STATE OF MINNESOTA

IN SUPREME COURT

REPORT OF SUPREME COURT STUDY COMMITTEE ON PREPAID LEGAL SERVICES*

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TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Your Committee, after holding seven meetings, hearing the views of labor union and insurance representatives, and studying the February 1974 and February 1975 Midyear Meeting amendments to the American Bar Association Code of Professional Responsibility, various judicial decisions, secondary authorities, and federal and state provisions regarding prepaid legal services, recommends that the Minnesota Code of Professional Responsibility be amended as set forth in the attached draft.

Your Committee believes that in any order that may be adopted to implement these recommended amendments it should be made clear that the Court does not intend to assume the responsibility which it believes belongs to the legislature, for regulating the rates that may be charged by prepaid legal service plans or the security of the funds collected under such plans.

In certain respects the attached draft reflects not what your Committee would favor if it were writing on a clean slate, but what it thinks is required in light of current United States Supreme Court First Amendment interpretations and the preemption specified in the federal Employee Retirement Income Security Act of 1974. For example, because of its strong belief in free choice of an individual in the selection of his lawyer your Committee, but for these factors, would have supported including some sort of reimbursement provision, restricting a lawyer's serving under a plan which did not reimburse those who chose counsel other than that selected by the organization.

*The footnotes herein constitute the Reporter's Notes.

The only area in which there was any substantial division on your Committee was with respect to filing requirements. Some members favored a more extensive filing requirement than draft DR 2-104(E) upon which a majority of your Committee agreed.

ABA FEBRUARY 1975 AMENDMENTS

On February 24, 1975, the American Bar Association approved amendments to the ABA Code of Professional Responsibility. Your Committee has considered those amendments and included in its draft some provisions from them, but decided not to follow them completely because of the following features they possess:

1) They retain the highly confusing format of scattering provisions relating to organizations' legal service activities into three separate DRs.

2) Their provisions respecting solicitation appear far less clear and workable than those your Committee has developed in draft DR 2-104(B)(3). For example, their DR 2-103(B) appears to permit paying a lay organization "usual and reasonable fees" for referrals, their DR 2-103(C) is very ambiguous as to whether "cooperating" with a lay organization could properly entail requesting it to recommend the use of one's services, and their DR 2-103(D)(4)(b) might create a difficulty for a lawyer serving under a bar association legal services project if he or an associate participated in initiating the project.

3) Their introductory portion of DR 2-103(D) is extremely vague as to whether "being recommended, employed or paid by, or cooperating with" an organization other than as specified would invariably be to "knowingly assist" the organization "to promote the use of his services."

4) Their DR 2-103(D)(4)(a) appears invalid so far as it applies to employer-sponsored plans covered by the federal Employment Retirement Income Security Act of 1974.

5) Their DR 2-103(D)(4)(c) appears meaningless because whatever purpose the organization is "operated for" would appear to be inside its legal services program.

6) Their DR 2-103(D)(4)(e) is extremely vague, regulates the organization (which seems improper in a Code regulating lawyers' conduct), appears invalid as to plans covered by the federal Employment Retirement Income Security Act of 1974, and raises constitutional questions under the First Amendment.

7) Their DR 2-103(D)(4)(g) operates directly upon the organization, which seems inappropriate in a Code regulating lawyers' conduct and appears invalid as to plans covered by the federal Employment Retirement Income Security Act of 1974. Moreover, its requirements seem excessive and their administration might unduly burden the disciplinary authority.

INTRODUCTION

In line with the profession's duty under EC 2-1 "to assist in making legal services fully available," there has been increasing interest in the matter of making such services available to "people of moderate means"--persons who, although not poor enough to obtain legal services free of charge, are deterred by lack of financial resources to utilize legal services even when those services are badly needed.

One means of making legal services fully available to people of moderate means is an "open panel plan," under which payment is made to any lawyer the beneficiary may select. This means would normally present no serious ethical hazards.

Another means of making legal services fully available to people of moderate means is a "closed panel plan"--one under which an organization employs, pays for, or recommends particular counsel to render the services to its members or beneficiaries. Although this means involves some ethical hazards, the United States Supreme Court has recognized a "First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable"[1] under which an organization has the "right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights,"[2] and has made it clear that regulation of lawyers which impairs organizations' ability to exercise this right will be upheld only if it is shown to be necessary (in the sense that a less restrictive alternative would not suffice) to serve a compelling government interest.[3]

Accordingly, this draft makes no distinction between open- and closed-panel plans, except with respect to organizations

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[1] United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971).

[2] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 221-22 (1967).

[3] See id. at 222, 225; Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing before the Tunney Subcommittee, 60 A.B.A.J. 791, 795 (1974).

"organized * * * or * * * operated for profit," as to which it is believed an exception is warranted in light of the "commercial exception" First Amendment doctrine.[4]

It would seem, however, that organizations formulating plans would do well to consider the fact that allowing individual selection (at least through a reimbursement provision) may promote a closer attorney-client relationship than a completely closed-panel plan.

It should be emphasized that lawyers employed, paid, or recommended by an organization are subject to the same general rules e.g., on confidences and secrets and differing interests, as any other lawyers.

AIMS

Throughout its existence, your Committee has sought to formulate Rules to serve the public interest reflected in EC 2-1 in "making legal services fully available," the public interest reflected in EC 1-1 in maintaining the integrity, independence, and competence of lawyers in providing legal services, and the need for full respect to the First Amendment guarantees of free speech and association as defined by the United States Supreme Court.

FEDERAL PREEMPTION

In the midst of its work, your Committee was confronted by another consideration--that of federal preemption. The Employee Retirement Income Security Act of 1974, was enacted September 2. It covers, among other things, "any plan, fund, or program * * * for the purpose of providing * * * prepaid legal services" maintained by an employer whose activities affect commerce, a union whose members' work affects commerce, or both (except government and church employee plans).

Section 514 of the Act supersedes "rules" of a state "agency * * * which purports to regulate, directly or indirectly, the terms and conditions" of covered plans "insofar as they * * * relate to" covered plans. (Emphasis added.)

The legislative history of this federal Act emphasized that §514 is intended to foreclose "professional" regulation "which would affect any employee benefit plan" covered by the Act,[5]

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[4]See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973); Valentine v. Chrestensen, 316 U.S. 52 (1942). Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

[5]120 Cong. Rec. H8696 (daily ed. Aug. 20, 1974) (remarks of Rep. Dent upon presenting bill).

and that under it "professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized--for example, prepaid legal services programs--whether closed or open panel,"[6] so that "the State, directly or indirectly through the bar, is preempted from regulating the form and content of a legal service plan, for example open versus closed panels, in the guise of disciplinary or ethical rules or proceedings"[7] and from making rules that "affect the substance or operation of prepaid legal service plans" or undo what Congress has "permitted to be done, that is, giving employers and unions the freedom to develop and operate legal service plans of their choice."[8]

This preemption development led your Committee to change its approach in two ways.

First, it led your Committee to protect certain provisions from the danger of preemption by drafting them to make it inarguable that they bear solely upon the lawyer's conduct, and do not purport to indirectly control that of the organization. For example, draft DR 2-104(B)(2) specifies "He recognizes the member or beneficiary * * * as his client," not "The member or beneficiary * * * is recognized," to make it clear that the Rule is not purporting to regulate any but lawyer conduct.

Second, it led your Committee to decide against including a reimbursement provision, such as that in the ABA February 1975 amendments.[9] A reimbursement provision would preclude serving

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[6]120 Cong. Rec. S15742 (daily ed. Aug. 22, 1974) (remarks of Sen. Williams upon presenting bill).

[7]Id. at S15758 (remarks of Sen Javits, another manager of bill).

[8]Ibid. (remarks of Sen. Williams).

[9]DR 2-103(D)(4)(e) thereof provides:
Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

unless the group reimbursed those who chose counsel other than that selected by the group. Your Committee had question whether any such provision could be drafted as to withstand constitutional attack,[10] but recognized that such a provision's most appropriate application, if any, would be to an employer or union plan, where the member or beneficiary is not as free as he would be with other "groups" to merely quit a group whose choice of counsel he disliked. So when the federal act came into the picture and precluded a reimbursement provision as to covered plans, your Committee decided against recommending any such provision.

REORGANIZATION OF RULES

The current Code sets forth language relating to participation with organizations' legal service activities in three Disciplinary Rules--2-101, 2-103, and 2-104. Your Committee concluded that it would greatly aid clarity to reorganize the rules, placing all the provisions which relate only to participation with organizations' legal service activities in a single rule--DR 2-104. Incident to this reorganization, your Committee has made a number of style and minor substantive changes in draft DR 2-101(B) and 2-103.[11]

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[10] See United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 580, 585 (1971) ("First Amendment principle that groups can unite to assert their legal rights as * * * economically as practicable"; "right to group legal action"; "collective activity undertaken to obtain meaningful access to the courts is a fundamental right"); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 221-22 (1967) ("right to hire attorneys on a salary basis to assist its members"); Bowler, Prepaid Legal Services and the Alternative Practice of Law, 51 Chi-Kent L. Rev. 41, 47 n. 41 (1974) (requiring "that a closed panel plan become an open panel plan whenever any member * * * so desires * * * is open to attack on * * * constitutional * * * grounds"); Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing before the Tunney Subcommittee, 60 A.B.A.J. 791, 796 (1974) ("The most blatant restriction on the freedom of association and petition of members of closed panel plans is contained in DR 2-103(D)(5)(a)(v). Masquerading as a free choice proposal, it really denies to a group the right to select a plan that is wholly and entirely a closed panel plan"). (Emphasis added throughout.)

[11] In DR 2-101(B) and 2-103(A) and (C) the words "or anyone associated with him" are substituted for "his partner, or associate." This was preferred to the ABA February 1975 more cumbersome change, "or his partner, or associate, or any other lawyer affiliated with him or his firm."

Draft DR 2-104(A) is substantially the same as the ABA February 1975 amendment to DR 2-103(D)(1)-(3), except that clauses (1) and (3) specify "operated or sponsored" rather than "operated, sponsored, or approved" by a bar association.[12]

(Footnote 11 continued)

In DR 2-101(B) the words "except as permitted under DR 2-103" are deleted from the end of the first sentence and "This rule" is substituted for "This" at the start of the second sentence. The latter change accords with the ABA February 1975 amendments.

In DR 2-103(B), (C), and (D), "any person" is substituted for "a person or organization," in light of the fact that definition (3) of the current Code specifies that "person" includes "organization."

In DR 2-103(B), the words "Except as permitted under DR 2-103(C)" are deleted from the start of the sentence, and "secure, or as a reward for having recommended or secured, employment by a client of himself or any lawyer associated with him" is substituted for "secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client." The underlined language makes this parallel DR 2-103(A), (C) and (D).

In DR 2-103(C), the concluding "except" clause is deleted (and transferred to DR 2-104(H)).

In DR 2-103(D) the words "that recommends, furnishes, or pays for legal services" are deleted as unnecessary; "any lawyer associated with him" is substituted for "his partner or associate", and everything after the first sentence is deleted (the matter covered thereby is now treated in DR 2-104(A), (B), and (C)).

DR 2-103(F) includes matter covered by current DR 2-104(A)(1), (4) and (5). The introductory portion is a reorganization of that of the current provision, "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that," as to include the "any lawyer associated with him" and "he knows or it is obvious" references, which seem appropriate here. In clause (1) "If the advice was to" is substituted for "A lawyer may accept employment by" and "reasonably believed" for "whom the lawyer reasonably believes," to make the clause fit the new introductory portion. In clause (2) "the right" is substituted for "his right" for the same reason. The matter covered by current clause (2) is now treated in DR 2-104(G)(2), and that covered by current clause (3) by DR 2-104(A), (B), and (C).

[12]The introductory portion of DR 2-104(A) parallels the introductory portion and clause (1) of draft DR 2-104(B), discussed in the next two paragraphs of the text.

RENDERING SERVICES TO MEMBER OR BENEFICIARY

Your Committee believes that the language in the introductory portion of draft DR 2-104(B) is much clearer than that in the comparable ABA February 1975 provisions.[13]

INDEPENDENT JUDGMENT: MEMBER OR BENEFICIARY AS CLIENT

Draft DR 2-104(B)(1) is similar to language in the ABA February 1975 amendments,[14] but is put in the active voice to make it clear that it bears solely upon the lawyer's conduct and does not purport

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[13]The ABA February 1975 amendment to DR 2-103(D) provides in part:

> * * * However [notwithstanding "A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B)"] this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm * * *:
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> * * * * *
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> (4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the following conditions are satisfied: * * *

See also the ABA February 1975 amendments to DR 2-103(C)(2) and DR 2-104(A)(3).

Draft DR 2-104(B) uses the simultaneously authorizing and limiting language "may * * * only if" to make clear what the framers of the above-quoted provision apparently intended, but did not make clear--it is not at all clear that mere "being * * * paid by, or cooperating with" an organization other than under the specified conditions would be to "assist" the organization "to promote the use of his services."

The word "cooperating" in the above-quoted provision is extremely vague. It seems far better to specify here "knowingly render legal services" and to treat (other) specific types of "cooperating" elsewhere (draft DR 2-104(B)(3), (G), and (H)).

[14]The ABA February 1975 Amendment to the introductory portion of DR 2-103(D) specifies, "there is no interference with the exercise of independent professional judgment in behalf of his client."

to indirectly control that of the organization, so as to protect it from the danger of preemption under the federal Employment Retirement Security Act of 1974.[15]

The same is true of draft DR 2-104(B)(2).[16]

SOLICITATION

Draft DR 2-104(B)(3) applies anti-solicitation restrictions to the lawyer regarding organizations' legal service activities. No reason appears to be less restrictive regarding solicitation as to organizations' legal service activities than regarding solicitation as to individual prospective clients--an organization, with its combined knowledge and resources, is in an excellent position to learn about the merits of individual lawyers without any necessity for the lawyer to step forward to extol his merits, and the amount of business to be obtained through solicitation as to an organization will usually be much greater than that to be obtained through soliciting an individual. Nor does this in any way impair any organization's freedom of association.[17]

The introductory portion's exception is to make clear that a lawyer is not barred from providing services under a bar association plan merely because he or an associate helped initiate the plan or sought to participate in it. It appears that the only way the open panel concept will have a real chance to compete for acceptance with the closed panel concept is if bar associations are allowed to participate in the initiation of open panel projects. A lawyer's ability to accept employment under a bar association plan after helping initiate or seeking participation in it would not involve the dangers that would inhere in a lawyer's ability to accept employment under a lay organization's plan after the lawyer individually helped initiate or sought participation in it.

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[15]Compare current 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."

[16]The ABA February 1975 Amendment to DR 2-103(D)(4)(d) provides, "The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter."

[17]In Stolz, Sesame Street for Lawyers: A Dramatic Rendition of United Transportation Union v. The State Bar of Michigan, 36 U.P.N. 14, 19 (1971), the author, while evincing a very liberal attitude toward freedom of association, indicates that "the right of people to gather together to negotiate fees with lawyers does not necessarily carry with it a right in lawyers to advertise cut-rate legal services" and that while "a lawyer has a right to answer questions that people ask him, * * * it doesn't follow * * * that he has a right to volunteer."

Subclause (a) applies the principles of DR 2-103(B), (C) and (E) to the matter or requesting or compensating others to initiate or recommend initiation of the organization or its legal service arrangement.

Subclause (b) is rather similar to provision in the ABA February 1975 amendments.[18] But instead of looking to the lawyer's "purpose" in helping set up the organization it looks to whether he acted at the unsolicited request of the organization.[19]

Subclause (c) applies the principles of DR 2-103(A), (C) and (E) to the matter of a lawyer's seeking an organization's employment, payment, or recommendation.[20] It allows him to recommend that the organization employ him on a full-time salaried basis on the view that this is more like securing a position as house or government counsel than "as a private practitioner" covered by DR 2-103(A) and (C).

Subclause (d) applies the principles of DR 2-103(B) and (E) to the matter of compensating another to obtain employment, payment, or recommendation by the organization.

AIDING ILLEGALITY OR FRAUD

Draft DR 2-104(B)(4) is quite similar to provision in the ABA February 1975 amendments,[21] except that it expressly refers to "dishonesty, fraud, deceit, or misrepresentation."

FOR-PROFIT ORGANIZATIONS

Draft 2-104(C) is designed to prevent lay commercialization of the practice of law. As stated previously, it is believed that dif-

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[18] DR 2-103(D)(4)(b) thereof specifies, "Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer."

[19] See Calif. St. Bar R. Prof. Conduct 23(1): "the arrangement was established by or at the request of a group."

[20] Compare Calif. St. Bar R. Prof. Conduct 20 (lawyer to furnish legal services only "at the request of such group"); Ky. RCA 3.475 (same); Wash. DR 2-103(D)(5)(a) ("The lawyer shall not have solicitied the use of his services by the organization or its members in violation of any Disciplinary Rule").

[21] DR 2-103(D)(4)(f) thereof specifies, "The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations."

ferent treatment regarding for-profit organizations is warranted in light of the "commercial exception" First Amendment doctrine.[22]

Lay commercialization of the practice of law is contrary to the public interest because a commercial provider of legal services is not, like a lawyer, restricted as to competence, integrity, manner of seeking employment, charging excessive fees, divided loyalties, independent judgment, or maintaining confidences and secrets. Accordingly, if such a provider were allowed to provide for legal services, nothing would bar the provider from obtaining clients by blatant advertising and solicitation, accepting clients whose needs could not be competently served, ignoring their conflicting interests, compromising their confidences and secrets, and overcharging them. The United States Supreme Court has recently held that a corporation may be prohibited from engaging in a pursuit unless controlled by licensed practitioners, on the ground that ownership "by people who do not know anything about it" or "divorce between the power of control and knowledge" where the pursuit "calls for knowledge in a high degree" may be seen as an evil.[23]

The reference in subdivision (C)'s introductory portion, "knows or it is obvious that the organization is organized for profit or, irrespective of its legal structure, is in fact operated for profit," is intended to cover situations where, although the organization is formally non-profit, the lawyer knows or it is obvious that as a practical matter it is for profit because, e.g., controlling members draw extremely large salaries.

The reference in the introductory portion, "that the employment, payment, or recommendation is pursuant to a regular practice of providing for legal services to others," reflects the view that if rendering services is consistent with the other Disciplinary Rules (including DR 2-104(B)), it should not be prohibited by DR 2-104(C) if the corporation's payment or recommendation of the lawyer to render the services is isolated and casual in nature, as opposed to being part of a regular practice of providing for legal services to others. It also reflects the view that even for-profit corporations have some First Amendment rights,[24] so that, for example, a for-profit sales corporation should be able to finance its salesman's Commerce Clause challenge to a local licensing requirement.

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[22]See note 4 and accompanying text, supra.

[23]North Dakota State Board v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), upholding statute allowing a corporation to operate a pharmacy only if a majority of its stock is owned by registered pharmacists.

[24]See New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964), finding First Amendment protection for a paid advertisement that "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."

The four clauses enumerate the only situations in which a lawyer may render legal services although provided for as a regular practice by a for profit corporation. In one of the situations--that covered by clause (4)--he may proceed only if the corporation uses an "open panel" approach.

Clauses (1) and (2) cover employer and union plans. As noted previously,[25] Congress has foreclosed professional regulation which regulates, albeit indirectly, the terms and conditions of prepaid legal service arrangements maintained by employers whose activities affect commerce or unions whose members' work affects commerce (except government and church employee plans).[26]

Clause (3) is to the same effect as the provision in Minn. Stat. §481.02, subd. 3 which states that the provisions on unauthorized practice and corporation practice "shall not prohibit any insurance company from causing to be defended, or from offering to cause to be defended through lawyers of its selection, the insureds in policies issued or to be issued by it, in accordance with the terms of such policies."

Clause (4) is in line with Minn. Stat. §60A.08, subd. 10, which specifies that a legal expense insurance contract may not "deny the insured the free choice of attorneys at law authorized to practice in the jurisdiction in which the service is rendered."[27]

Your Committee preferred its draft subdivision (C) to the approach of the ABA February 1975 Amendments.[28]

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[25]See discussion under "Federal Preemption," supra.

[26]However, §514(b)(2)(A) of the Employee Retirement Income Security Act of 1974 provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance," so it is possible that Minn. Stat. §60A.08, subd. 10, specifying that a legal expense insurance contract may not "deny the insured the free choice of attorneys at law authorized to practice in the jurisdiction in which the service is rendered," could apply to insurance used to fund employer or union plans covered by the federal Act.

[27]See also Ky. RCA 3.476(a): "the plan permits the member of the plan to use the services of any [lawyer] of his choice; and, no agent, servant or employee of the plan or the plan itself shall recommend to a member of the plan the services of any particular [lawyer(s)]."

[28]DR 2-103(D)(4)(a) thereof provides:

> Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organiza-

SOLE PROPRIETOR EMPLOYER

Draft DR 2-104(D) reflects the view that the same rules should apply respecting employers who are sole proprietors as respecting employers which are corporations.

FURNISHING INFORMATION

Draft DR 2-104(E) reflects the view that a lawyer who renders legal services to a member or beneficiary of an organization that employs, pays for, or recommends him to render the services should furnish the Board of Professional Responsibility information as it may reasonably require regarding his compliance with the Code in rendering the services. It allows the Board flexibility in the area of requiring information, so that it can tailor its approach to the matter in light of developing experience, and is included in lieu of rigid, automatic filing requirements such as those included in the ABA February 1975 amendments[29] and in some state provisions.[30]

SERVICES NOT COVERED BY ARRANGEMENT

Draft DR 2-104(F) is aimed at preventing a lawyer from using his connection with an organization's legal services arrangement as a feeder. It is in effect an exception from the provision

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(Footnote 28 continued)

> tion 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 such organization bears ultimate liability of its member or beneficiary.

As mentioned previously, this appears invalid so far as it applies to employer-sponsored plans covered by the federal Employment Retirement Income Security Act of 1974.

[29]DR 2-103(D)(4)(g) thereof provides:

> Such organization has filed with the appropriate disciplinary authority at least annually 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 such failure.

As mentioned previously, this operates directly upon the organization, which seems inappropriate in a Code regulating lawyers' conduct, and appears invalid as to plans covered by the federal Employment Retirement Income Security Act of 1974.

[30]Automatic filing requirements bearing upon the lawyer appear in Calif. St. Bar R. Prof. Conduct 20, 23, Ky. RCA 3.475(h), and Wash. DR 2-103(D)(5)(e).

of draft DR 2-103(F)(1) permitting a lawyer to accept employment notwithstanding it results from unsolicited advice to a layman to obtain counsel or take legal action, if the advice was to a client.

This provision is included in lieu of an ABA February 1975 provision, which appears unworkable.[31]

PERMITTED COOPERATION WITH PUBLICITY

Draft DR 2-104(G) permits a lawyer to cooperate with certain publicity activities or organizations which provide for legal services.

Clause (1) is substantially identical to provision in the ABA February 1975 amendments.[32]

Clause (2) follows the approach of an ABA February 1975 provision.[33]

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[31]The ABA February 1975 Amendment to DR 2-103(D)(4)(c) provides:

> Such 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.

As mentioned previously, whatever purpose the organization is "operated for" would appear to be inside its legal services program.

[32]DR 2-101(B) thereof states the following as an exception to the provision that "A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf":

> a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

[33]The ABA February 1975 Amendments apparently incorporate the ABA February 1974 amendment to DR 2-104(A)(2), which sets forth the following as an exception to the Rule that "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice":

Clause (3) is to the same effect as provision in the ABA February 1974 amendments.[34] The exception is added because draft DR 2-104(C)(4) allows the lawyer to render legal services paid for by a for-profit organization thereunder only if the organization does not employ or recommend him.

LAWYER REFERRAL

Draft DR 2-104(H) is substantially identical to provision in the ABA February 1975 amendments.[35]

DEFINITIONS

The ABA February 1975 Amendments removed the words "representative of the general bar of the geographical area in which the association exists" from after the words "bar association."[36] The ABA Committee's Comment explained, "The result is to leave it to the Standing Committee on Ethics and Professional Responsibility * * * in its subsequent rulings on a case-by-case basis to determine what is a 'bar association.'" Your Committee believed that the limiting words in question should be retained. They are included in the recommended Definition (7).

(Footnote 33 continued)

> A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

Draft clause (2)'s reference, "so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice," parallels language in draft DR 2-103(F)(2) (and current DR 2-104(A)(4)).

[34] DR 2-101(B)(6) thereof provides that DR 2-101 "does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name":

> In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A)(6), directed to a member or beneficiary of such organization.

[35] DR 2-103(C)(1) thereof provides:

> He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

[36] See ABA February 1975 Amendments to DR 2-103(C)(1), (D)(1)(d), (3).

OTHER MATTERS

The changes set forth in the attached draft are intended as a substitute for the ABA's February 1974 and February 1975 amendments insofar as they amend the Disciplinary Rules under Canon 2 and add certain definitions.[37] Your Committee has not thought it within its charge to consider the propriety of the other ABA February 1974 amendments,[38] nor of the ABA February 1970 amendments[39] which, although apparently not included within the Court's August 4, 1970 order adopting the Code, are set forth in the Code in the pocket part of volume 27B of Minnesota Statutes Annotated.

Respectfully submitted,

SUPREME COURT STUDY COMMITTEE ON
PREPAID LEGAL SERVICES

by Robert F. Henson
Robert F. Henson
Chairman

Dated: April 28, 1975

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[37]Draft Definition (7) is recommended in lieu of the ABA February 1975 version specifying, "'A bar association' includes a bar association of specialists as referred to in DR 2-105(A)(1) or (4)." ABA February 1975 Definition (8) defines "qualified legal assistance organization," a term not used in your Committee's draft. ABA February 1974 Definition (9) was eliminated by the ABA February 1975 amendments, and your Committee does not recommend it.

The Committee did not pass on the question whether to recommend ABA February 1975 EC 2-33. That EC appears consistent with the Committee's approach.

[38]Amending DR 5-105(A), (B), (D), 7-102(B)(1), and 7-110(A), (B), adding DR 8-103, and amending EC 2-18 and 7-34.

[39]Amending DR 2-105(A)(1) and 2-108(B) and adding a Definition (7) (superseded by ABA Feburary 1975 Definition (7)).