

## COMMITTEE ON PROFESSIONAL ETHICS

Opinion 0802

Topic: Participation in “Advantage Legal Assist” by “Workplace Options”

Digest: It is permissible to participate in a pre-paid legal services plan, as long as certain conditions are met; it is not permissible to participate in a panel operated by Workplace Options that does not constitute a pre-paid legal services plan

Code: 22 NYCRR 1200.8 (DR 2-103(F)(3) and (4))

### QUESTION

1. May an attorney participate in “Advantage Legal Assist” by “Workplace Options”?

### OPINION

2. Workplace Options is an organization, located in North Carolina, which provides services to Employee Assistance Programs. One of the services provided is Advantage Legal Assist. This program provides free telephonic legal advice to the employees whose employers provide the service, and provides the employee with the name of an attorney in the employee’s geographical area. The attorney whose name is provided agrees to give the employee a free 30 minute consultation and to give a 25% discount on fees. Attorneys who wish to participate may do so as either a Participating Law Firm or as both a Participating Law Firm and as a Telephone Access Law Firm. Participating Law Firms do not pay anything to Workplace Options, and do not receive any remuneration from Workplace Options. Telephone Access Law Firms do not pay anything to Workplace Options, and receive payments for the services provided.

3. The New York State Bar Opinion 825 (7/15/08) addresses whether an attorney may provide legal services to clients referred by an Employee Assistance Program, where the services are paid for by the Employee Assistance Program, or where the referral results in ancillary private retention. The opinion concludes that such participation is ethical so long as certain conditions are met. Those conditions, which are relevant here, include the following:

1. The lawyer’s compliance with DR 5-107(A) and (B).
2. Compliance with DR 2-103(F)(4), particularly the following requirements:
  - a. The organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished or selected by the organization for the particular matter would be unethical, improper or inadequate, and the plan provides for appropriate procedure for seeking that relief.

- b. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, particularly Judiciary Law §§ 495 and 496.
  - c. The organization has filed periodic reports with the appropriate disciplinary authority
3. Performance of appropriate conflict checks, even with the provision of telephonic services.
  4. Observance of the duty of confidentiality.
  5. Observance of the requirements of DR 2-103(A)(2)(b) regarding solicitation
  6. Compliance with DR 6-101 and NY State 664 (1984), regarding competent representation.
  7. Compliance with 22 NYCRR Part 1215, concerning engagement letters.

In order to comply with these conditions, the lawyer participating has the duty with respect to conditions 1, 3, 4, 5, 6, and 7. It is assumed for purposes of this opinion that the attorney will be able to so comply. The organization, however, has to comply with the conditions set forth in # 2, above. Whether or not the subject organization so complies is addressed below.

4. Does the organization provide appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished or selected by the organization for the particular matter would be unethical, improper or inadequate, and does the plan provide for appropriate procedure for seeking that relief?

Paragraph 8 of the agreement between Workplace Options and the Participating Law Firm, provides that where the firm cannot accept the employee as a client, the firm must advise the employee to contact Workplace Options for further assistance. No other details of the relief or the procedure for the employee to follow is provided. Before a lawyer participated in this plan, the lawyer should ensure that there are appropriate provisions for the client in the plan documents.

5. Should the lawyer know that such organization is in violation of applicable laws, particularly Judiciary Law §§ 495 and 496?

While DR 2-1030(F)(4) does not refer directly to Judiciary §§ 495 and 496, it is generally accepted that these sections are the applicable laws referred to in DR 2-103(F)(4). See Simon's Code of Professional Responsibility (2008 ed.), at page 346. As a general rule, the Committee on Professional Ethics does not advise on questions of law. However, since the Disciplinary Rule refers directly to applicable laws, we offer the following discussion:

Judiciary Law §495(1)(d) provides that "No corporation or voluntary association shall . . . furnish attorneys or counsel." However, §495(7) provides that the prohibition in §495(1) does not apply to "organizations which offer prepaid legal services" or to "non-profit organizations . . . organized operating primarily for a purpose other than the provision of legal services and which furnish legal services as an incidental activity in furtherance of their primary purpose." The import of the statutory language is that if the plan is one for prepaid legal services or if the plan is an "incidental activity" in furtherance of a non-profit organization's primary purpose, the plan

is permissible under §495. If, however, the plan does not meet this test, then the plan would be operating in violation of §495, and participation in the plan would violate DR 2-103(F)(4).

Some portions of the Workplace Options' Advantage Legal Assist operate in the nature of prepaid legal services. Certainly the Telephone Access Law Firms are providing pre-paid legal services to the employee, and that portion of the plan would fall outside the prohibition contained in §495(1). But law firms which participate only as "Participating Law Firms" in the "Local Referral Service" might not be participating in an organization which is providing "pre-paid legal services." Furthermore, it does not appear that Workplace Options is a non-profit organization; its literature indicates that it is organized as an LLC. Thus, if the "Local Referral Service" is not a pre-paid legal services plan, then that plan would violate §495, and participating in it would not be appropriate.

#### 6. Compliance with filing requirements

Both Judiciary Law §496 and DR 2-103(F)(4)(f) impose filing requirements upon the organization. §496 requires filing with the Appellate Division for all pre-paid legal services plans. DR 2-103(F)(4)(f) imposes even greater filing requirements through a comprehensive annual report. If the organization has not filed a proper annual report, the lawyer should not participate with that organization unless the lawyer has no knowledge or reasons to know of the failure to file. *See, Simon, supra* at 346. No information regarding this organization's filing or failure to file has been provided.

7. Finally, it should be noted that a lawyer may participate in a Lawyer Referral Service, if the service complies with DR 2-103(F)(3). Under that provision, a lawyer may accept referrals, so long as there is no interference with the exercise of independent professional judgment on behalf of the client, from "A lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule." Workplace Options, a North Carolina organization, does not indicate in its materials that it is operated, sponsored or approved by any bar association. There are no laws or court rules in New York which apply to lawyer referral services. *See, Simon, supra* at 343-4. In the absence of any such authorization, DR 2-103(F)(3) does not provide any permission to participate in this plan.

### CONCLUSION

8. Participation as a "Telephone Access Law Firm," would be participation in a pre-paid legal services plan. It is permissible for a lawyer to participate in a pre-paid legal services plan, subject to the requirements of DR 2-103(F)(4). However, participation in the "Local Referral Service" alone, may not constitute participation in a pre-paid legal services plan. If it does not, the plan would be in violation of Judiciary Law §495, and participation in the plan would be improper under DR 2-103(F), in that it would not qualify under either 2-103(F)(4)(e), or 2-103(F)(3).