

ETHICS OPINION

011114

FACTS: A provider law firm for a pre-paid legal services business requests the Ethics Committee review two of their marketing mailings as well as the propriety of the firm sharing information gathered by it with the pre-paid plan sponsor.

The pre-paid plan sponsor sells memberships that entitle members to certain legal services free of charge and to others at a reduced rate. The free benefits include the preparation of a will, living will and power of attorney. The premium is paid to the pre-paid plan sponsor and the provider firm receives a monthly per capita payment from the pre-paid plan sponsor. In an attempt to persuade the members to take advantage of the will benefit provided (and enhance membership retention), the provider firm proposes to mail the following postcard to their active members:

As the [pre-paid legal service] provider law firm for the State of Montana, we are writing to request that you take advantage of the will preparation benefits afforded to you as part of your membership. As a [pre-paid legal service] member you are entitled to the following free benefits:

- o Preparation of your **Will**;*
- o Preparation of your **Living Will**;*
- o Preparation of your **Durable Power of Attorney**.*

*As mentioned, **all of these items will be prepared for you at no charge**. In order to take full advantage of these benefits, please call us at [their 800#]. Thank you for the opportunity to continue to assist you with your legal needs.*

The firm is also proposing to send the following letter to the pre-paid legal service members in the State:

THIS IS AN ADVERTISEMENT

Dear Pre-Paid Member:

Re: Hip and Knee Implants

If you currently have an attorney representing you on these matters, please disregard this advertisement. It has recently been announced that certain hip implants which were marketed primarily in the United States between July, 1997, and December, 2000, are being recalled. Approximately 17,500 of these defective "hip joints" have been implanted into patients. It appears that most, if not all, of these defective components will have to be surgically removed. Perhaps you have seen news coverage of this problem. Although it

has not been on the news, it now appears that there may be defective knee joint implants on the market as well.

A number of people who have received these defective joints have contacted us to ask about their legal rights. It is our opinion that anyone who has received one of these defective joints may be entitled to substantial monetary damages. As your Pre-Paid provider firm, we have a number of lawyers who are very experienced both in products liability cases and in any kind of medical/legal case. We are available to consult with you at any time at no cost if you think you have received one of the defective hip implants or one of the possibly defective knee implants.

If you elect to have us represent you against the manufacturer, we will do so on a contingency fee basis and at the usual Pre-Paid discount rate. A contingency fee arrangement means that we will not bill you for our services but will be paid a percentage of any amounts recovered for you. If we do not win or settle your case, you will owe us nothing for attorney fees, although you may be liable for costs.

If you believe or a family member feels you or they might have a claim for a defective hip, knee or other joint implant, please call us for a consultation. We can advise you at no cost regarding your legal rights and options, and can potentially help you decide what action, if any, you should take.

If you call us, please make reference to this letter. Remember, your Pre-Paid membership is valuable, but only if you use it when it is necessary.

In a separate matter, the pre-paid plan sponsor is proposing that the Montana member firm join the pre-paid plan sponsor's computer network so that the pre-paid plan sponsor has access to the Montana firm's member intake records. The intake records include information on the member's specific legal issue, the facts giving rise to that issue and the advice or recommendations given by the attorney in response, as well as the name, address, phone number, membership number, and listing of covered dependants of the insured. No mechanisms are available for the firm to monitor the pre-paid plan sponsor's access to or use of the information gleaned from the firm's intake records. The member is not advised in advance that this information may be accessed by the pre-paid plan sponsor and the member's consent is not obtained prior to it being accessed by the pre-paid plan sponsor.

QUESTIONS PRESENTED:

1. Does the information contained in the postcard and letter violate Rules 7.2 and 7.3 of the Montana Rules of Professional Conduct?
2. Does Rule 1.6 of the Montana Rules of Professional Conduct preclude the pre-paid legal service plan sponsor's unfettered access to the information contained in the provider firm's intake records?

SHORT ANSWERS:

1. Both the postcard and letter comply with the constraints of Rules 7.2 (Advertising) and 7.3 (Direct Contact with Prospective Clients); however, as to the letter, the provider firm should consider the added cautions of Rule 7.1 (Communications Concerning a Lawyer's Services), and Rule 1.1 (Competence).

2. Yes.

DISCUSSION:

A threshold issue to these inquiries is whether the members of the pre-paid plan are the clients of the provider law firm before any contact with the firm. It is the opinion of this Committee that the mere subscription to a pre-paid legal service plan does not create an attorney-client relationship. The pre-paid plan sponsor is not a law firm. The threshold information provided to the pre-paid plan sponsor to initiate coverage therefore is not deemed confidential, nor subject to any attorney-client privileges. If a member utilizes their benefit and contacts the provider firm, an attorney-client relationship may be created. The key element for determining when an attorney-client relationship is entered is whether confidential information has been disclosed by the client to the provider firm lawyer. See ABA Formal Opinion 90-358 and Montana Ethics Committee Opinion 010830.

The postcard and letter as proposed do not run directly afoul of Montana Rules of Professional Conduct 7.2 and 7.3. The letter, however, could potentially encounter challenges within Rule 7.1 and Rule 1.1. The Rules regulating what information attorneys may offer about legal services provide:

RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;*
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or*
- (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.*

RULE 7.2 Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) 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.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

RULE 7.3 Direct Contacts with Prospective Clients

A lawyer shall not contact, or send a written communication to a prospective client for the purpose of obtaining professional employment, if:

(a) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person cannot exercise reasonable judgment in employing a lawyer;

(b) the person has made known to the lawyer a desire not to receive a communication from the lawyer; or

(c) the lawyer reasonably should know that the communication involves coercion, duress or harassment;

(d) the lawyer reasonably should know that the person is already represented by another lawyer.

The Ethics Committee has issued several previous opinions discussing marketing mechanisms and mailings: [870709](#), [941221](#), [951027](#), and [951230](#). Those Opinions discuss in considerable detail Montana's rules regulating what information attorneys may offer about legal services. In particular, Ethics Opinion [941221](#) discusses the history of our Rules and their significant permissiveness compared to the ABA's Model Rules.

The facts supplied indicate that the prohibitions of Rule 7.3 are not involved and that the postcard and letter comply with the requirements of Rule 7.2. Notable, however, are the confines of Rule 7.1. The provider firm must assure that all advertising is accurate and that it does not mislead or create unjustified expectations. The Committee recognizes that the advertisement is intended as loss leader advertising in that it has the undisclosed agenda of luring remunerative business to the firm using the "bait" of free services. The Committee's opinion is that this particular loss leader advertising does not violate the ethical rules. However, the Committee encourages attorneys who utilize loss leader advertising to analyze the issue of whether their loss leader advertising is misleading.

Further, Rule 1.1 provides that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Committee raises the issues of competence and accuracy in light of the fact that only one of the provider firm members has more than six years' experience in the practice of law in Montana. The letter represents: "[a]s your Pre-Paid provider

firm, we have a number of lawyers who are very experienced both in products liability cases and in any kind of medical/legal case."

The Ethics Committee feels that while, on balance, it is left to the provider firm to determine if this is, in fact, an accurate representation of the firm's competence, the statement seems an exaggeration.

Another potential misrepresentation exists in the context whether the member is entitled to a reduced attorney fee: as we understand it, the member is told that in becoming a member of the plan, they pay reduced attorney fees. The provider firm must assure that the client actually receives a reduced fee.

An additional area where the accuracy of representation is unclear is the statement: "it now appears that there may be defective knee joint implants on the market as well." Simply put, is it true that there is an acknowledged defective knee joint that has been implanted? Or is the letter passing along rumor?

The pre-paid plan raises several remaining areas of concern central to Rule 1.6:

1. Rule 1.6 precludes the pre-paid legal service plan sponsor's unfettered access to the information contained in the provider firm's intake records. The pertinent portion of Rule 1.6 provides: "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation..."¹ As set out above, the intake records include information generally considered confidential and the member is not advised that the information given to the firm may be accessed by the pre-paid plan sponsor.

The pre-paid 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. Plan quality control mechanisms are unacceptable to the extent that they lead to disclosure by the lawyer of the information relating to the representation.²

2. The client consent required to over-ride the confidentiality protection must be informed consent after consultation. Merely including a prospective waiver in the plan's documents is not sufficient to permit plan sponsor's access to intake records. "Consultation" is defined in the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Model Rules of Professional Conduct*, Terminology (1999).

The facts presented indicate that the members are unaware of the plan sponsor's interest in access to the provider firm's records. Consent clearly is not accomplished. The suggestion that there might be mechanisms available for the firm to monitor the plan sponsor's access to or use of the

information gleaned from the firm's intake records is moot. Such access is unacceptable absent informed client consent after consultation.

CONCLUSION:

The proposed postcard and letter do not run directly afoul of Rules 7.2 (Advertising) and 7.3 (Direct Contact with Prospective Clients). However, there is potential that the letter overstates the experience of the firm or could otherwise be misleading, perhaps in violation of Rule 7.1 (Communications Concerning a Lawyer's Services), and Rule 1.1 (Competence).

The plan sponsor's interest in access to the provider firm's records is precluded by Rule 1.6 (Confidentiality), absent informed client consent after consultation.

Notes

1 The main purpose for the rules affording protection of client confidences is to encourage clients "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter" in order to develop all facts essential to proper legal representation. Rule 1.6, Comment.

2 As noted earlier in this discussion, the duty of confidentiality applies to protect information imparted by a would-be client seeking to engage the lawyer's services even though no legal services are performed and the representation is declined. Ethics Committee Opinion 010830.

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