

NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Advisory Opinion

June 15, 1982

Group Legal Services Plan - State Employees Association

FACTS

The inquiring firm has been approached by a member of the Fringe Benefits Committee of the State Employees' Association (SEA), with a proposal concerning the establishment of the group legal services program described below. Under the plan individual members of the SEA would pay the firm an annual nonrefundable fee entitling them to an as yet undetermined amount of legal services. Legal services required beyond those included in the annual fee would be billed either at the firm's regular rate, or possibly at a reduced fee. In the event that two members of the Association were to oppose one another in a legal matter, the firm would represent neither party, and in the event of any other conflicts which arose the firm would decline representation as it would in the case of any of its other clients outside of the group program. The SEA would derive no profit from the arrangement, and all financial transactions would be directly between the program participants and the law firm.

DISCUSSION

Disciplinary Rule DR 2-103(D) of the current New Hampshire Code of Professional Responsibility provides that "a lawyer shall not knowingly assist a person or organization that recommends, furnishes or pays for legal services to promote the use of his services or those of his partners or associates." The Rule does provide, however, that the lawyer may cooperate in a dignified manner with the legal services activities of any of five classes of organizations enumerated in the Rule, provided that the lawyer's independent professional judgment is exercised on behalf of his client without interference or control by any organization or other person.

The only class of permitted organizations into which the SEA might fall is that set forth in DR 2-103(D)(5) which provides that a lawyer may cooperate with "any other nonprofit organization that recommends, furnishes or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities and only if the following conditions, unless prohibited by such interpretation, are met:

- (a) the primary purposes of such organization do not include the rendition of legal services;
- (b) the recommending, furnishing or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;
- (c) such organization does not derive a financial benefit from the rendition of legal services by the lawyer;
- (d) the member or beneficiary for whom the legal services are rendered and not the organization is recognized as the client of the lawyer in that matter."

The facts and circumstance disclosed in the inquiring firm's letter raise serious doubts as to whether the SEA may be considered to be an eligible organization under DR 2-103(B)(5), even if we assume that the Association is a nonprofit organization whose primary purposes does not include the rendition of legal services, and that the SEA member for whom the services are to be rendered and not the SEA itself will be recognized as the client of the lawyer in the matters in question.

First, it is not clear that controlling constitutional interpretations in effect at the time of the rendition of the legal services require the allowance of legal service activities such as those contemplated by SEA, although the United States Supreme Court has in the past upheld the constitutional right of labor unions and other voluntary associations to procure or provide legal services for their members. See United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1957); Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 112 L. Ed. 2d 89, 84 S. Ct. 1113 (1964); NAACP v. Button, 372 U.S. 415, 9 L. ed. 2d 405, 83 S. Ct. 328 (1963). The proposed SEA referral program includes certain aspects, including the possibility of providing legal services at a discount to members, which were not features of the above programs, whose constitutional right to exist has specifically been upheld by the U.S. Supreme Court.

Further, even if it is conceded that controlling constitutional interpretations require the allowance of legal service activities such as those contemplated by SEA, the four conditions enumerated in DR 2-103(D)(5) remain applicable unless specifically prohibited by such constitutional interpretation. In this connection, DR 2-103(D)(5)(b) requires that the recommending, furnishing or payment for legal services to its members must be "incidental and reasonably related to the primary purposes of such organization." In the opinion of the Committee the recommending,

furnishing or paying for legal services to members is not an activity incidental or reasonably related to the primary purposes of SEA, in that the purported objectives of the SEA legal services program, to provide an economical source of general legal services on personal matters to SEA members, do not appear to be incidental or reasonably related to the presumed principal objectives of the State Employees' Association as an advocacy and collective bargaining organization representing the interests of state employees.

Finally, to the extent to which attorneys participating in the SEA plan would regularly provide legal services to subscribing members of the Association at a discount from the usual fees which would otherwise be charged under the circumstances, determined within the parameters of DR 2-106, such conduct may constitute a violation of DR 2-103(D)(5)(c), which provides that "the organization may not derive a financial benefit from the rendition of legal services by the lawyer." Further DR 2-103(B) provides, with exceptions not material hereto, that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client or as a reward for having made a recommendation resulting in his employment by a client." Although the letter from the inquiring firm indicates that the SEA will not profit from the referral arrangement directly, as pointed out in prior ABA and New Hampshire Ethics Opinions, the provision of the legal services at a discount to participants in a legal services program may be deemed to be of indirect economic benefit to the Association, in that it represents a financial benefit which the Association may transfer to those of its members subscribing to the plan, which in turn could be financially beneficially to the Association in attracting members. See, e.g., ABA Informal Opinion 1236 (1972).

CONCLUSION

For the reasons set forth above, the Committee finds that the proposed SEA group legal services program does not conform to Disciplinary Rule 2-103(D) under the current New Hampshire Code of Professional Responsibility. A revised and updated Code is currently under study which, if endorsed by the Committee and adopted by the New Hampshire Supreme Court may significantly alter the conclusions reached in this Opinion.