PROFESSIONAL GUIDANCE COMMITTEE
PHILADELPHIA BAR ASSOCIATION
Opinion 2012-7
(February 2013)

The inquirer has a company which is interested in offering a prepaid legal services plan ("Plan") in Pennsylvania. The inquirer asks for an opinion detailing what applicable Pennsylvania Rules of Professional Conduct ("Rules") are implicated by way of the Plan's structure and services. The specifics of the Plan include:

1. The Plan assists its participants with all types of personal legal issues including divorce, child custody and support, paternity, adoption, domestic violence, civil litigation, guardianship, bankruptcy, name change, criminal defense, expungement, traffic tickets, DUI, wills, living trusts, probate, real estate, landlord-tenant disputes, immigration, credit report issues, personal injury and more.

2. Participants have only one telephone number to call whenever they need to use the Plan. This is a toll-free telephone number that rings directly into the home office, which is run by the owners of the company which is attorney owned and operated. In the home office, a comprehensive computer database is maintained including a separate record for each participant, which details the participant's personal information, place of employment, various uses of the Plan service and specific notes about every call made to the Plan. In addition, a separate hard file is maintained on each participant, containing the participant's enrollment form, copies of correspondence and any and all documentation sent to us by the participant.

3. Through the home office, the Plan administers free, unlimited legal advice and consultation to answer all questions for the participant, free document and contract review, free letters and phone calls on the participant's behalf to resolve ongoing disputes, free credit report analysis and repair and free wills for the participant and his/her spouse or significant other. When the participant is facing a problem or issue that requires formal attorney representation, the Plan refers the participant to a panel attorney.

4. When a referral is made, the participant calls the panel attorney's office to arrange for a free initial consultation. Thereafter, the participant can decide whether to move forward by retaining the panel attorney at a pre-determined discounted fee. The participant and panel attorney have a schedule of the discounted fees before the initial consultation.

5. The Plan does not compensate nor indemnify its panel attorneys in any way. Panel attorneys are paid directly from a participant for representation pursuant to
the discounted fee schedule. In this regard, a panel attorney accepts payment from the participant in the same fashion as the panel attorney’s normal course of business. The Plan merely sets the discounted fee amount.

In sum, the inquirer’s company provides its participants with limited legal representation on general matters and discounted attorney referrals when formal representation is requested. The general matters are included in the participant’s membership. The formal representation is performed by independent panel attorneys who have agreed to discount their customary fees for our participants. The Plan is generally offered on a month-to-month basis to its participants.

Rule 1.1. Competence 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.

Comment 5 to that Rule provides that,

(5) Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice Of Law, provides in part that,

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

The Committee believes that the proposed structure of the operation of the home office raises concerns under both these Rules. Given that all the phone calls are handled by the home office, the services provided by that office are obviously quite broad in scope. As such, Rule 1.1 requires that the individuals who are handling the actual phone calls must be competent to render the services being provided. If the individuals providing this phone advice are not Pennsylvania admitted attorneys or at least supervised by a Pennsylvania admitted attorney, there might be an issue of the unauthorized practice of law (UPL) occurring. The concern the Committee has is whether the plan’s presence and solicitation of Pennsylvania employers, with a goal towards rendering advice on a broad number of issues based on Pennsylvania law constitute the UPL if the advice is not given by a Pennsylvania admitted attorney or supervised by a Pennsylvania admitted attorney. Even if an attorney admitted in another state is rendering the advice, if not admitted in Pennsylvania or directly supervised by a Pennsylvania admitted
attorney, the concern about the unauthorized practice of law remains.

Rule 1.4 Communication, provides in part that,

(c) A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer’s professional liability insurance drops below either of those amounts or the lawyer’s professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

The Committee believes that assuming the issues regarding competence, supervision and the unauthorized practice of law are addressed, that since the practice of law is occurring at the “home office”, (albeit the limited practice of law), that the requirements of Rule 1.4c apply, and the inquirer is cautioned that compliance with that Rule is required.

Rule 6.5. Nonprofit and Court Appointed Limited Legal Services Programs provides in part that,

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

The issue of conflicts of interest is also of concern, and there is no mention in the inquiry as to how such conflicts will be handled. While Rule 6.5 provides for a limited conflict of interest standard, it does so only as limited scope representation provided under the auspices of the programs discussed in the Rule. The Plan clearly does not qualify as one of these programs, and the self-designation by the Plan as one of “limited scope” does not relieve it of any of its ethical obligations under the conflict of interest Rules (1.7, 1.8, 1.9 and 1.10). See Joint opinion of the Philadelphia Bar Association Professional Guidance Committee and the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee 2011-100 (attached) which clearly outlines that all the ethical responsibilities and obligations of a representation also apply to a limited scope representation.

Conflicts of interest between participants, who are in fact clients of the Plan can arise in several different ways. For instance, if two members of the same union or employer participate in the Plan and become adverse in one of the areas in which services are provided; if a simple will is provided under the Plan for a covered individual
and spouse and then the covered individuals choose to divorce; if there is consultation with the plan by a husband and wife on an agreement of sale for purchase of real estate and then a year later that couple decides to divorce. None of these types of issues are addressed at all in the inquiry and the Committee hastens to point out that they are only a very few examples of any number of conflicts which could arise. Given the broad scope of services provided, as well as the Plan’s extensive record keeping, the Committee advises that a comprehensive conflict of interest detection process needs to be in place, as well as a method for handling such conflicts of interest once discovered.

Although not raised in the inquiry, given the extensive amount of documentation (both paper and electronic) the Plan is accepting from its clients and retaining, the Plan must be sure that the home office has both adequate computerized back up as well as adequate security for its electronic records so as to prevent illegal access through hacking of what is clearly confidential information. In addition, appropriate electronic back-up as part of a comprehensive disaster recovery plan should be developed if not done so already. Recent changes made by the ABA to the Model Rules of Professional Conduct, most of which have been recommended for adoption (although not yet done so) by the Pennsylvania Supreme Court, includes the addition of a comment to Model Rule 1.1. That new comment (number 8) to that Model Rules provides that,

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.5, Fees, provides in part that,

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

The provisions of this Rule clearly apply to the services provided by the home office under the Plan, and not just to panel member attorneys. This is further discussed in Joint Opinion 2011-100 cited above. It is important to note that the fees charged for the services provided should be clearly outlined to each participant, preferably before he or she chooses to sign up for the Plan, so there is clarity on the point of what the plan will and will not provide and at what cost. There is also an issue as to the definition of what some of the basic services provided actually are. For instance, what is the definition being used for "a simple will"? Does it include a testamentary trust if the participant has minor children? What if a participant has a disabled child that may require a special needs trust? Issues such as this need to be considered and perhaps detailed more thoroughly in the Plan materials and provided to potential participants prior to their signing up and paying money.
Another consideration that must be addressed is when a participant becomes a client and when a participant ceases to be a client. This may or may not be upon the commencement and cessation respectively of paying the monthly fee. If so, as required by Rule 1.16b, consideration must be made to avoiding prejudice to the client in an ongoing matter should the client's failure to pay result in being dropped by the Plan.

The Committee suggests that many of these issues noted in this opinion could very well be addressed in the Plan's enrollment materials.

The Committee recognizes that this opinion has pointed out a number of issues that it believes the Plan must address before commencing its operation in Pennsylvania. Some of the issues are very complicated, and it is the Committee's recommendation that both private ethics counsel as well as consultants, where appropriate, (for instance individuals who provide recommendations of and training for computerized conflicts of interest checking software) should be utilized in making sure that the Plan addresses the issues noted in this opinion, as well as further issues that will most certainly arise as development of the Plan moves forward.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.