal services plan requires that the trust contain a provision that upon the church member's death, the church will receive a minimum amount of \$20,000 or 20% of the distributable trust, whichever amount is greater. In the event that the church member does not want to bequeath such amount to the church, the church member would bear the cost for preparing the trust. All monies received through bequests by church members are used in furtherance of the church's religious purpose.

The Ohio Code of Professional Responsibility encourages lawyers' participation in *qualified legal assistance organizations* as a means by which the legal profession makes high quality legal services available to all.

EC 2-32 As a party [sic] of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with *qualified legal assistance organizations* providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

A *qualified legal assistance organization* is defined as "an office or organization of one of the four types listed in DR 2-103(D)(1)-(4), inclusive that meets all the requirements thereof." Definitions, Ohio Code of Professional Conduct. The four types of qualified legal assistance organizations listed in DR 2-103(D)(1)-(4) are a legal aid or public defender office; a military assistance office; a lawyer referral service; and a bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries.

A church operating a group legal services plan for its members is an example of a qualified legal assistance organization referred to in DR 2-104(D)(4) as a bona fide organization. A lawyer is permitted to participate with a group legal services plan of a bona fide organization, such as a church, if the requirements of DR 2-103(D)(4)(a) through (h) are met and if there is no interference with the exercise of independent professional judgment on behalf of the lawyer's client.

DR 2-103 (D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote

the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed, or paid by, or cooperating with, assisting, and providing legal services for, one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm **if there is no interference with the exercise of independent professional judgment on behalf of the lawyer's client:** [Emphasis added].

- (1) A legal aid office or public defender office:
 - (a) Operated or sponsored by a duly accredited law school.
 - (b) Operated or sponsored by a bona fide non-profit community organization.
 - (c) Operated or sponsored by a governmental agency.
 - (d) Operated, sponsored, or approved by a bar association.
- (2) A military legal assistance office.
- (3) A lawyer referral service that complies with division (C) of this rule.
- (4) Any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries provided all of the following conditions are satisfied:
 - (a) The organization, including any affiliate, is organized and operated so that no profit is derived by it from the rendition of legal services by lawyers, and 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 the organization bears ultimate liability of its member or beneficiary.
 - (b) Neither the lawyer, the lawyer's partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, nor any non-lawyer, shall have initiated or promoted the organization for the primary purpose of providing

financial or other benefit to the lawyer, partner, associate, or affiliated lawyer.

(c) The organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not the organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization, if such member or beneficiary so desires, may select counsel other than that furnished, selected or approved by the organization; provided, however, that the organization shall be under no obligation to pay for the legal services furnished by the attorney selected by the beneficiary unless the terms of the legal services plan specifically provide for payment.

Every legal services plan shall provide that any member or beneficiary may assert a claim that representation by counsel furnished, selected, or approved by the organization would be unethical, improper, or inadequate under the circumstances of the matter involved. The plan shall provide for adjudication of a claim under division (D)(4)(c) of this rule and appropriate relief through substitution of counsel or providing that the beneficiary may select counsel and the organization shall pay for the legal services rendered by selected counsel to the extent that such services are covered under the plan and in an amount equal to the cost that would have been incurred by the plan if the plan had furnished designated counsel.

(f) The lawyer does not know or have cause to know that the organization is in violation of applicable laws, rules of court, and other legal requirements that govern its legal service operations.

(g) The organization has filed with the Supreme Court of Ohio, on or before the first day of January of each year, a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal

service activities or, if it has failed to do so, the lawyer does not know or have cause to know of the failure.

DR 5-107(B) requires that a lawyer avoid influence by someone other than the client. This rule buttresses the requirement of DR 2-103(D) that in order to participate with a group legal services plan there be no interference with the exercise of independent professional judgment on behalf of the lawyer's client:

DR 5-107(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

The proposed church sponsored group legal services plan contains a provision that improperly interferes with the exercise of independent professional judgment on behalf of the lawyer's client and thus violates DR 2-103(D) and DR 5-107(B). The church bears the cost of the lawyer's preparation of a self-trusted revocable trust at no cost to the member only if the lawyer drafts the trust with a provision that upon the church member's death the church will receive a minimum amount of \$20,000 or 20% of the distributable trust, whichever amount is greater. In the event that the church member does not want to bequeath such amount to the church, the church member must bear the cost for the lawyer's preparation of the trust.

The objectionable provision—trust preparation at no cost to the group legal services plan member if the lawyer drafts a trust for the member with a provision that upon the member's death the church will receive a minimum amount of \$20,000 or 20% of the distributable trust, whichever amount is greater—places the participating lawyer in a conflict. The more bequests made to the church, the more satisfied the church is with the participating lawyer's legal services. The more satisfied the church is with the lawyer's services, the more likely it is to refer plan members to that particular lawyer. The more the lawyer is rewarded by having plan members referred to him or her, the more likely it is that the lawyer will encourage inclusion of the trust provision that benefits the church. The provision jeopardizes the lawyer's independent professional judgment in providing legal services that meet the client's needs because the group legal services plan requires that the church's needs be given consideration in every client matter involving a self-trusted revocable trust.

Further, DR 2-103(D)(4)(a) requires that the organization is organized and operated so that no profit is derived from the rendition of group legal services by the lawyer. As proposed, the organization is operating its group legal service plan to receive large sums of money (twenty thousand dollars or twenty percent of the distributable trust whichever is greater) from the rendition of group legal services by the plan lawyer. The organization is offering the lawyer's preparation of a self-trusted revocable trust as a no cost plan benefit only if it receives a windfall from the provision of the legal services. While this may not violate the letter of DR 2-103(D)(4)(a), for it is not "profit" in the sense that the organization has non-profit status and the money from the bequest would be used only in furtherance of religious purposes, it violates the spirit of the rule. DR 2-

103(D)(4)(a) is a rule that is concerned with "profits" by a sponsoring organization having an impact on the attorney-client relationship. As explained in the ABA annotations to the DR 2-103(D)(4)(a) "[t]his provision is premised upon the connection between the realization of profit by a lay organization from the rendition of legal services by a lawyer and the potential for interference with the independent exercise of the lawyer's professional judgment to enhance that profit." American Bar Foundation, *Annotated Code of Professional Responsibility* 76 (1979).

In conclusion, this Board advises as follows. It is improper under DR 2-103(D) and DR 5-107(B) of the Ohio Code of Professional Responsibility for a lawyer to participate in a group legal services plan paid for by a church to provide estate planning services at no cost to church members, but which contains a provision that if a church member needs a self-trusted revocable trust, the church will bear the cost only if the lawyer prepares the trust with a provision that upon the member's death the church will receive a minimum of \$20,000 or 20% of the distributable trust, whichever amount is greater.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.