PREPAID LEGAL SERVICES: DEVELOPMENT AND PROBLEMS

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INTRODUCTION

Prepaid legal service plans are a recent development in the delivery of legal services.[1] They provide legal services to private individuals for a fixed cost. Participants in the plan pay a fixed sum in advance so that in the event the need arises there will be no additional cost for the services covered by the plan arrangement. A prepaid legal service plan may be very similar to health insurance or other types of casualty insurance. Most plans operating today are those arrived at by collective bargaining between management and unions to provide services to individual employees included in the bargaining group. Thus, plans of prepaid legal service are becoming a more common item in the fringe benefit package that workers will obtain as part of their employment.

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1. The field of prepaid legal services is new and the literature concerning it is to be found in out-of-the-way corners: brochures, unpublished reports, transcripts of conferences, committee reports, private correspondence—to mention but a few of the treasure troves. Although prodded unmercifully by conscientious law reivew editors, this Article remains documented mainly by the personal memories and experiences of the writer gained during his seven years of service as staff director to the American Bar Association [ABA] Special Committee on Prepaid Legal Services. There is one source book worth special notice, W. PFENNIGSTORF & S. KIMBALL, LEGAL SERVICE PLANS: APPROACHES TO REGULATION (1977). This scholarly work, published with the assistance of the National Science Foundation, contains excellent and well-documented sections on the typology of plans, antitrust considerations, student legal plans, automobile club plans, employee benefit plans, the European experience on prepaid legal plans, and suggestions for regulation of plans. There are two principal gathering agencies: the American Prepaid Legal Services Institute, 1155 East 60th Street, Chicago, Ill. 60637, and the National Resource Center for Consumers of Legal Services, 1302-18th St., N.W., Washington, D.C. 20036. Both organizations issue publications on topical developments and try to provide some clearinghouse assistance from their overladen shelves of materials. The Center issues a periodical newsletter and a magazine entitled *New Directions*.

In addition, there are other groups, principally credit unions, which are now experimenting with prepaid legal plans.

The basic push behind consideration of prepaid legal systems has come from the trade union movement. Prepaid plans provide a new and useful fringe benefit for union members, especially in the somewhat unusual situations where members already have medical, dental, and optical plans. These plans help present members as well as attract new members of local unions which are not already committed to a national organization. Similarly, credit union leagues see prepaid legal plans as a useful service for individual members and as a promotional device to encourage unaffiliated local credit unions to join the league or state organization.

The principal attraction of this new system, from the perspective of bar associations, is the solution it may bring to the problem of the unavailability and general nonuse of lawyers by the general public, particularly those in the middle income ranges. It was because of this "forgotten client"[2] that the American Bar Association [ABA] began its efforts of exploration, experimentation, and promotion of prepaid legal systems.[3] It was hoped that such systems would overcome the cost barrier of legal services and, perhaps, encourage the public to use lawyers for planning and prevention rather than as a last-ditch means of avoiding crises.

Writing about prepaid legal services is difficult because its history is marked by controversy. Many insurance experts staunchly deny that there is any market for plans of legal services, and some bar association leaders claim that prepaid plans will not work. Other leaders laud the successful working of their plans. While employee benefit plans which include prepaid legal services are constantly growing, and some are in their sixth year of operation, many union/management leaders are still skeptical. They are reluctant to give prepaid legal plans any attention or priority in their bargaining sessions. Many consumer leaders favor the plans, yet many remain undecided or opposed to legal service plans. Bar leaders are equally divided. Beyond the leadership in the union/management sector and bar associations, the same division exists for non-employment-related groups of consumers and the general public.

Information about prepaid plans is growing, however. The United States Department of Labor is collecting reports on the employee bene-

2. Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A.J. 1092, 1092 (1971).

3. *See* discussion note 36 *infra*. *See also Prepaid Legal Services*, 47 U.S.L.W. 2293 (1978) (reporting on the ABA's Seventh National Conference on Prepaid Legal Services where emphasis was placed on the importance of marketing techniques for the success of prepaid legal service plans).

fit plans under the provisions of the Employee Retirement Income Security Act of 1974 [ERISA].[4] Consumer and legal organizations are also gathering data. However, little uniformity exists in the data collected thus far. This lack of reliable data severely restricts useful analysis and makes actuarial projections on cost impossible.[5] Nevertheless, the growth of plans is steady and certain. Prepaid plans are here to stay. Within the next decade twenty-five percent of the population will have access to a lawyer via a prepaid plan, and fifty percent of the lawyers in active practice will be participating in such plans.[6]

WORKING DEFINITION OF PREPAID LEGAL SERVICES

There is no universally accepted definition of a plan of prepaid legal services, a term formulated by the ABA Special Committee on Prepaid Legal Services.[7] One purpose of the Committee was to promote the interest of the public and consumers, as well as that of bar associations and lawyers, in prepaid developments. The Committee's

4. *See* 29 U.S.C. § 1143 (1976) which provides: "The Secretary is authorized to undertake research and surveys and in connection therewith to collect, compile, analyze and publish data, information, and statistics relating to employee benefit plans . . . ." *Id.* § 1143(a)(1). The Employee Retirement Income Security Act of 1974 appears in scattered sections of 29 U.S.C.

5. In August 1977, the Ford Foundation made a grant to Professor Claude C. Lilly of the University of Southern California. This grant was sponsored by the American Prepaid Legal Services Institute to study and analyze data from selected plans so that an estimate could be made of how much a plan might cost. The type of data kept by even the well-operated plans proved insufficient in most instances, and it has been necessary to spend additional time and money to pull needed data out of the records. The study was published in July 1978, and it is available from American Prepaid Legal Services Institute, 1155 East 60th Street, Chicago, Ill. 60637.

6. This prediction was originally made by F. William McCalpin, in 1972, while serving as chairman of the ABA Special Committee on Prepaid Legal Services. The outlook for rapid development of prepaid plans was fairly roseate then, and McCalpin would probably not object to having five or six years added to his prediction.

7. At its inception in 1970, the Committee was called the Special Committee on Legal Cost Insurance. In 1971, at its request, the name was changed to Special Committee on Prepaid Legal Services since the Committee did not want anyone to assume that a prepaid legal plan was necessarily insurance and, therefore, subject to the regulation and requirements of the various state commissioners of insurance.

In the health field there were health service plans that operated with different regulation than health insurance plans. *See, e.g.*, Knox-Keene Health Care Service Plan Act of 1975, CAL. HEALTH & SAFETY CODE §§ 1340-1399.60 (West Supp. 1977). *See also* California Physicians' Service v. Garrison, 28 Cal. 2d 790, 801, 172 P.2d 4, 13 (1946).

Blue Cross organizations enjoyed different treatment than commercial insurers. Also, it was clear that bar associations, whose entry into prepaid legal services the Committee wished to encourage, would not have the resources to meet normal capitalization requirements for insurance company qualification. The ABA Special Committee was chided for sometimes confusing capital and operating reserves as required by insurance laws. The Committee's point was duly noted, however, and drafts of model legislation proposed by the National Association of Insurance Commissioners allow the commissioner to consider other factors, such as a pledge of services by participating lawyers within a bar-sponsored plan, as sufficient in lieu of posting such capital in a cash form with the commissioner. Such an approach might be more acceptable than legislation or administrative action that exempts bar activity from any insurance regulation. In April 1978, such a bill to exempt bar-sponsored plans was soundly defeated in the assembly of the Oklahoma legislature, most legislators indicating that the bar should compete on equal terms in this new market. Additionally, "prepaid" was a broader term than "group," since prepaid plans could be offered to the general public and would not have to be restricted to groups. Furthermore, "group" usually connoted a union plan, and the Committee wanted a broader connotation.

task was to determine whether these new systems would help to increase the availability of lawyers to the public.[8] A flexible term like "services" would not inhibit experimentation with or entry into prepaid plans.

A working definition of a prepaid legal plan is any system or arrangement whereby payment is made in advance for legal services that may be needed later if such services are within the type of benefits provided by the plan. In a prepaid plan, the cost of the covered service is paid for in whole or in part by the plan or fund or insurance company. The services covered are substantial, more than a brief amount of advice and referral services provided on a discounted fee basis. Such access plans are useful in helping a person find a lawyer, but they do not help solve the problem of the cost of legal service.

EARLY DEVELOPMENT

In the early 1900's various groups discovered that their members were in need of legal services as a result of the risks of their employment. The Policemen's Benevolent Association of New York provided its members with legal help if the policeman was suspended or discharged and wanted to contest such action.[9] The plan was informal and was not reduced to writing until much later. It began as a group arrangement addressed to a special legal need and paid for out of membership dues, and it continues in existence today. It was not considered insurance.

Other employee group plans continue to grow, but there is not much information about these early group plans because those who needed help learned about the arrangements easily enough by word of mouth, and printed brochures were not required by a regulatory authority. Furthermore, these group plans were not viewed favorably by

8. The ABA Special Committee on Prepaid Legal Services was formed at the suggestion of an earlier Special Committee on the Availability of Legal Services, which also had been chaired by F. William McCalpin. That earlier committee was one of the most forward looking and imaginative committees in the history of the ABA. Many of its suggestions on legal services to the poor became ABA policy. Its concern with the lack of service to the vast middle class caused it to recommend study and action on group and prepaid systems for improving such service.

9. Interview with the general counsel of the Policemen's Benevolent Association of New York, in New York (May 1971).

Other early group plans are the New York Legal Aid Society, which was formed in 1876 to meet the legal needs of poor German immigrants, and the Chicago Legal Aid Society, which was formed to meet the special legal needs of destitute women and children. Services provided were limited and restricted to "necessary" legal needs and to civil law cases only. Later, more coverage of the whole range of personal legal problems developed, and the service was extended to all poor persons, not just to German immigrants or hapless women and children.

The progression in legal aid has been from specialized groups and subject matter to more generalized coverage of persons and types of cases. In prepaid plans, limitations to job-related matters have been dropped so that a broad range of all personal legal problems is now covered. *See* R. SMITH, JUSTICE AND THE POOR 134-49 (1967).

bar associations, which were much more powerful in the early 1900's and more inclined to find violations of the unauthorized practice of law or of ethical codes.

In this tradition of group action, the Railway Trainmen and the Illinois Mine Workers formed group plans: one to provide investigative help and referrals to known lawyers who would take less than the standard contingent fee, and the other to handle workmen's compensation cases for members without deducting the statutory percentage fee for the lawyer. Canon 35 of the original Canons of Professional Ethics prohibited the interposition of an intermediary between client and lawyer in the rendition of legal services.[10] Basing their actions mainly upon that Canon, the State Bar of Virginia first challenged the Trainmen plan but lost in the United States Supreme Court.[11] In 1967, the Illinois State Bar Association challenged the Mine Workers. It was also unsuccessful.[12] The Supreme Court did not see much difference in steering group members to a panel of railway liability attorneys or to a staff attorney paid by the Mine Workers union.[13] The State Bar of Michigan also challenged the Trainmen plan, and once again the challenge was upset. Justice Black wrote:

> The common thread running through our decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.[14]

This line of constitutional cases clearly established group legal arrangements as part of the right of assembly guaranteed under the first amendment. While all of these Supreme Court battles were being decided, some early group plans were being suppressed because of alleged unauthorized practice of law[15] or because the proposed plan offered a broader range of personal legal services than was related to the em-

10. ABA CANONS OF PROFESSIONAL ETHICS No. 35.
11. Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 8 (1964).
12. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222-25 (1967).
13. *Id.* at 224-25.
14. United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 585-86 (1971). This case arose after the union changed its name to United Transportation Union. An excellent discussion of the *Trainmen* and *Mine Workers* cases may be found in Christensen, *Regulating Group Legal Services: Who is Being Protected—Against What—And Why?*, 11 ARIZ. L. REV. 229 (1969). This article forecasted the outcome of the *United Transportation Union* case two years before it was decided.
15. In 1965 the New York County Lawyers Association filed a complaint against the Hotel Trades Council in New York alleging their plan, patterned after the neighborhood law office approach of poverty law programs, used nonlawyers in the neighborhood office for intake of cases, and this sometimes resulted in the rendition of legal advice without a license. The union chose not to contest the action and terminated its plan. N. Y. Times, May 9, 1965, at 84, col. 1.

ployment of the member.[16]

STRUCTURE OF PLANS

Group legal service plans may be structured in a variety of ways.[17] However, there are three major aspects of every plan. First, the persons to receive legal service may be individual members of the public or a group of individuals linked together by employment or by some other common group purpose. The recipient is seldom an individual member of the public since very few plans in the United States[18] offer their plans of service to the general public. Those few that do are plans that limit the services to brief advice and referral on a fee-for-service basis[19] or that limit services to specialized areas such as automobile-related problems.[20]

For all practical purposes, therefore, recipients of prepaid legal services are members of groups. The most significant groups are labor unions or employment-related groups such as all of the employees of a

16. *See* N.Y. BAR ASSOCIATION COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 163 (1970) (where it was found that it would be unethical for lawyers to participate in a plan that would supply legal services not related to their employment, such as other personal problems of domestic relations, estate matters, home purchases, and other legal matters "having no connection with the union's primary function of representing its members in its dealings with their employers"). The opinion appeared on the eve of United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971), and several members of the New York Ethics Committee dissented and gave a much broader reading to the provisions of Disciplinary Rule [DR] 2-103 of the ABA Code of Professional Responsibility urging that the clearly constitutional interpretation was to recognize the broadness of the Supreme Court holdings in Brotherhood of R.R. Trainmen v. Virginia *ex. rel.* State of Virginia, 377 U.S. 1 (1964), and United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). New York has now adopted the February 1975 amendments to the ABA Code and has repudiated its restrictive views on closed panel plans.

17. *See generally* W. PFENNIGSTORF & S. KIMBALL, *supra* note 1, at 9-86; AMERICAN BAR ASSOCIATION, HANDBOOK OF PREPAID LEGAL SERVICES (Murphy ed. 1972); THE FUTURES GROUP & THE NATIONAL CONSUMER CENTER FOR LEGAL STUDIES, PREPAID LEGAL SERVICES: HOW TO START A PLAN (1975) [hereinafter cited as THE FUTURES GROUP]; C. LILLY, LEGAL SERVICES FOR THE MIDDLE MARKET (1974).

18. There are many plans offered to the general public by insurance companies and automobile clubs in Great Britain and Europe. *See* W. PFENNIGSTORF & S. KIMBALL, *supra* note 1, at 487-567.

19. Another open panel non-bar-sponsored plan that sells to the general public is National Legal Services, Inc., of Los Angeles, Cal. This plan offers toll-free general legal advice by a lawyer on the telephone, some letter writing services, an execute-your-own-will service, and referrals to a statewide panel at a cost of $60 per year to the subscriber. National did a number of spot commercials on television since under Rule 2-104 of the California Rules of Professional Conduct open panel plans were allowed to advertise their availability to the public. All of this occured before Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The television exposure brought many telephone calls but did not justify, in terms of completed voluntary applications accompanied by hard cash, the more than $20,000 spent on the media.

The organizers of the plan, Stuart Baron and Blair Melvin, also own Group Legal Services, Inc., a closed panel plan offering to groups rather than the general public. It has operated longer and with some success. However, their newest venture is called The Law Store. It offers unlimited telephonic consultation with a lawyer for $9.95 per year. Do-it-yourself kits on six or seven legal problems sell for an average of $75.00 apiece. On the opening of the first store on May 1, 1978, they received free national publicity on NBC-television news. Several lawyers, interviewed later, commented that they would not operate such a venture or that it was not in good taste; however, they agreed it was permitted under the present state of the law.

20. See discussion note 50 *infra*.

given business or corporation where employees are not members of a union or where a union is not certified as the bargaining agent of the employees. Plans for these employee groups are defined as employee benefit plans under ERISA.[21] Employee benefit plans are a legitimate subject for collective bargaining, and the union may include a plan of legal services as one of the fringe benefits that is to be negotiated with management.

Outside of these job-related groups, the groups most frequently utilizing prepaid legal service plans are credit unions. Other potential groups could be, for example, members of a country club, tenants in an apartment, subscribers to a newspaper, or members of a church.

The second major aspect of the plans concerns the manner in which prepayments are made. Prepayment may be accomplished by any of the following methods:

1. Contributions made by the employer and paid to the trustees of a legal service plan, where such an arrangement has been agreed to in the collective bargaining agreement between labor and management;[22]

2. Payments out of union dues, collected through deductions made by the employer, into a trust fund for legal services;[23]

3. Payroll deduction from the employee's earnings, matched with an equal amount by the employer, and forwarded to the administrators of the plan;[24]

4. Deduction from a savings account with a credit union;[25] and

5. Voluntary cash payments made by the individual directly to the plan for enrollment therein.[26]

Under the first collection method, the employees have voted to ratify the agreement obtained by the union in collective bargaining and to commit 100% of the employee group to participation in the plan. Under the second method, the members have voted at a union meeting to commit 100% of the membership to an earmarking of a special amount to a plan of legal services. Under the remaining three methods, the group members must voluntarily enroll in the plan and authorize a deduction or make direct payment.

The third aspect of the plans consists of its administration and operation. In many of the collectively bargained plans, where the plan

21. *See* W. PFENNIGSTORF & S. KIMBALL, *supra* note 1, at 189-253.

22. This is the most typical method used today and applies to about 90% of the plans now operating.

23. This method is used in plans of Laborers' Local 229 at Shreveport, Louisiana, and Laborers' Local 423 at Columbus, Ohio.

24. This method was used by a small die casting company in Portland, Oregon, whose plan was administered by Oregon Prepaid Legal Insurance, Inc.

25. This is typical for practically all plans now serving credit union groups.

26. This method is used by National Legal Services, Inc., of Los Angeles.

has been obtained as a fringe benefit, a joint trust is established with an equal number of labor and management trustees who are accountable for the operation and finances of the plan.[27] They may hire a professional administration firm to handle all administrative details, but they guarantee the solvency of the fund to pay for plan services through their own management of moneys received.[28] That is, they self-insure the performance of the plan. The same trustees may elect to have premiums paid to an insurance company which then administers the plan and assumes the risk of performance of services promised by the plan under normal insurance principles.

Finally, the plan administrator may be a corporation formed by private entrepreneurs. Such an entity receives the funds for its plan usually from individual subscribers. It designs, prices, and promotes the plan. It recruits attorneys and then pays them for services rendered to the individual client.[29] Other plans provide full-time staff attorneys. In this situation, the administrator has only oversight functions, and the staff takes care of records, forms, payments, and most administrative details.[30]

Regarding the operation of prepaid plans, the benefits to be provided may be stated in a variety of ways: so many dollars worth of services,[31] so many hours of legal services,[32] so many dollars up to a specified maximum for various legal procedures,[33] or any and all personal legal services required by the individual.[34] Most plans have dollar limits and exclude certain services. Some have deductibles such as a specified sum payable by the individual client to begin plaintiff litigation. Some require a payment of twenty percent to be made by the

27. *See* 29 U.S.C. § 186(c) (1976). The administrator may also be an organization like the Ohio Prepaid Legal Services Trust. This entity was formed by the Ohio State Bar Association to aid in the development of prepaid legal services. It now administers the plan of the city employees of Columbus, Ohio. The plan was negotiated by District Council 1632 of the American Federation of County, State, and Municipal Employees with the City of Columbus. For a discussion of the negotiations for this plan, see AMERICAN BAR ASSOCIATION, TRANSCRIPT OF PROCEEDINGS, NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES 5 (1975) [hereinafter cited as TRANSCRIPT 1975].

28. Under ERISA, the trustees cannot effectively delegate this responsibility for plan solvency. *See* N. LEVIN, ERISA AND LABOR-MANAGEMENT BENEFIT FUNDS 215, 269 (1975).

29. This procedure is used by the plan of National Legal Services, Inc., at Los Angeles.

30. This procedure is followed by the plan of Laborers' Local 423 at Columbus, Ohio.

31. This is the Shreveport plan approach to statement of benefits. *See* AMERICAN BAR ASSOCIATION, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES (Murphy & Walkowski eds. 1973) [hereinafter cited as COMPILATION].

32. Original design of the plan of Local 423 of Laborers' International Union at Columbus, Ohio. AMERICAN BAR ASSOCIATION, TRANSCRIPT OF PROCEEDINGS, NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES 71 (1972) [hereinafter cited as TRANSCRIPT 1972].

33. Design of Stonewall Insurance Company for Maryland Credit Union plan and its other plans. COMPILATION, *supra* note 31, at 23.

34. Plan of Alaska Teamsters. This all-encompassing statement applies to cases handled by the selected law firms in Alaska for problems that could be resolved in Alaska. For matters in the lower 48 states a maximum of $3,000 for counsel retained outside of the plan was imposed. *See* THE FUTURES GROUP, *supra* note 17. The plan is described in a chart appended at rear of text.

individual client for all legal expenses over a specified amount.[35] This sharing of expense device is similar to major medical expense insurance policies.

PROVISION OF LEGAL SERVICE: OPEN OR CLOSED PANEL OF LAWYERS

The prepaid legal plans that most closely resemble insurance or Blue Cross operations are the open panel plans, often "sponsored" by bar associations.[36] These plans allow the individual client to choose his or her own lawyer. The lawyers providing services can consist of all lawyers admitted to practice, or a very wide group of practicing lawyers who agree to participate in cases covered by a prepaid plan. In Oregon, for example, over one-third of all lawyers admitted to the state bar have agreed to participate in plans sponsored by Oregon Prepaid Legal Insurance, Inc., an organization formed by the Oregon State Bar. The client will have a one-in-three chance of obtaining the lawyer of his or her choice.

Where the choice of a lawyer is more restricted—to one lawyer, to one firm, or to one group of lawyers employed solely to handle clients from the plan—the plan is described as a closed panel operation. The individual client must use the services of the lawyers selected by the group that sponsors or pays for the plan. However, in many of the closed panel operations, there is an "option out" to choose a nonplan attorney in certain situations. Such options might be given in cases where there is a conflict of interest, such as representing a member-husband and a covered dependent-wife in a divorce proceeding. Also, it might be that it is geographically more convenient, and possibly less expensive for the plan, to use a local lawyer chosen by the client rather than to require usage of a staff attorney from a central office far removed from the site of the legal problem or need. In a few cases, the individual member might be allowed to continue with his former lawyer if he had previously established a relationship with him.

35. *See* AMERICAN BAR ASSOCIATION, TRANSCRIPT OF PROCEEDINGS, NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES 57 (1974) [hereinafter cited as TRANSCRIPT 1974].

36. A list of bar association sponsored plans and a Summary and Profiles of Bar Association Sponsored Prepaid Plans (December 1977) is available from the American Prepaid Legal Services Institute, 1155 East 60th Street, Chicago, Ill. 60637. "Sponsored" by a bar association may mean that the bar has announced to the public and its members that it approves of the prepaid plan offered by an insurance company or other organization that is marketing a plan of prepaid legal services in that bar's jurisdiction. In return for such sponsorship, the bar may have some control over the way in which the plan is structured or offered to prospective group clients. The term also may mean that the bar has formed an entity or corporation (like Kansas Prepaid Legal Services, Inc., or Texas Legal Protection Plan) which promotes and offers prepaid legal plans to the public. Such activity is financed with contributions from lawyers or other sources, sometimes by voluntary amounts paid by the lawyer to become a participating lawyer and sometimes by general assessment of all members through a one-time dues increase.

The restriction of the client's choice of a lawyer and the development of the closed panel plans generated countless discussions in organized bar circles. Conservatives within the bar alleged that closed panel lawyers would be controlled by the union groups that hired them and that these groups would interfere with representation of the individual client or union member. It was also argued that the quality of services would suffer in these systems of mass production for mass clientele. To cure these evils, restrictive rules of professional conduct were suggested.[37] In a few states, rules were adopted that required open panels for group legal plans.[38]

The February 1974 amendments to the ABA Code of Professional Responsibility, the Houston Amendments,[39] reflected the repressive bent of the most conservative members of the ABA House of Delegates. Essentially, the amendments, via an ethical consideration, warned lawyers to be cautious before participating in a closed panel operation. Closed panel plans were limited in their advertising and were required to provide an "option out" so that plan funds would pay for a nonplan lawyer chosen by the individual client. One criticism of the Houston Amendments characterized the action as the largest backward step the ABA had taken since it denied membership to Justice

37. *See* text accompanying notes 70, 71 *infra*.

38. Minnesota, North Carolina, and Texas are examples. For discussions of the open/closed panel controversy, see Fisher, Baron & Cole, *Prepaid Legal Services: Open v. Closed Panels*, 58 MASS. L. Q. 243-62 (1973). *See also* TRANSCRIPT 1974, *supra* note 35, at 63-78.

39. See discussion note 71 *infra*. The Houston Amendments were proposed by the ABA General Practice Section and adopted by the ABA House of Delegates by a vote of 144 to 117. They may still be in force and effect in the following states: Kansas, North Dakota, South Carolina, South Dakota, and Vermont. DR 2-103 prohibited a closed panel lawyer from accepting or performing any legal service for an individual member of a plan beyond what the plan allows as a benefit. It required all nonqualified legal organizations (*i.e.*, closed panel plans) to include an "opt-out" provision available to individual members, and it read as follows:

> Any of the organization's members or beneficiaries is free to select counsel of his or her own choice, provided that if such independent selection is made by the client, then such organization, if it customarily provides legal services through counsel it pre-selects, shall promptly reimburse the member or beneficiary in the fair and equitable amount said services would have cost such organization if rendered by counsel selected by said organization.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (1974). The disciplinary restrictions imposed upon closed panel plans were enough, but closed panel advocates became inflamed over the ominous language of Ethical Consideration [EC] 2-33 which read in part:

> It is probable that attorneys employed by groups will be directed as to what cases they may handle and the manner in which they handle the cases referred to them. It is also possible that the standards of the profession and quality of legal service to the public will suffer because consideration for economy rather than experience and competence will determine the attorneys to be employed by the group. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully consider the risks involved before accepting employment by groups under plans which do not provide their members with a free choice of counsel.

Id. EC 2-33. For a discussion of which version of ABA CODE OF PROFESSIONAL RESPONSIBILITY has been adopted by various states, see *Current Developments*, NEW DIRECTIONS, Apr.-May 1976, at 12.

Brandeis on thinly veiled ethnic grounds.[40]

To repair the leak in the professional dike, a special ad hoc committee was formed, and ameliorative amendments were passed one year later in February 1975. These changes *almost* satisfied the consumer groups and the federal government, but the Antitrust Division of the United States Department of Justice pressed for more changes in the general advertising provisions of the ABA Code of Professional Responsibility and was successful somewhat later in its challenge of the ABA control of law lists. In August 1977, a strategic retreat on advertising controls was passed by the ABA House of Delegates.[41] Although all these scenarios and developments are part of the increasing erosion of the authority of the organized bar, it might be said that the venemous controversy over prepaid legal services has accelerated the deterioration of the profession's influence.[42]

EXAMPLES OF PLANS IN OPERATION

As indicated previously, prepaid plans can be structured in a variety of ways. Several illustrations might help to show how these generalized variants come together in an operating plan.

Open Panel Model

The plan of Local 229 of the Laborers' International Union at Shreveport, Louisiana, was the first prepaid plan to begin operations in

40. Others joined in the condemnation of the amendments. The Antitrust Division of the United States Department of Justice found an opening to raise the whole advertising restriction issue and to question the arrogant presumption of the organized bar to issue any important rules at all. Statement of Joe Sims, Special Assistant to the Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before Committee on Professional Ethics, N.Y. State Bar Association (Aug. 21, 1974). Not to be left behind, the Federal Trade Commission [FTC] asserted its claim to protect the public from lawyer organizations, thereby enjoying a small amount of the limelight. The FTC protects the consumer against possibly false and misleading practices within the profession and professional organizations. Representatives of the FTC began attending meetings of the ABA on prepaid legal services in 1974. In 1975 they began an informal investigation of the ABA and its policies on advertising and discipline. In 1977, a special task force was announced that was to study the entire professional association picture. According to the President of the ABA, the association should encourage both open and closed panel prepaid legal services. *See* Smith, *President's Page*, 60 A.B.A.J. 369, 369 (1974).

41. The retreat was undoubtedly a result of the Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), that the blanket prohibition on advertising by attorneys violated the first amendment. *Id.* at 384.

42. This erosion has been aided by the President of the United States, Jimmy Carter, in his remarks to the Los Angeles County Bar on May 4, 1978, when he indicated that 90% of the lawyers represented only 10% of the people and that bar associations (excepting the Los Angeles County Bar, of course) often were more concerned about lawyers' interests than the public interest. Professional associations are in a distinct quandary, needing to be concerned about their members and the economic problems of their members, while at the same time needing to base their positions on service of the public interest. In spite of all the cost-efficient techniques, lower cost of lawyers' service is going to mean less income to lawyers or no income to some lawyers who are displaced by "progress." It is doubtful that lawyers are ready to turn to the Teamsters or another trade union where their economic demands may be voiced openly.

the United States.[43] The Shreveport plan provides service for 100% of the 550 members of Local 229. Originally financed by funds from the Ford Foundation and the ABA and with a contribution of two cents per hour by the union from dues income, the plan provided a member with a potential of $1,665 worth of legal services in the first year and double that amount in the second year if no use was made of the plan in the first year. The plan has cost the individual member between $32 and $48 per year. Benefits have been increased so that $3,000 worth of services are now available if the member or his dependents need them. Usage of the plan has been restrained during a seven-year period; only eighteen percent of the plan members used plan benefits. Critics say the group is atypical and should be ignored,[44] but this infrequent usage is close to the usual norm of twenty to twenty-five percent that characterizes most plans. Members say they are pleased with the plan. "It's like money in the bank when you need it." Many members are certified for eligibility and actually see a lawyer, but no fee is charged and no usage is recorded.[45]

43. For a description of the Shreveport plan, see P. Murphy, R. Jackson, & D. Chandler, Lawyers for Laborers: The Shreveport Plan of Prepaid Legal Services After Four Years 1971-1974 (1975) (available from the American Bar Association Circulation Department, 1155 East 60th Street, Chicago, Ill. 60637) [hereinafter cited as Shreveport Plan]. The plan of the Los Angeles Joint Board of the Hotel and Restaurant Employees and Bartenders Union began in 1957 and offered a goodly amount of prepaid services for the one-half cent per hour that funded this plan, a part of the union welfare benefit package. However, eligibility within union membership was limited to those members whose incomes were either at or slightly above the poverty level, and many would have qualified for legal aid if they had applied. The program tried to have some selection of lawyers available to members, but many participating lawyers became less and less willing to accept the modest fees that were available. Only a handful survived to the second and third year of operation. The program ended in 1959 because of an alleged need of the one-half cent contribution for higher medical plan costs. This termination, however, coincided with the termination of the union president under whose aegis the program had begun. The plan caused great ethical ripples because it had intermediaries (which were banned by Canon 35) or "commercialized the profession." *See* W. Cedarquist, *Lawyers at the Crossroads—Profession or Trade?*, 31 UNAUTH. PRAC. NEWS 79 (1965-66).

44. The Shreveport plan has been maligned by critics who claim that its 97% black membership is below normal educational levels, is too poor economically, is too small a group to be typical, is too phlegmatic, and is located in the prejudiced setting of the old South. *See* TRANSCRIPT 1974, *supra* note 38, at 60-61. Therefore, it is to be ignored and its success and survival brushed aside. Most of its critics are from metropolitan or populous areas where no significant activity to promote or develop prepaid plans had occurred at the time the criticisms were made.

45. In 1973, McQueen & Associates conducted a special survey of 86 members of the union who had received certifications for service from the administrator but for whom no bill had been received from an attorney, apparently indicating no service had been given to the member. The astounding results follow:

82 saw an attorney
75 received advice and consultation
32 had letters written by the attorney
54 had legal papers other than letters prepared
3 paid directly to the legal office
7 received payment subsequently through the plan
66 of the matters are now completed
5 have gone to a lawyer since

The survey would seem to show that lawyers often do not charge for advice and consultation with a client, having more *pro bono* impulse than is generally attributed to them. They also can be notoriously slow billers for work done. This use of a lawyer in a counseling or preventive law role

Shreveport was designed to test the viability of an open panel system of delivering prepaid legal services. It has amply demonstrated that its program can work in communities of 100,000 population.[46] Its basic plan design has been copied in at least eight other locations where prepaid plans are in operation.

Under the Shreveport open panel plan, lawyers will be paid reasonable fees as billed and up to the limit of the covered services.[47] Although this provision allows a choice of lawyers that is as broad as possible, almost all of the work done since the plan began in 1971 has been performed by over fifty local lawyers. The client goes to the lawyer of his choice, and if he wants a referral, the local administrator will give him the names of three lawyers who have participated previously in the plan. However, such requests for referral are rare. Most of the cases are handled by one or two lawyers in Shreveport who have done work for other members of the union. The plan operates smoothly with good local administration. The local bar cooperates fully and has representatives serving as trustees of the plan.[48]

Although space does not permit description of other open panel plans in Arizona, Florida, Idaho, Michigan, Minnesota, New Mexico,

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is one of the most useful characteristics of prepaid plans. The survey was published in COMPILATION, *supra* note 31, at 18. It is now out of print, but copies might be available from the American Prepaid Legal Services Institute, 1155 East 60th Street, Chicago, Ill. 60637.

46. *See* Shreveport Plan, *supra* note 43. There is a much larger open panel employee benefit plan of prepaid legal services in Ohio. There are over 4,000 members and their dependents who may choose a lawyer from a panel of 700 participating lawyers in the Columbus area. The plan is administered by the Ohio Legal Services Fund, a trust formed by the Ohio State Bar Association. The local chapter of the American Federation of State, County, and Municipal Employees and the city administration chose this open panel model in 1975, and it has operated satisfactorily since then. Open panel plans are often criticized for their inability to control costs, yet the Columbus plan actually decreased the amount of the city's contribution required for the second year of operation. *See* THE FUTURES GROUP, *supra* note 17 (chart appended at rear of text).

A large number of groups are served in Kansas. Kansas Prepaid Legal Services, Inc., [PLS] sponsored by the Kansas Bar Association, operates with a professional administrator that carries out the marketing of the various plans offered as well as the collection of prepayments from subscribers, payment of lawyer claims, and normal details of administration. Kansas has many smaller groups, all voluntary subscription plans, thus far. Where a group "endorses" a plan, thereby allowing the provider to solicit individual subscriptions, the selling effort required is obviously much greater than enrolling 100% of the group in one fell swoop—as is characteristic of practically all the employee benefit/union plans. About 600 Kansas lawyers participated in one or more of the ten plans in operation at the close of 1977. Participation is always open, and it includes the value of being listed with the administrator for purposes of referral. PLS, however, will pay any lawyer admitted to practice for providing benefits covered under the plan. When nonparticipating lawyers receive their first PLS check for services, there is, not surprisingly, a willingness to enroll at a $50 entry fee as a participating lawyer. Interview with President of Kansas Prepaid Legal Services, Inc. (1977). See discussion note 27 *supra*.

47. See text & note 31 *supra*.

48. Details on the Shreveport operation have been reported to the writer by Ralph Jackson, President of Southwest Administrators, the administrator of the Shreveport plan, and are contained in part in Shreveport Plan, *supra* note 45. The Shreveport Plan pamphlet contains a narrative report analysis of claims paid in the four-year period and other information. The bar has cooperated in that it has not filed grievances against nor prosecuted the plan or participating lawyers for ethical violations. It has encouraged all lawyers to participate. It has a fee review committee to make sure that fees charged are reasonable.

North Carolina, Oregon, Texas, Utah and Washington,[49] these plans are all bar sponsored. Michigan and Minnesota have teacher groups. North Carolina, Oregon, and Texas have some small employer groups. Most are directed to non-employment-related groups like credit unions, and most rely on voluntary enrollment of individual members within the groups that endorse the plan.

Motor Club Plans

For more than three years Prepaid Legal Services, Inc., of Ada, Oklahoma, a non-bar-sponsored plan, has been successfully selling a plan of service limited to automobile-related problems. In three active years, this company has sold over 28,000 individual policies to the general public in Oklahoma. The cost is sixty dollars per year. The consumer can use the services of any lawyer admitted to practice. The lawyer is paid reasonable fees for services performed within the scheduled benefit coverage. That coverage also includes limited payment for consultation with a lawyer on any legal problem so that use of a lawyer for consultation and preventive law is encouraged. Its remarkable selling record, which is in sharp contrast with the failure of many others, is due to a dynamic management coupled with an exceptional sales force.[50]

Insurance Plans

Only a few insurance companies have policies of prepaid legal services actually written and now outstanding.[51] The first to have such a plan, Stonewall Insurance Company of Birmingham, Alabama, has written policies since 1973 for several very small groups in South Dakota and Maryland. Stonewall will probably phase out of the prepaid legal field, not because of adverse experience, but because of slowness of sales and other reasons. The policy offers a substantial list of specified services with specified maximum amounts the plan will pay. The individual insured may use any licensed attorney. Another company,

49. See discussion note 36 *supra*.

50. Its high first year commission rate of 50% gives the salesman such exceptional drive that they have even sold policies to law school professors—an admittedly hard-sell group. Second year commissions drop to 10% at which point the company and shareholders are able to show a profit. The company complies with Oklahoma Insurance Department regulations and has adequate reserves, a good claims record, and assets of over one million dollars. It hopes to expand its automobile-related plan to more states in the near future. Most of these details are from brochures issued by Prepaid Legal Services, Inc., and interviews with Harland Stonecipher, President of Prepaid Legal Services, Inc. (Feb.-Mar. 1978). *See* W. PFENNIGSTORF & S. KIMBALL, *supra* note 1, at 99, 130, 373-74.

51. For a discussion of insurance industry activity, see Ohman, *Prepaid: A Risky Venture for the Insurance Industry,* NEW DIRECTIONS, Mar.-Apr. 1978, at 35. *See also* COMPILATION, *supra* note 31, at 49-83 (proposed insurance policies).

operating since 1974, is Credit Union Mutual Insurance Society, which sells only to credit union members.

Midwest Mutual Insurance Company of Des Moines, Iowa, has over seventy separate plans in operation. It offers a very comprehensive coverage of personal legal problems for an average of seven dollars per month without dependents or ten dollars per month with dependents. Most of its plans are sold with some form of cooperation or endorsement by bar associations. In Oregon, the state bar formed a corporation, Oregon Prepaid Legal Insurance, Inc. It agreed with Midwest to market only Midwest offerings for a period of two years, to enroll participating attorneys, and to perform other administrative and marketing functions. In turn, Midwest contributed substantial sums for the cost of initial and ongoing operations. Participating lawyers also agreed, as a condition of participation, to accept pro rata reductions of their billings if claims to Midwest exceed eighty percent of premiums collected.[52]

Somewhat similar agreements have been signed with local and state bars in six other states. In 1973 and 1974, Midwest began a very aggressive effort to develop prepaid legal plans. In 1978, it was still developing new business and continuing all prior plans. A comparatively small company, it has invested large sums in its developmental efforts and has not, until recently, seen much return.[53]

Closed Panel Plans

Almost ninety-five percent of prepaid plans today are closed plans.[54] They are employee benefit plans, as labelled by ERISA. Most have been negotiated between labor and management as a fringe benefit of employment and are funded by money paid by the employer, on a cents-per-hour basis, into a trust fund to pay for such services. Others are funded by setting aside union dues for legal services.[55] The recently announced plan between Chrysler Corporation and United Auto Workers will use $17 million already accumulated in a supplemental unemployment benefit fund.[56]

52. Contract between Prepaid Legal Insurance, Inc. of Oregon and Midwest Mutual Insurance (Oct. 4, 1974) (copy on file with author).

53. Interview with F. Jay Lutz, Western Regional Manager for Prepaid Legal Services of Midwest Mutual Insurance (Feb. 1978).

Many other insurance companies have expressed interest in legal expense insurance and a few have devoted some time and money exploring the concept but none are writing policies. Meanwhile, they are waiting for prepaid plans to develop a more immediate and pressing demand.

54. This is my estimate, confirmed and shared with other experts in consumer and bar circles.

55. See text & notes 22-25 *supra*.

56. Using the supplemental unemployment benefit fund to finance legal services first occurred in 1972 in the plan of the Chicago Joint Board of the Amalgamated Clothing Workers. *See* TRANSCRIPT 1972, *supra* note 32, at 53. *See also* TRANSCRIPT 1974, *supra* note 35, at 48.

In the plan of the Washington District Council of Laborers' International Union,[57] seven staff lawyers provide services to an average of 8,000 members eligible for service. At different times, between three and six cents per hour has been earmarked from union dues to provide a very full range of services for civil and criminal problems. The plan permits the use of outside counsel in certain instances. Fees charged must be reasonable and are monitored by the directing attorney. About sixteen percent of plan funds are used for such retained counsel. The plan has steadily increased benefits and has lowered contributions when possible.

The plan of Alaska Laborers - Construction Industry utilizes three law firms to provide a very wide range of services to about 7,000 eligible members plus their dependents.[58] These three firms handle most of the legal problems, but outside counsel are also used since many problems occur when members are in other states, where about fifteen percent of plan funds are spent. Contributions to this plan are thirteen cents per hour.

TYPES OF CASES HANDLED

Most plans provide a broad range of services on personal legal problems, including both civil and criminal matters, and allow for plaintiff and defendant representation. Substantively, family cases—divorce, custody, and adoption—constitute a large percentage of the caseload. The Shreveport plan shows that, in terms of money spent, domestic relations problems constitute an average of 26.3% of the caseload.[59] An average of fourteen percent of the cases of the

57. A narrative report on the plan may be found in TRANSCRIPT 1975, *supra* note 27, at 82-88.

58. The writer helped to design this program in 1975 and the facts reported are based on personal knowledge of 1976 operations. No plan brochures or formal reports have been circulated to the general public and none are available. In 1978, covered employees had decreased to 3,000.

59. The table below is a special report furnished by the administrator of the Shreveport plan.

Laborers' Local No. 229 Legal Service Plan
Five year (62 months) Claims Summary
By Type of Case
January 1971-February 1976

General	Totals
A. Members certified for usage	475
B. Percentage of usage (family unit)	18.2%
C. Files closed with fee charged	299

Categories of Cases	% in terms of money spent
A. Domestic relations	26.3

Washington Laborers' plan consists of marital, adoption, and other family problems.[60] For its first year of operation, which may be unrepresentative, a northern California legal aid program concentrated fifty-nine percent of its work on dissolutions, child custody disputes, and

B.	Automobile (all inclusive)	26.6
C.	Retail credit & consumer problems	.7
D.	Bankruptcy	2.4
E.	Successions	5.6
F.	Unemployment	.9
G.	Workmen's compensation	2.0
H.	Tort	
I.	Criminal	27.3
J.	Juvenile	4.2
K.	Real property	
L.	General contract problems	.4
M.	Insurance (other than auto)	1.2
N.	Administrative law	
O.	Unknown	2.2
	Totals	100%

60. The table below is a special report prepared by Richard Scupi, the Director of the Washington Laborers' Plan, circulated to plan trustees, members, and to the author in August 1976.

Intake of New Legal Matters: Laborer's Legal Services, Washington, D.C.

	Four Year Totals	% of Four Year Totals
Total New Cases	5,538	100
Attorneys		
Staff	4,659	84
Retained	879	16
Jurisdiction of Case		
D.C.	2,629	47
Md.	1,700	31
Va.	1,164	21
Other	45	1
Nature of Problem		
Marital	399	7
Adoption	63	1
Other family	343	6
Wills/Probate	138	2
Credit actions	353	6
Consumer	488	9
DWI	342	6
Traffic violations	573	8
Other traffic	681	12
Landlord/Tenant	265	5
Housing	502	9
Criminal/Juvenile	519	9
Public benefits	542	10
Tax	54	1
Miscellaneous	276	5
New Clients Served	3,554	64
Previous Clients Served	1,985	36

other family matters.[61]

A much greater use is made of lawyers' services for representation in traffic and police courts. In the Washington Laborers' plan, twenty-six percent of the cases involved traffic offenses, including charges of driving while intoxicated. During its first two years of operations about fifty percent of lawyer time was devoted to traffic and police court representation in the plan of Laborers' Local 423 at Columbus, Ohio. Protection against possible police harassment was the most important reason for adoption and implementation of the plan in 1972.

Shreveport uses a new form of category that the administrator calls "Automobile (all inclusive)," which demonstrates the importance of the automobile in the American way of life. The category includes property damage, traffic cases (including DWI), defense of personal injury (if uninsured), suspension of driver's license, title questions, and repossessions. In the five years between 1971 and 1976, the plan spent 26.6% of its fee payments on ninety-three such cases.

As the Columbus Laborers' statistics on the use of lawyers for police court representation indicate, the plans are responsive to the legal needs of the members served.[62]

THE ROLE OF THE ABA SPECIAL COMMITTEE IN THE DEVELOPMENT OF PREPAID LEGAL SERVICES

At its formation in 1970, the ABA Special Committee on Prepaid Legal Cost Insurance, later the Special Committee on Prepaid Legal Services, had nine members who were objective, eager, and hard working—a rare combination for a voluntary committee. The Committee's task was to supervise the two experiments in Shreveport and Los Angeles,[63] to monitor developments in the field, and to recommend what the permanent role of the ABA should be vis-à-vis the new development of prepaid legal services. It completed these assignments and much more and continues today even though its recommended progeny, the American Prepaid Legal Services Institute, was spawned in 1975.

Throughout its history, the Committee had one principal objective: to make legal services more available to the average citizen who

61. This information was derived from Administrator of Siskiyou Legal Services Project, Report of Cases Opened from Jan. 1, 1977 to Nov. 30, 1977 (unpublished report).

62. As yet, there is no indication that programs will develop procedures to address the common legal needs of the group such as model tenants' leases or standard consumer contracts. Activity by the Columbus program did help to develop procedures in the police court for helping to treat alcoholic problems.

63. For a number of reasons that would require a careful and extended statement, the Los Angeles County Bar project was discontinued in 1973. Some of those funds were diverted to the State Bar of California and its prepaid legal organization, California Lawyers' Service, Inc. [CLS]. CLS was thwarted in turn by the Antitrust Division of the U.S. Department of Justice.

had been ignored or underserved by prior systems of delivering legal services to the public. The Committee was concerned that services be of good quality, be reasonably priced, and safeguard lawyer-client relationships.[64]

In 1970, the chief proponent on the prepaid legal services front within the trade union movement was the Laborers' International Union, a union whose principal membership was in the construction industry and whose general counsel was a member of the ABA Committee.[65] The theory was then, and still is, that whatever happened with employee benefit plans within the union/management sector would be emulated later by nonunion groups. Such had been the history of health benefit plans, dental plans, and vision services. To overcome the first obstacle in the federal statutes, it was necessary to amend the Labor Management Relations Act so that plans of legal service would be a valid and permissible activity to which employer contributions could be made. The Committee spearheaded the efforts of the ABA in support of amendments to the Act. It joined with representatives of the trade union, the consumer movement, and the insurance industry. These joint efforts were rewarded with the passage of an appropriate amendment in August 1973.[66]

The amendment of the Labor Management Relations Act allowed employers to contribute to a jointly administered trust fund established by a labor organization to defray the costs of legal services. Although the labor members of the Committee thought that employers could deduct contributions for plans of legal service from their income as a reasonable and necessary expense of doing business, the amendment gave legal service plans the status of a permissible fringe benefit, made it very clear that employers could contribute thereto, and merely paved the way for beginning the next round—securing tax exempt treatment for such plans. The amendment also had the effect of making prepaid legal plans a subject for mandatory collective bargaining. Interested unions could then insist upon pursuing demands for such plans in their negotiations with management.

The Committee has also been strongly concerned over the insurance regulation of prepaid legal activity by the various state insurance commissioners. Uninformed regulation might well inhibit the free ex-

64. AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 120-21 (1975).

65. Robert J. Connerton served on the Committee until the Houston Amendments to the Code of Professional Responsibility were passed in February 1974. Other prominent labor lawyers who served on the Committee at various times were Steve Schlossberg, general counsel for United Auto Workers; Robert M. Segal, regional counsel for AFL-CIO at Boston; and Charles P. Scully, regional counsel for AFL-CIO at San Francisco. Scully has been reappointed to the Committee for 1978-79.

66. Pub. L. No. 93-95, § 502(c)(8), 87 Stat. 314 (1973) (codified at 29 U.S.C. § 186 (1976)).

perimentation with program design that is needed in these early stages of development. The chairman of the Committee served as a member of a committee of the National Association of Insurance Commissioners [NAIC] that drafted model legislation for insurance regulation of prepaid legal insurance. This participation assured that the concerns of the ABA and the legal profession were considered in the intensive drafting sessions which lasted one year. The December 1975 draft was adopted by NAIC. That model bill, and later modifications to it, afford the new concept of prepaid legal insurance a flexible and intelligent treatment.

After the troubles of 1974 in regard to professional ethics,[67] consumer and trade union forces again joined with the ABA to work on tax reform that would give prepaid legal plans the same income tax advantages as health care plans.[68] This broad treatment was not achieved. However, after an immense amount of work by all concerned, a new section was added to the Internal Revenue Code in 1976 which allows an employee to exclude from gross income amounts contributed to legal service plans provided by the employer.[69]

The year 1974 was a bad year for the Committee. From its inception in 1970, the Committee had been concerned with the rules of professional conduct regarding participation by lawyers in prepaid legal plans. Many lawyers had requested guidelines more helpful than those contained in the 1969 ABA Code of Professional Responsibility. Communication was good between the Committee and the ABA Standing Committee on Ethics and Professional Responsibility. For the February 1974 meeting of the ABA at Houston, the Standing Committee had drafted a more understandable and even-handed rule for prepaid and group legal plans.[70] However, the violent reaction of the many conservatives within the ABA House of Delegates was not expected, nor was the political power and influence that the leadership of the General Practice Section of the ABA had upon such conservatives. The General Practice Section was convinced that closed panel plans constituted

67. See text & notes 70-71 *infra*.

68. The Internal Revenue Code excludes from gross income amounts paid into health care plans by employers and amounts received for health care by the individual employee. I.R.C. §§ 105, 106.

69. Pub. L. No. 94-455, § 2134(a), 90 Stat. 1926 (1976) (codified at I.R.C. § 120). An adequate discussion of the income tax considerations for prepaid legal plans is not possible without unduly extending this Article. Those who assisted in the joint efforts for changes in the tax laws were: John C. Hendricks, for the ABA, and Paul S. Berger, for the AFL-CIO (drafting of language and research memoranda on the need for change); Sandy DeMent, of the National Resource Center for Consumers of Legal Services (chief coordinator of congressional contacts, with assistance from Robert D. Evans of the ABA Washington office); and Robert J. Connerton. Senator Robert Packwood of Oregon achieved the compromise legislation that passed. Many others also helped.

70. *See* Report of the Standing Committee on Ethics and Professional Responsibility to House of Delegates of the ABA (Feb. 1974) (available from the ABA).

a threat to the profession. They alleged that legal services by such panels would be of questionable quality, that group or union members might be treated shoddily or clinically, and that group or union leaders would interfere excessively with the professional performance and loyalties of the lawyers performing service for individual members.[71] The conservatives won and the restrictive Houston Amendments of the General Practice Section were adopted by the House of Delegates.[72]

Later in 1974 the trade union movement had its revenge on the conservatives within the ABA when Congress passed the Employee Retirement Income Security Act of 1974 [ERISA].[73] The statutory language of ERISA and the interpretation added by dialogues in the United States Senate made it clear that regulation of prepaid legal activity in the area of employee benefit plans was preempted by Congress.[74] Bar associations were clearly warned, via ethical rulemaking, not to interfere with these plans.

Later amendments to the ABA Code of Professional Responsibility have eased the problems between consumers and the legal profession regarding the manner in which legal services must be provided under prepaid or group plans. However, the Committee still feels that further changes to the present Code are needed. During 1977 and 1978 it has concentrated its efforts on drafting language that would clarify some of the remaining doubts. The Committee has forwarded the following rule to the ABA commission charged with the task of redrafting the entire Code:[75]

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71. *See* Report of the General Practice Section to the House of Delegates of the ABA (Feb. 1974) (available from the ABA).

72. See text & note 39 *supra*.

73. Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified in scattered sections of 29 U.S.C.).

74. *See* 28 U.S.C. §§ 1001, 1002(1) (1976).

75. An extract from the Committee's report provides:

> In the opinion of the Committee, group and prepaid practice constitute a sufficiently important and different mode of delivering legal services to merit a special rule directed to their particular problems.
>
> Although at least one state now allows direct in-person solicitation of the officers or representatives of any bona fide group of 15 or more individuals, the Committee did not want to recommend any changes on this issue until the U.S. Supreme Court has acted in regard to two cases involving solicitation that are now pending on *certiorari*. The Committee recognizes that an additional ethical consideration relating to group and prepaid legal services may be required if any of the above suggestions are adopted, but none is submitted at this time.

The cases that concerned the Committee were decided by the Supreme Court on May 30, 1978: Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), and *In re* Primus, 436 U.S. 412 (1978). The *Ohralik* decision would allow states to ban lawyers from soliciting an accident victim in a harassing manner and under circumstances which do not facilitate informed and reliable decision-making. The Court noted that such solicitation could not be compared "to the mutual assistance in asserting legal rights that was at issue in United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971)." 436 U.S. at 458. It is likely, therefore, that direct in-person solicitation of the leadership of a group and also of the individual members of that group is constitutionally pro-

Practice in Cooperation with a Plan of Group or Prepaid Legal Services

A lawyer may cooperate with a plan of group or prepaid legal services or an arrangement whereby individual members of a group or of the general public are provided legal services or access to lawyers through a structured delivery system, and which publicizes its availability for that purpose provided that the plan or arrangement:
(1) Permits no infringement upon the independent exercise of the professional judgment of any lawyer furnishing service thereunder;
(2) Permits no violation of the privilege of confidential communications between client and lawyer;
(3) Contains no provisions that would require the lawyer providing services thereunder to act in derogation of his professional responsibilities;
(4) Requires a document in writing that clearly describes the benefits to be provided, the exclusions therefrom, and any conditions thereto, to be distributed to all beneficiaries of the plan;
(5) Contains a provision permitting the individual beneficiary at his own expense, except where the plan provides otherwise, to retain a lawyer outside of those available under the plan or arrangement;
(6) Provides a method for objective review and resolution of disputes and grievances arising under the plan or arrangement;
(7) Contains a provision that there be filed with the appropriate disciplinary authority or government agency responsible for regulation of the plan or arrangement, at least annually, a report on the plan or arrangement showing its terms, its schedule of benefits, its subscription or enrollment charges, agreements with lawyers participating therein, number of clients served, and financial results of its legal service activities.

Those representing the consumer organizations and trade unions consider that clauses four and six may run afoul of ERISA regulation and that clause seven may not be sufficiently related to ethical conduct to be proper for inclusion.[76] However, the Code would affect plans beyond

tected unless there are untoward pressures or harassment where the purpose of the solicitation is to help the group and its members achieve "mutual assistance in aserting legal rights."

76. An extract from a letter by the Director of National Resource Center for Consumers of Legal Services follows:

> I likewise think the general rules on prepaid are an improvement in clarity and simplicity, but I suspect they will raise some problems with plans subject to the Employee Retirement Income Security Act (ERISA).
>
> The introductory paragraph to your new rule is excellent. It does away with all the superfluous stuff concerning profit and non-profit plans and the nature of groups. Clauses (1), (2), (3) and (5) are likewise clear and well justified.
>
> Clause (4), however, raises problems. In the first place, it has almost no relationship to any question concerning the ethical conduct of attorneys. It is more in the nature of an insurance regulation or a consumer protection rule. It may be a wise rule, but it *does not* belong in the Code of Professional Responsibility. Moreover, Clause (4) may run afoul of ERISA in the sense that its requirements are parallel to those of ERISA. Even a conservative reading of the preemption doctrine would teach that where an area or type

the scope of employee benefit plans regulated under ERISA. There are many plans operating now for credit unions, cooperatives, and other non-job-related associations. Whatever offends ERISA may be considered superfluous, but clauses four and six are good requirements. These clauses test the fairness of the plan, and the lawyer should be ethically concerned that the plan in which he is participating does not lead the client down the proverbial garden path.

As to clause seven, it may be that ethics, like beauty, is something to be recognized or seen in the eyes of the beholder. The determination of what constitutes "ethical conduct" is a difficult one at best. The position of the organized bar is shaky and tenuous at the moment, and it may be necessary to leave the supervision for this requirement to the various state legislatures. The rule is one that would have some probability of passing the ABA House of Delegates. Some of its drafting was based on these pragmatic grounds. It certainly can be improved and redrafted, and its omission would not be too serious.

However, the Committee suffered an unkind blow at the hands of its offshoot, the American Prepaid Legal Service Institute. They voted to eliminate all three clauses questioned by our consumer and trade union friends. Time, perhaps aided by litigation, will work out all of these differences.

CONCLUSION

Prepaid plans are here to stay. There will be some disappointments and disillusionments along the way. However, they still represent one of the most important solutions to the problem of getting better legal service to the many Americans who are served poorly or

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of regulation is explicitly assumed by the federal agency, the state analog is preempted and to no effect.

Clause (6) raises precisely the same problem, since ERISA requires grievance systems which meet certain criteria.

Clause (7) falls in a different category, raising two fresh questions. First is the question of the authority to require filings and second is the question of the types of information required. Dealing with the second question first, I think the kinds of information requested must bear some relevance to issues concerning the ethical conduct of attorneys. Copies of basic plan documents and of attorney contracts would seem reasonable, since the bar has an interest in seeing that the attorneys are not placed in ethically compromising situations. However, subscription or enrollment charges, numbers of clients served or financial results seem questionable. If these kinds of information are to be required, I think each must be separately and carefully justified before being added to the list.

It would be far preferable, with respect to such filing requirements, that the legislatures designate a proper repository for such filings, directed at *plans*. Including these requirements in the CPR raises the same old problem: how the bar can accomplish by indirection what it does not have the authority to do directly.

Letter from Sandy DeMent, Director of National Resource Center for Consumers of Legal Services to Philip J. Murphy (Jan. 5, 1978).

not at all by the present system.[77] Progress may seem slow to enthusiasts who thought this concept would sweep across the country like wildfire. As plans become more common in employee groups where unions have negotiated the plans, there should occur a gradual growth of plans instituted by employers in nonunion shops or work-settings. Private health care plans took almost forty years to develop to their present coverage, and they are far from covering all members of the public even now. Public demand will increase as those who enjoy plan benefits now tell their friends about the usefulness of lawyers and the way to obtain service under prepaid plans. With few exceptions, plans begun in the early 1970's are still surviving and satisfying the members served. Inevitably, those in the middle income ranges will have meaningful access to lawyers and the legal system.

77. *Accord*, Address by President Jimmy Carter, Los Angeles County Bar Association (May 5, 1978):

> You know, and I know, that legal help is often beyond the reach of most of the middle class as well. Here too, I believe the bar has an obligation to accommodate those with modest incomes. Free and open competition is the best way to bring legal services within the reach of average citizens. Another solution, which my Administration supports, is the expansion of prepaid legal plans, legal clinics, and other low cost alternatives, such as those pioneered by the United Auto Workers.