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Prepaid Legal Services Have Arrived

John R. Dunne

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**PREPAID LEGAL SERVICES HAVE ARRIVED***

by John R. Dunne**

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INTRODUCTION

"The first drafts of the winds of change," gauged in early 1974 as only "whispering through the house of the law," have accelerated to the point where lawyers are now on notice that they must materially change some of their most basic policies and attitudes toward their profession if they intend to meet the demand for legal services which a larger segment of the public can afford. The legal profession has failed to serve the middle-income families who comprise the bulk of our population. Most individuals of moderate means simply cannot afford to hire a lawyer at today's prices. Although legal services for the poor have been expanded in recent years, sufficient attention has not been devoted to the problems of citizens of average means—wage earners, small businessmen, civil servants, teachers, and some professionals.

Prepaid legal services can, if the organized bar will allow it, become an instrument for harnessing those winds of change so that the twin objectives of the profession—to secure the full realization of citizens' rights and to provide its members with the means to earn a livelihood—can be achieved. By establishing a mechanism which embodies the insurance concept of spreading the risk among many, legal services can become accessible at a price which the vast majority of the American public is able to afford.

Reforms can spring from within the profession or they can be forced from without. Regardless of their source, one thing is certain, they are coming soon. The current debate over whether and how prepaid legal services plans shall be implemented in New York may well determine whether the bar will meet its professional responsibility to the public or be a mere spectator as outside forces move in and preempt its traditional prerogatives.

In mid-1975, the United States Supreme Court announced to the legal profession in clear and convincing terms that it must reappraise many of its long-standing conceptions of its professional responsibilities. While the Court recognized in Goldfarb v. Virginia State Bar that lawyers are, indeed, a "learned profes-

2. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2 (1975).
sion,” it declared that their traditional status does not exempt them from the terms of the Sherman Antitrust Act and, therefore, mandatory minimum fee schedules are a proper subject of federal regulation if they affect interstate commerce. When coupled with other federal legislative and regulatory initiatives aimed directly at the legal profession, this most recent warning should arouse the organized bar to affirmative action lest default give life to the “rumors of a ‘federal takeover’ of the legal profession.”

Prepaid legal services, while only one of a host of proposals designed to fundamentally alter the system of delivering legal services, cannot be dismissed as just a half-hearted attempt at legal reform. Recent federal legislation, reinforced by federal court decisions protecting the right of citizens to act jointly to achieve their rights of legal representation, will encourage labor unions and consumer groups to establish legal services programs. The laws and lawyers of this country must be prepared to accommodate this development.

II. THE EVOLUTION OF PREPAID LEGAL SERVICES

The concept of prepaid legal services is not a recent idea.
Interestingly, "legal expense insurance has been practiced successfully in Europe for more than 50 years and in some countries it has become one of the major lines of [insurance] business."13 Articles in this country extolling the benefits of legal insurance date back to the early 1950's. A 1952 article by a Los Angeles attorney, Louis M. Brown, states: "If insurance to cover doctors' fees and hospital bills is a good idea, insurance for attorneys' fees ought to be just as good—good for insurance companies, good for the insured and good for the legal profession."14

It was not until recently, however, that surveys and discussions concerning the need for legal services have brought this concept into public focus. Sparked by the Supreme Court and federal legislative action, some bar associations, labor unions, and consumer groups have been actively involved in establishing programs designed to benefit the middle-class American.15 However, there has been a general reluctance by regulatory agencies and professional organizations to encourage or even allow prepaid legal services programs to develop.

A. What are Prepaid Legal Services?

There are many ways to define prepaid legal services. "Prepaid legal services are plans whereby a group arranges to pay for legal services performed in [sic] behalf of its members."16 They provide "a method of assisting people to obtain the funds necessary to secure legal services,"17 and are "plan[s] . . . in which the individual client pays in advance for legal services which he may need or use in the future."18

Essentially, prepaid legal services are a financing mecha-

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13. W. PFENNIGSTORF, LEGAL EXPENSE INSURANCE: THE EUROPEAN EXPERIENCE IN FINANCING LEGAL SERVICES 8 (1975). Great Britain until very recently was one of the few European countries without any legal expense insurance. "However, in January of 1974, Lloyd's of London introduced its legal costs and expense insurance, thus bringing Great Britain in line with the rest of Europe." Id. at 27.
15. See text accompanying notes 58-95 infra.
17. Sokoloff, Prepaid Legal Services—Read It—You'll Like It, Special Issue: Prepaid Legal Services, Jan., 1973, at 28 (ABA publication).
18. ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, A PRIMER OF PREPAID LEGAL SERVICES 3 (P. Murphy ed. 1974).
nism. Payments to legal services funds "may be made on behalf of the individual by a payroll deduction on his wages, by an authorization to deduct the money from his credit union account, or directly by the individual himself." Generally, the individual involved is a member of a group such as a credit union, a trade union, or employees' association, though he might also be the employee of a business corporation, a college student, or faculty member, farm bureau member or a government worker. In return for the individual's contribution to the plan, he is entitled to a predetermined schedule of benefits described in terms of dollar allowances for specific legal tasks.

Most of the earlier plans—dating back to the early 1900's—"were ones in which the legal service[s] to be derived from membership in the group were related to the employment of the individual," so that a teacher, dock worker, or policeman, among others, could be helped if he were dismissed or suspended, or given legal help if he were injured on the job. Recently, however, systematized plans ancillary or unrelated to employment but covering a broad range of possible legal needs have been created.

In discussions of the structure of legal services plans, the terms "prepaid" and "group" are often used interchangeably. Presently, "all prepaid plans in operation are, in fact, group

19. Id.
20. For a more comprehensive discussion of the nature of these plans, see text accompanying notes 58-95 infra.
21. Legal expense insurance was written as early as 1899 by the Physicians' Defense Co. of Fort Wayne, Indiana. The problems it created for regulatory agencies were not entirely different from those now presented by prepaid legal service plans. See Physicians' Defense Co. v. Cooper, 139 F. 576 (9th Cir. 1912); Uredenburgh v. Physicians' Defense Co., 136 Ill. App. 509 (1906); Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N.W. 396 (1907); Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N.E. 567 (1905). Later, insurance-type coverage of legal expenses was offered by automobile clubs as a part of their membership services. See Arkansas Motor Club v. Arkansas Employment Security Div., 237 Ark. 419, 373 S.W.2d 404 (1963); Allin v. Motorists' Alliance of Am. 234 Ky. 714, 29 S.W.2d 19 (1930); Continental Auto Club v. Navarre, 337 Mich. 434, 60 N.W.2d 180 (1953); Texas Ass'n of Qualified Drivers v. State, 361 S.W.2d 580 (Tex. Civ. App. 1962); National Auto Serv. Corp. v. State, 55 S.W.2d 209 (Tex. Civ. App. 1932).
22. ABA PRIMER, supra note 18, at 4.
23. Of course, employers are able to offer prepaid legal services as an "employee benefit plan," see note 180 infra. Such plans are now subject to the comprehensive requirements of the Employees Retirement Income Security Act of 1974 (ERISA), commonly called the Pension Reform Act. Under ERISA, the defined term "employee benefit plan" would include those set up by, inter alia, "labor union[s] or any . . . group . . . which exists for the purpose . . . of dealing with employers concerning . . . matters incidental to employment relationships." 29 U.S.C.A. § 1002(4) (1974).
The advantages of structuring these plans as group offerings are several: (1) for those who are members of unions or employee associations, the cost may eventually be included as part of the fringe benefits associated with the job; (2) if 100 percent of the group is covered, those who do not use the services help to pay for those who do, so that the "risk of use" is spread among the whole group and the individual cost is kept low; (3) usually there is an easy collection mechanism, like a payroll deduction, to collect the normally small monthly prepayments. It must be remembered in this regard, that there are no conceptual problems with, or differences among, prepaid plans which could be offered to individuals who have no group affiliation. The device most likely to be utilized to provide such coverage would be an individual insurance policy, marketed by an insurance company and offering a specific schedule of legal services indemnification for a stated premium. Legal insurance then, may be employed as a term of art. Rather than being a device for pooling the risks of heavy losses, legal insurance represents an effort to prepay or budget for the expense of legal services.

B. The Need for Legal Services

In response to what has been sensed in recent years as the unfilled need for legal services, studies have been conducted by bar associations and consumer and labor groups in an attempt to discover the extent to which the general public is under-represented, and to explore methods of alleviating the problem. One such study, conducted in California by Jerome E. Carlin and Jan Howard in 1965, concluded that the use of lawyers is positively correlated with income, social status, and occupation. The Carlin-Howard poll went on to point out that as income rises, so does involvement in social interactions traditionally thought of as legal in nature, e.g., estate management needs, contracting, property acquisition, and litigation.

Numerous other surveys and articles have been prepared by the legal community on this subject, many of which have found

24. ABA Primer, supra note 18, at 4.
25. Id. at 3.
27. See ABA Special Committee on Prepaid Legal Services, Compilation of Reference Materials on Prepaid Legal Services (1973) (Surveys Section) at 1-28 [hereinafter referred to as ABA Compilation]; ABA Special Committee to Survey Legal Needs, The
that only a relatively small percentage of individuals regularly see
an attorney, and that this number usually increases with income,
social status, and education.\footnote{28}

Recognizing the failure of the legal profession to adequately
represent many Americans, the House of Delegates of the Ameri-
can Bar Association in 1971 authorized the appointment of a
Special Committee to Survey Legal Needs,\footnote{29}

[t]o explore the extent to which adult Americans have experi-
enced various legal problems of a personal . . . nature;
[t]o determine how these problems were dealt with and the
extent to which lawyers' services were relied upon in resolving
them; [and] [t]o learn as much as possible about the factors
that influence decisions to use or not use lawyers' services.

The Committee's results confirmed the necessity of increas-
ing the extent to which Americans consult lawyers and also indi-
cated the attitude those responding to the survey had toward
attorneys. The Committee concluded that "although the experi-
ence of consulting a lawyer is widely shared . . . this experience
is generally rather thin."\footnote{30} For example, while 67 percent of those
interviewed "reported having consulted a lawyer at least once in
their lifetimes," 43 percent of this group had their "experience
limited to taking a single problem to a single lawyer."\footnote{31}

The failure of many people to consult more frequently with
attorneys may well be understood by analyzing the attitudes
those responding had toward lawyers. Fifty-seven percent felt
that "the legal system favors the rich and powerful over everyone
else"; 62 percent expressed the belief that "most lawyers charge
more for their services than they are worth"; 56 percent felt law-
yers do not "work as hard for poor clients as for . . . rich and
important [ones]"; 57 percent disagreed that "lawyers are
prompt about getting things
done."\footnote{32} Other reasons given for the
general public's infrequent use of legal services include the cost

\footnote{28. See generally Brickman, Legal Delivery Systems—A Bibliography, 4 U. Tol. L. Rev. 468 (1973); and articles listed at
note 12 supra.}
\footnote{29. ABA Special Committee to Survey Legal Needs, The Legal Needs of the Public 1 (Curran & Spalding ed. 1974).}
\footnote{30. Id. at 81.}
\footnote{31. Id. at 79.}
\footnote{32. Id. at 94-96.}
of employing an attorney in relation to the ability to pay, the
inaccessibility of lawyers, the lack of perception that a lawyer’s
services are needed, and the absence of well-defined means of
selecting a lawyer.  

The problem of obtaining necessary legal services is most
crucial for middle-class individuals. James Fellers, the former
President of the American Bar Association, “estimates that per-
haps two-thirds of the 140 million middle-income Americans ‘just
are not receiving legal services today.’” 34 “A regular civil trial
today, with or without a jury,” observed United States Circuit
Court Judge Shirley M. Hufstedler, “‘is beyond the economic
reach of all except the rich, the nearly rich or the person seriously
injured by a well-insured defendant.’” 35 This point was empha-
sized by New York State Attorney General Louis Lefkowitz, who
stated: 36

While the affluent in our society have little difficulty in meeting
legal expenses and the indigent are now able through efforts of
legal aid and publicly funded legal service programs to obtain
free legal representation, the average moderate wage earner too
often finds himself in a position where his income exceeds maxi-
mum levels which would entitle him to free legal aid but is
insufficient for him to retain private counsel.

According to one estimate, 40 million citizens at the poverty
level receive free legal services, while 140 million citizens with
moderate incomes receive gravely inadequate legal representa-
tion or none at all. 37 What must be accepted is the concept of
“access to the law for all,” i.e., “every individual has a right to
legal services as an inherent ingredient of his legal rights and an
inherent part of the process which determines his correlative legal
duties.” 38

As Barlow Christensen pointed out in his treatise on this
subject: 39

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34. Green, The High Cost of Lawyers, N.Y. Times, Aug. 10, 1975, § 6 (Magazine), at
9.
35. Id.
36. Lefkowitz, The Non-Availability of Legal Services to Persons of Moderate
37. ABA Primer, supra note 18, at 3, 7.
38. Remarks of John L. Ryan to the National Conference on Prepaid Legal Services,
April 27-29, 1972.
There is no reason to suppose that the potential demand for lawyers' services among people of moderate means is significantly smaller than it is among the other segments of society. Indeed, there is every reason to believe that it is relatively as great. While people of moderate means may not have the same problems as the affluent with respect to the preservation of wealth and property, they probably have more problems than the wealthy in such fields as consumer credit and landlord-tenant. At the same time, their lack of resources probably forecloses them from some of the alternative solutions available to the wealthy, so that if they get satisfactory solutions to their problems at all they must do so through the law and lawyers' services.

C. Supreme Court Cases

Beginning in the 1960's, in a series of cases involving group legal services programs, the United States Supreme Court repeatedly held that the freedoms of expression, assembly, and petition guaranteed by the first and fourteenth amendments assure all citizens of the right "to act collectively to secure . . . lawyers to assert their claims . . ."40

In the first of these cases, NAACP v. Button,41 the Court ruled that the organized bar could not prevent a private association from using litigation as a "constitutionally privileged means of expression to secure [the] constitutionally guaranteed civil rights."42 of its members. The Virginia State Conference of NAACP Branches had developed an extensive program of assisting litigation which would serve to secure the elimination of racial segregation in the public schools of Virginia. In order to stay within the designated aims of the organization, each of the attorneys engaged in the program agreed to abide by the Association's policy of limiting the types of litigation it would assist.43

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42. Id. at 442.
43. The NAACP would not: underwrite ordinary damage actions, criminal actions in which the defendant raises no question of possible racial discrimination, or suits in which the plaintiff seeks separate but equal, rather than fully desegregated public school facilities. Id. at 420. The Virginia Supreme Court of Appeals had held that such restrictions imposed on lawyers working for the NAACP violated, inter alia, Canons 35 and 47 of the old ABA CANONS OF PROFESSIONAL ETHICS, which prohibited any lay interference with the attorney-client relationship. NAACP v. Harrison, 202 Va. 142, 155, 116 S.E.2d 55, 66 (1960). For the present version of this restriction see ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D), and for a discussion of its implications see text accompanying note 140 infra.
The attorney received no compensation from the assisted litigant and no salary or retainer from the NAACP; rather, he was paid on a per-diem basis by the Conference for his services in the particular case at a rate lower than what would normally be charged for equivalent private professional work. The attorneys spoke to parents and children at local NAACP meetings and encouraged them to bring lawsuits to achieve desegregation; however, plaintiffs in particular actions made their own decisions to sue. The litigant might or might not be a member of the NAACP, and could withdraw from the case at any time. He retained “not so much a particular attorney as the ‘firm’ of NAACP and Defense Fund lawyers [expert in] arguing the difficult questions of law that frequently arise in civil rights litigation.”

This legal assistance plan involved no monetary stakes. Civil rights suits are not particularly remunerative and such litigation is admittedly not the object of general competition among Virginia lawyers. Since litigants and attorneys had the same or similar interests at heart, there was no danger of “professionally reprehensible conflicts of interest . . . .” Thus, the Supreme Court concluded that the NAACP plan amounted to “advocating lawful means of vindicating legal rights.” As such, it was protected by the first and fourteenth amendment guarantees of freedom of speech, assembly, and petition. Furthermore, the Court held the Virginia statute banning improper solicitation of legal business unconstitutional. Justice White, upholding the right of the NAACP to fight segregation by litigating important cases stated: “[I]t is beyond the power of any State to prevent the exercise of constitutional rights in the name of preventing a lay entity from controlling litigation.”

The next relevant Supreme Court decision was Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, which focused on a program wherein specific lawyers were recommended by the union to represent members in railroad personal injury litigation. In 1883 the Trainmen had joined together to provide financial assistance to injured members and to seek safer
working conditions. The Federal Employer's Liability Act (FELA)\(^5\) did not adequately assure workers that they would receive the compensatory damages Congress intended for them to receive. Thus, the Brotherhood set up a Department of Legal Counsel to keep incompetent, profiteering claim adjusters from taking advantage of its members.

On the advice of local lawyers and federal and state judges, the Brotherhood selected a regional lawyer or firm with a reputation for honesty and expertise in the field. When a worker was injured or killed, the local lodge would recommend that he or his widow not settle the claim without seeing a lawyer and, in many cases, suggested the lawyer whom the Brotherhood had chosen for the area.

In protecting this group from challenges by the organized bar, the Supreme Court declared:\(^{51}\)

\textit{Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counselled adversaries . . . and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped (citation and footnote omitted).

In \textit{United Mine Workers v. Illinois State Bar},\(^2\) the Supreme Court extended further constitutional protection to group legal plans by supporting even the outright hiring of staff attorneys by the union to represent its members. Under its program, the United Mine Workers hired one attorney on a salaried basis to represent members and their dependents having personal injury and death claims under the Illinois Workmen's Compensation Act. Injured members were provided with forms to be filled out and sent to the union's "legal department." If such an application form were received from a member, it was considered to be a request for the union attorney to seek adjustment of the claim on the member's behalf. Members could employ other counsel if they so desired, and frequently the union attorney—obligated

\begin{footnotes}
\item 51. 377 U.S. 1, 7 (1964).
\item 52. 389 U.S. 217 (1967).
\end{footnotes}
solely to the member—suggested that they seek outside help.

The union attorney would attempt to settle the claim. If such efforts failed because the member refused to accept the settlement offer of the employer, the claim would proceed to a hearing before the Industrial Commission. The final award was made directly to the injured member; no part of it benefited the attorney, who was entirely compensated by his annual salary from the union.

In upholding this scheme, the Supreme Court pointed out:53

In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members.

The Court's decision in United Transportation Union v. Michigan54 represents the culmination of these Supreme Court cases:55

The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers 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.

In the United Transportation Union case, the union sought to protect its members against the same abuses of excessive fees and incompetence dealt with in the United Mine Workers case.56 But here the Court specifically announced that the constitutional principles enunciated in its decisions could not be limited to the facts of each particular case. Rather, the Court said, these principles apply to all situations wherein groups seek to provide legal

53. Id. at 225.
55. Id. at 585-86.
56. In the United Transportation Union case, however, the Union recommended attorneys to its members from whom an agreement had been previously secured that legal fees would not exceed 25 percent of the recovery. On the other hand, in the United Mine Workers case, the attorney was a salaried employee of the union.
services for themselves by recommending or even hiring staff attorneys.\textsuperscript{57}

D. Existing Plans

In 1967, the American Bar Association appointed the Special Committee on Availability of Legal Services to determine whether a program could be developed to deliver legal services to the middle class.\textsuperscript{58} After studying the relationship between legal services and the middle class, the Committee concluded that: (1) the middle class was not utilizing the services of lawyers when such services would have been appropriate; (2) no statistical data existed that measured the use of lawyers by the average American; and (3) no systems of delivery of legal services existed that involved the participation of a substantial majority of the bar and allowed for a free choice of lawyer by the prospective client.\textsuperscript{59}

By 1968 the ABA had seriously begun to explore legal services programs. In that year, the Board of Governors appointed a subcommittee to launch experimental pilot programs which would allow the prospective client the freedom to choose any lawyer in the community.\textsuperscript{60} Upon the recommendation of the subcommittee, the American Bar Association and the American Bar Endowment made grants to two prepaid programs—one in Los Angeles, California and the other in Shreveport, Louisiana. These grants were then followed by grants from the Ford Foundation.\textsuperscript{61} The Los Angeles program would have provided certain legal services for the members of the Southern Chapter of the California Teachers Association (CTA) and was scheduled to commence operations in the fall of 1973.\textsuperscript{62} The program never came to fruition, however, partly because of a breakdown in negotiations caused by leadership differences within the CTA, and a lack of

\textsuperscript{58} See Prepaid Legal Services, 19 St. Louis B.J. 17, 18 (1973).
\textsuperscript{60} Id. In 1970 the ABA authorized the formation of the Special Committee on Prepaid Legal Cost Insurance. The name of this committee was later changed to the Special Committee on Prepaid Legal Services. In August of 1972 this committee recommended that all state and local bar associations offer prepaid legal service plans. ABA Special Committee on Prepaid Legal Cost Insurance, Report No. 33 to ABA House of Delegates (July 1971), reprinted in ABA Revised Handbook on Prepaid Legal Services 43, 47-48 (1972).
\textsuperscript{61} Meserve, supra note 59, at 1093.
\textsuperscript{62} Id.
sustained interest on the part of the Los Angeles Bar Association.\textsuperscript{63}

Unlike Los Angeles, the Shreveport program began operation in January of 1971. Sponsored by the Shreveport Bar Association, the program provides legal services to the 600 members of a local of the Laborers' International Union. Since family dependents are included in the program, the total number of covered persons is about 1400.\textsuperscript{64} Each member of the union contributes two cents of his hourly wage to the Shreveport Legal Services Corporation, a not-for-profit corporation which is controlled by trustees appointed by the union and the bar association. In return the member is entitled to the following legal services:\textsuperscript{65}

1. $100 worth of consultative services per year on any one subject, not to exceed $25.00 per visit;
2. $250 for office work, such as investigation, research, negotiation, or drafting of documents (a prepayment of $10.00 by the client is required);
3. representation in judicial or administrative proceedings—$325 for preparation and filing of pleadings; $40.00 for court costs; $150 for out-of-pocket expenses; and
4. if the member is a defendant or respondent, the benefits under (3) plus reimbursement of 80 percent of the next $1,000 in litigation expenses incurred.

Clients covered by the program are entitled to use the services of any attorney licensed in Louisiana or elsewhere in the United States. Because plan members are permitted to employ the attorney of their choice, this plan encompasses the essential aspects of the "open panel" prototype.\textsuperscript{66}

The utilization rate of the Shreveport program was slow at first. Some attributed this to the particular characteristics of the group. The membership was, and still is, predominately black and the median annual family income was only about $5,000 at the time the program became operational.\textsuperscript{67} Whether these char-

\textsuperscript{63} Conversation with Philip Murphy, Staff Director, ABA Special Committee on Prepaid Legal Services, Aug. 19, 1975.
\textsuperscript{65} ABA Compilation, \textit{supra} note 27, (Plans Section), at 1-2.
\textsuperscript{66} For a discussion of open panel plans see text accompanying notes 119-122 \textit{infra}.
\textsuperscript{67} Meserve, \textit{supra} note 60, at 1094.
acteristics actually played a role in the low initial utilization is uncertain since inhibitions about seeking legal services are the result of complex factors.68 Despite early difficulties in attracting members to use the services, however, the Shreveport program has gradually gained in popularity, so that now 20 percent of the eligible members use the services annually.69 It is safe to categorize the Shreveport plan as a landmark in prepaid legal services, since it was the first plan to be sponsored by a bar association and also the first prepaid program to allow the beneficiaries the freedom to choose their own attorney.

Another prepaid legal services program established by an affiliate of the Laborers' International Union is the Local 423 Legal Services Plan in Columbus, Ohio.70 The plan, in operation since 1972, covers both the active members and retired members of the local along with their dependents, totalling approximately 2,600 individuals.71 The funds for the plan come out of union dues: seven cents of each member's hourly wage is set aside for the legal service fund which is controlled by the union.72 The fund employs a staff of four, full-time, salaried attorneys who provide the following services without any fee or charge to the member:73

1. Legal advice and consultation;
2. Representation in workmen's compensation and unemployment compensation proceedings arising within the geographical jurisdiction of Local 423;
3. In all other matters arising within the geographical jurisdiction of Local 423 . . . each covered family [is] entitled to eighty hours of legal services [unless a case is pending] during each calendar year in connection with up to five matters or proceedings per calendar year . . . .

68. Id. Meserve notes that research done by the American Bar Foundation indicates that, "[h]abit patterns, life style, ability to find and use resources—all of these can cause the phenomenon of not seeking out a lawyer." Id.
70. See Prepaid Legal Services, 43 U.S.L.W. 2485, 2486 (Gen. May 27, 1975) [hereinafter referred to as Prepaid Legal Services].
71. Conversation with Sandra DeMent, Executive Director, National Consumer Center for Legal Services, Aug. 20, 1975.
72. Id.
73. ABA Compilation, supra note 27, (Plans Section), at 92. Certain services are specifically excluded, for example, business matters in which the legal costs would constitute a business expense for federal income tax purposes; a judicial or administrative proceeding in which the adverse party is a participating member or an employer party to a collective bargaining agreement with Local 423; or a proceeding in which legal services are available through representation on a contingent fee basis or insurance. Id. at 92-93.
Another prepaid legal services plan, operated by an affiliate of the Laborers' International Union, the Washington District Laborers' Council, involves approximately 10,000 families. Similar to both the Shreveport and Columbus programs, the plan is funded from union dues at the rate of three cents per hour, and the coverage is very similar to that of the Columbus plan. A staff of seven attorneys handles 80 percent of the claims, and the remaining 20 percent are handled by outside attorneys selected by the client.

The Consumers' Co-op of Berkeley, California is a cooperative of 80,000 families which owns and manages 12 grocery stores. In 1969 several Co-op members organized the Consumers' Group Legal Services (CGLS) to provide competent legal counsel at reasonable prices to Co-op members. Today, CGLS has a staff that includes a full-time staff attorney along with 55 “panel” attorneys who have signed contracts to render services according to its fee schedule. For an annual fee of $30.00, each member of CGLS is entitled to two consultations per year with the staff attorney or one of the plan attorneys. Services beyond the original consultation are billed to the client at specified rates.

The Michigan Education Legal Services Corporation (MEALS) was begun on November 15, 1974. The plan, which is funded by grants from the Michigan State Bar Association and the National Education Association, involves 400 teacher members and their families. The day-to-day operation of the plan is controlled by an independent administrator who is directed by a board consisting of three MEALS members and two bar members. During its first six months of operation, approximately 15 percent of the members used the services of the plan. Fifty percent of this utilization involved the drafting of wills, 10 percent involved administrative and judicial proceedings (primarily domestic relations matters), and 10 percent was in the area of advice and counsel.

In September 1974, District Council 37 (DC 37), a New York
Prepaid Legal Services

City local of the American Federation of State, County and Municipal Employees (AFSCME), started a prepaid legal services pilot project which now covers 26,000 of its 125,000 employees. The participants in the project were selected randomly by computer.

One group of 5,000 [was to be] covered for consumer matters, including debt, contracts, credit and the like. A second group of 1,000 . . . [was to be] covered for consumer matters as well as a broader range of civil matters, such as family problems, wills and tenant-landlord disputes. Coverage for both groups include[d] the employee, spouse and dependent children.

The covered employee contributes nothing to the cost of the program. It is funded by a combination of outside grants and contributions from the Union trust funds established with employers' contributions. Services are rendered to both groups by a full-time staff of attorneys, para-professionals, and social workers. This arrangement is used because the objective of the program is to develop a highly efficient and effective system of delivering legal services at a reasonable cost. By utilizing a staff of full-time specialists along with computers, manuals, forms, and other mechanized services, it is anticipated that this objective will be achieved.

Two prepaid legal services plans—one sponsored by the New York County Lawyers and the other by Local 237 of the International Brotherhood of Teamsters—were recently approved by the Appellate Division of the New York State Supreme Court after the New York State Court of Appeals reversed a previous denial of approval. Although neither of these plans is presently operating, both are expected to begin shortly.

The New York County Lawyers' plan is restrictive in that its availability is limited to persons who possess a net worth no greater than $25,000 and who receive an annual income of between $6,000 and $15,000 per year. This restriction is imposed.

83. Conversation with Julius Topol, Executive Director of the Municipal Employees Legal Services Fund, Apr., 1974.
84. Legal Service Program in Fast Start at DC 37, Public Employee Press, Oct. 11, 1974, at 6, a copy of which is on file in the office of the Hofstra Law Review.
85. Conversation with Julius Topol, supra note 83.
86. N.Y.S. Bar Ass'n Special Committee on Availability of Legal Services, Compilation of Materials on Prepaid Legal Services [hereinafter referred to as N.Y.S. Bar Ass'n Compilation], Notice of Submission and Application for Approval of Proposed Prepaid Legal Services Plan of New York County Lawyers Ass'n (July 18, 1973) at 13.
in order to limit the availability of the plan's resources to people of "moderate" means. For an annual "subscription" fee of $100.00 ($25.00 more for a spouse, and $10.00 more for each dependent under 21), every subscriber is eligible for certain specified legal service benefits, provided that the subscriber utilizes the services of an attorney who is a participant in the plan. Any lawyer admitted to practice in the State of New York who has an office in New York City may become a participant by executing and filing with the plan a standardized agreement and paying a registration fee of $25.00 for the plan year.

The prepaid legal services plan established by Teamsters Local 237, composed of New York City employees, is funded entirely by employer contributions to the Teamsters Welfare Fund. The Fund, in turn, advances all sums necessary for the operation and administration of the plan to a law firm designated as the Prepaid Legal Services Section. The plan is presently designed to cover only eligible members of the union and not their spouses. Each of these eligible members is entitled to receive legal services benefits up to $1,000 per year if one of the attorneys employed by the Prepaid Legal Services Section is utilized. The plan covers a wide range of legal services, including such areas as domestic relations, housing and business matters, and tax advice. On the other hand, the plan specifically excludes, inter alia, coverage for proceedings directed against the employer or union, class action suits, slander and libel cases, and the preparation of tax returns.

E. Federal Legislation

1. Taft-Hartley

On August 15, 1973 the President signed into law Public Law 93-95, an amendment to Section 302(c) of the Labor Management
Relations Act of 1947 (the Taft-Hartley Act) which permits employers to contribute to jointly administered trust funds for the purpose of "defraying the costs of legal services."\(^9\) The new provision specifically provides that none of the contributed funds may be used to sue either an employer (except for workmen's compensation claims) or a union.\(^8\)

The legislation's sponsor, Senator Harrison A. Williams of New Jersey, claimed that the bill was made necessary by\(^9\)

the growing recognition that existing methods of delivery of legal services to middle and working class citizens are inadequate.

The establishment of legal service programs through collective bargaining, in a manner similar to the way health benefit programs have been established, would be an important step toward alleviating this problem.

Because this amendment makes legal services, at the discretion of either party, a mandatory subject of collective bargaining, Williams' assumptions have proven to be correct. At the present time, some 2500 plans are operating across the country as compared to 500 in 1971.\(^9\) Since a large number of these plans have originated through collective bargaining,\(^10\) without the Taft-Hartley amendment many of them would not exist today.

2. **ERISA**

Just one year later, on Labor Day, 1974, the President signed Public Law 93-406, the Employees Retirement Income Security Act of 1974 (ERISA).\(^10\) The Act was created "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries,"\(^10\) by requiring the reporting and disclosure of information about such plans and by establishing standards of conduct and obligations for the plan's fiduciaries. Excluded from the Act are, *inter alia*, plans established or maintained by federal, state, or municipal governments.\(^10\)

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\(^8\) Id.
\(^10\) Conversation with Lisa Schwartz, supra note 69.
\(^10\) Id.
\(^10\) Id. at § 1001(b).
\(^10\) Id. at § 1003(b). See also National Consumer Center for Legal Services, *The Pension Bill Preempts and Perplexes*, 1 GROUP LEGAL REV., Oct. 1974 at 1.
The Act defines an “employee welfare benefit plan” to mean:

[...] any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits . . . apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions) (emphasis added).

With regard to the regulation of these plans, the Act provides for total preemption of all state laws insofar as they apply to “employee benefit plans.” While states retain authority to regulate the sale of prepaid legal services insurance plans, the content of those plans would not be subject to a state insurance commissioner’s control.

3. **Internal Revenue Code**

Presently, the tax treatment of group legal services plans is uncertain. If there is to be a substantial increase in the number of plans, it will be necessary to amend the Internal Revenue Code so that the participants in legal services plans can receive the same tax treatment as participants in group health and accident plans.

Although the Internal Revenue Service has not ruled on the specific tax aspects of legal services plans, it is generally agreed...
that employer contributions made on behalf of an employee to a

group legal services plan are deductible by the employer as an

"ordinary and necessary expense of the trade or business" under

section 162 of the Internal Revenue Code of 1954. Legislation is

needed, however, to make certain that neither employer contribu-
tions to group legal services plans nor the services themselves are

considered taxable income to the employee.

Section 61(a)(1) of the Code defines gross income to include

"compensation for services, including fees, commissions and

similar items." Treasury Regulation Section 1.61-1(a) states that:

Gross income means all income from whatever source derived,

unless excluded by law. Gross income includes income realized

in any form, whether in money, property or services. Income

may be realized, therefore, in the form of services, meals, ac-

commodations, stock or other property, as well as in cash . . . .

(Emphasis added.)

It appears necessary, therefore, to amend Section 106 of the

Code so that employer contributions to prepaid legal services

plans are treated in the same manner as employer contributions

to accident and health plans. Section 106 of the Code currently

states:

Gross income does not include contributions by the employer to

accident or health plans for compensation (through insurance or

otherwise) to his employees for personal injuries or sickness.

Thus, an employer can now contribute to accident and

health plans and his contribution would not be considered as part

of the employee's gross income. Section 106 should, therefore, be

expanded to read:

legal services plan will be a tax exempt entity under § 501(c) of the Internal Revenue Code
has not been squarely answered. The Shreveport Plan, see text accompanying notes 64-
69 supra, has been granted tax exempt status under § 501(c)(3), but on very narrow
grounds. The applicability of § 501(c)(4) and § 501(c)(9) is still unclear. See Prepaid Legal
Services, supra note 70, at 2488.


110. See Hendricks, note 107 supra.

111. INT. REV. CODE OF 1954, § 61(a)(1).


113. See N.Y.S. BAR ASS'N COMPILATION, supra note 86, Proposed Legislation with

Respect to Prepaid/Group Legal Services Plans (Feb. 14, 1973) at 4. This report was

prepared by James W. Lamberton and Nathan Ritzer, both of New York City, and was

approved by the Committee on January 26, 1973.

114. INT. REV. CODE OF 1954, § 106.

115. Hendricks, supra note 107, at 14.
Gross income does not include contributions by the employer to accident, health or legal services plans for compensation (through insurance or otherwise) to his employees for personal injuries, sickness or legal needs.

Similarly, it is apparent that unless specifically excluded, benefits in the form of the services or reimbursements received under legal services plans could be treated as income. Accordingly, Section 105 of the Code which already excludes medical payments and services from gross income, should be amended to specify similar exclusions for legal service benefits. 116

The foregoing amendments are contained in legislation pending before both houses of the Congress. 117 Until their passage, potential but reluctant participants in prepaid legal services plans will have yet another excuse for not participating in such plans.

III. ISSUES AND CONTROVERSIES SURROUNDING PREPAID LEGAL SERVICES

A. Open Versus Closed Panel Plans

The most controversial, and probably least productive discussion on prepaid legal services programs has centered around the form these plans are to take. Essentially the plans fall into two basic prototypes—the "open" and the "closed" panel plans.

Open panel plans, in theory, permit a member or subscriber to be reimbursed for the legal fees of any lawyer he chooses. Under the closed panel arrangement, members must consult lawyers who have previously been selected by those who set up the plan, such as the employer, union, or plan director. Some closed panel plans presently contain a provision guaranteeing group members the right, when specific conflicts arise, to obtain other counsel of their choice. 118 Such modifications of the two basic approaches have been described as open-closed or closed-open, indicating the confusion as well as the variety of options available in this new area. Regardless of the advantages and disadvantages of each

116. Id. at 4, 14.
117. H.R. 3023, 94th Cong., 1st Sess. (1975); S. 2051, 94th Cong., 1st Sess. (1975). These amendments were introduced by Representative Joseph Karth (Democrat Minn.) and Senator Henry Jackson (Democrat Wash.) respectively.
118. The Code of Professional Responsibility contains such an "opt-out" provision, see ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(4)(e) (1975). See also note 149 infra.
type or form, in order to make legal services truly available to a large number of people, all types of prepaid legal services plans must be encouraged to develop.

1. Benefits of the Open Panel

Generally speaking, bar associations have endorsed the open panel plan. Many lawyers believe that open panel arrangements would attract more clients, while closed panel plans would siphon off clients from their regular practice. This, it is claimed, would prove especially true in small, one-industry towns where a single law firm may control most of the area's legal business under a closed panel plan. The bar has traditionally favored the open panel on the grounds that the independently selected attorney is in a better position to serve his client with a higher degree of loyalty, skill, and zeal.

The proponents of open panel plans feel that the mutual confidence and respect, so necessary in an attorney-client relationship, is best preserved by the open panel forum. Without interference by a third party, the client is more likely to have confidence in the lawyer of his choice; and, on the other hand, the lawyer is able to maintain his own independence. In closed panel plans, it is argued, the employer may exercise some control over the attorney, thus creating lay interference between lawyer and client in violation of the profession's Code of Professional Responsibility.

The possibility of such interference is not merely a concern of the organized bar. Under Section 90 of the Judiciary Law, the appellate division in New York State is responsible for maintenance of the professional standards of the bar for the benefit of the public:

Where there is involved the interposition of an organization or corporation in the rendering of legal services, the Appellate Division must assure that the link of professional responsibility

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120. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-107(b) (Feb. 1975). This disciplinary rule prohibits a lawyer from permitting a non-lawyer employer to direct or regulate his professional judgment. See note 146 infra dealing with EC 2-33 which specifically cautions attorneys participating in legal services plans to avoid lay interference with the performance of their professional responsibilities.

121. N.Y. JUDICIARY LAW, § 90(2) (McKinney 1968).

between lawyers and the clients they serve is not diluted, dissolved, or immunized from judicial oversite (citation omitted).

Furthermore, proponents of the open panel endorse this form because members who feel they are being denied some rights as members of the sponsoring group could seek advice from an independent lawyer. This is not likely to be the case under a closed panel, it is argued, because members would be inhibited from seeking such advice from an attorney hired by the group.

2. Benefits of the Closed Panel

Advocates of the closed panel point out that many of the people covered by prepaid legal plans have not had extensive contact with attorneys in the past and are not likely to be able to make a sensible choice of an attorney.¹²³ Under the open panel, it is claimed, individuals run the risk of selecting a poor attorney, while the screening process employed under a closed panel insures an informed and rational choice by the group. In addition, its advocates claim that closed panel plans generate an increased and predictable flow of legal work to the participating attorneys, thereby making possible a more efficient system of production and delivery of legal services—an efficiency which improves the quality and accessibility of those legal services.¹²⁴ They further contend that attorneys serving on closed panels have an incentive to practice preventive law because the full burden of any failure to head off such problems eventually falls on their shoulders.

By reason of the predictability of the types of services which will be required, the closed panel attorney is in a better position to utilize para-professionals, automation, mechanization, and specialists, thus producing greater efficiency, reduced costs, and increased quality of services. Closed panels, it is argued, will familiarize the client both with specific lawyers and with the legal services that are available. Further, the fear and mistrust of lawyers that have been a major impediment to the regular use of legal services by the middle class may be dispelled by this increased familiarity.¹²⁵

¹²⁵ See Shayne, Prepaid Legal Services, supra note 119, at 2.
3. Effects of Federal Legislation on Open and Closed Panel Plans

(a) Taft-Hartley Amendment

The amendment to Section 302(c) of the Taft-Hartley Act permitting employer contributions to jointly administered prepaid legal services trust funds, was enacted after an intense battle over the open/closed panel issue. Prior to the passage of this legislation, the House of Representatives amended the Senate-passed bill to guarantee to beneficiaries of these trusts, legal services by "the counsel of their choice."

Once the Senate bill and House amendment reached the Conference Committee, the conferees agreed to delete the House amendment since it would have, in effect, precluded closed panel plans. Thus, the final agreed-upon version of the Taft-Hartley amendment entitles those who set up a prepaid legal services plan, i.e. employers and unions, "to the counsel or plan of their choice," thereby guaranteeing the availability of a variety of options.

Reporting back to the Senate after the Conference Committee agreement, Senator Jacob Javits remarked:

I think that our intention should be clear in respect to the legislative history we are making here. Unions and employers will have the same freedom that they now have in setting up medical and hospital plans, to establish closed panel or open panel plans.

(b) ERISA

The history of the Employee Retirement Income Security Act of 1974 (ERISA) in certain respects parallels the evolution of the Taft-Hartley Amendment. Congress had been actively considering pension reform proposals for approximately seven years. By 1974 the Senate and the House had adopted separate bills. The House version provided for extensive federal preemption of state laws governing vesting, portability, reporting, and disclosure. In addition, it "precluded any employee benefit plan . . . from being subject to any state law purporting to regulate.

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127. Id.
129. Address by Robert J. Connerton, supra note 105.
insurance companies, banks, trust companies or investment companies.\textsuperscript{130}

Although the federal preemption provisions greatly exceeded those in the Senate bill, union and consumer groups wanted total federal preemption which the House bill did not contain.\textsuperscript{131} These groups contended that without such preemption, state insurance commissioners and bar associations would work together to prohibit the development of closed panel plans in an attempt to "corner the market for their respective constituencies . . . ."\textsuperscript{132} Union and consumer leaders felt that these constituencies were only interested in establishing open panel plans.

At the Joint Committee on Conference meeting, the conferees responded to the union and consumer demands by preempting all state laws except: (1) those of general criminal application\textsuperscript{133} and (2) state insurance laws which regulated plans established primarily for the purpose of providing death benefits.\textsuperscript{134} In addition, the conferees defined the terms "State law"\textsuperscript{135} and "State"\textsuperscript{136} in order to prevent any professional association such as a bar association from infringing on the form or content of benefit plans.\textsuperscript{137}

Two days after the Conference agreement, Senator Williams reported to the full Senate that:\textsuperscript{138}

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. Consistent with

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 6. \textit{See} Employees Retirement Income Security Act, 29 U.S.C.A. \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Address by Connerton, supra note 105, at 5-6.}
\item \textsuperscript{138} \textit{120 Cong. Rec. 15,742 (daily ed. Aug. 22, 1974).}
\end{itemize}
this principle, State professional associations acting under the
guise of State-enforced professional regulation, should not be
able to prevent unions and employers from maintaining the
types of employee benefit programs which Congress has author-
ized—for example, prepaid legal services programs—whether
closed or open panel—authorized by Public Law 93-95.

Because of this extensive federal preemption, there was some
concern that state bar associations would be prohibited from dis-
ciplining attorneys who participate in employee legal service
plans. In response to this concern, Senator Javits stated: 139

Section 514 of the Act does not preempt State bar associations
from adopting and enforcing ethical rules or guidelines generally
and/or from disciplining its members or acting to discipline
members of the bar, which bar associations often do. . . . But
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.

4. Questions of Attorneys’ Ethics

In obtaining and providing service to clients, a lawyer must
conform with rules of conduct promulgated by the judicial branch
of each state’s government. These rules must, in turn, conform
with rights guaranteed by state and federal constitutions. As
group legal services plans continue to multiply, the number of
previously uncounseled Americans using the services of a lawyer
will also grow substantially. Who will get these new clients will,
to a large degree, depend on the rules of conduct set forth by the
ABA.

There has been much discussion and controversy over the
ABA Code of Professional Responsibility and its relation to pre-
paid legal services programs. Recent amendments have caused
many leaders in the field to question the extent and sincerity of
the bar’s announced commitment to making legal services more
available to the public.

The authority to regulate the professional conduct of lawyers

139. Id. at 15,758. After the passage of ERISA a number of trade unions and con-
sumer groups brought suit against the ABA for violating § 514 (29 U.S.C.A. § 1144 (1974))
through the Code of Professional Responsibility. The ABA responded by eliminating the
unequal treatment of closed panel plans in the Code. See text accompanying note 145
infra. See also note 180 infra for comments of Chief Judge Breitel on the question of federal
preemption and the role of the courts in supervising the professional conduct of attorneys.
derives from the duty of the judicial branch to protect the public from incompetent, dishonest, or disloyal attorneys. The rules contained in the ABA's Code of Professional Responsibility are advisory in nature and are used by states as a model for establishing their own rules to govern attorneys.

In 1964 the American Bar Association began its work of recodifying its ethical rules, then known as the Canons of Ethics. It took five years to produce the Code of Professional Responsibility and to have it adopted by the House of Delegates of the ABA. The Code is divided into two main sections: Ethical Considerations (EC's) and Disciplinary Rules (DR's). Violations of DR's may result in a warning, suspension, or disbarment.

Advertising or solicitation by attorneys is prohibited by the Code in DR's 2-101, and 2-104. Third-party interference with the individual lawyer-client relationship is prohibited in DR 5-107. The key section, however, relating to prepaid legal services is DR 2-103. As originally adopted in 1969, DR 2-103(D) permitted a lawyer to "cooperate in a dignified manner" with the legal service activities of the following, provided there was no interference or control of his independent professional judgment by such organizations: (1) certain legal or public defender offices; (2) military legal assistance offices; (3) a lawyer referral service sponsored by a representative bar association; (4) a representative bar association; and (5) any organization which finances legal services for its members, but only if: (i) it is a non-profit organization, (ii) the furnishing of such legal services is "incidental and reasonably related" to the primary purposes of such organization, but not a primary purpose, and (iii) only to the extent required by "controlling constitutional interpretation at the time."

In response to the overriding need to make legal services more readily available to middle-income persons, the Committee on Professional and Judicial Ethics of the ABA proposed to the House of Delegates in 1974 amendments to the Code which would have permitted lawyers to participate in both closed and open panel plans, sponsored by profit and non-profit organizations, with few restrictive conditions.

At the mid-winter meeting at Houston in February, the Committee encountered strong opposition to its proposals, as a result of which the House of Delegates adopted amended revisions of the Code to be effective March 1, 1974. Under these revisions, a lawyer could be employed or paid by, or cooperate with any of the following offices or organizations, in addition to those previously
permitted under DR 2-103(D): (1) An organization operated, sponsored, or approved by a representative bar association; (2) any organization which finances legal services under a plan (a) administered or funded by an insurance company or “other organization” and (b) with a panel of lawyers numbering the greater of 300 or 20 percent of those licensed in the geographical area.

Clearly, these organizations were all basically variations of the “open panel” since they would offer the clients varying amounts of freedom to choose which attorney they wish to have represent them. In particular, the majority of bar association plans allow the “subscribers” or “clients” to choose any attorney who is a participant of the plan. Even though this partially restricts the choice of the subscriber, there would still be enough attorneys to choose from to make the plan, essentially, an open panel one. The same would be true of a plan with a panel of lawyers numbering the greater of 300 or 20 percent of those licensed in the geographical area.

Organizations financing legal services plans (known as qualified legal assistance organizations) might, under the 1974 amendments, be for-profit or not-for-profit, the only restrictions being: (a) the member or beneficiary is recognized as the client; (b) the organization is in compliance with all governing and applicable laws and legal requirements; and (c) the lawyer shall not have initiated such organization for the purpose of providing financial or other benefits to himself.\textsuperscript{140}

Under the 1974 amendments lawyers could also participate in legal assistance organizations not designated as qualified legal assistance organizations. Aside from meeting the requirements established for qualified legal assistance organizations, however, these “non-qualified” organizations would have to adhere to traditional restrictions, \textit{i.e.}:

(1) “Such organization is not organized for profit and its primary purposes do not include the recommending, furnishing, rendering of or paying for legal services”\textsuperscript{141}

(2) extensive filings of by-laws, agreements, income, benefit schedules, and subscription charges must be submitted;\textsuperscript{142}

\textsuperscript{141} \textit{Id.} at DR 2-103(D)(a)(i).
\textsuperscript{142} \textit{Id.} at DR 2-103(D)(a)(viii).
(3) members of the organizations are free to select counsel of their choice, provided that if such independent selection is made by the client, then the organization shall reimburse the member for the services.143

In addition to these amendments to DR 2-103(D), the ABA House of Delegates adopted a new Ethical Consideration, EC 2-33, which discouraged attorney participation in closed panels. It warned that any attorney "should carefully consider the risks involved" before participating in a closed panel plan.

These amendments to the Code of Professional Responsibility drew immediate criticism from consumer and labor groups; from the Senate Subcommittee on Representation of Citizen Interests, chaired by Senator John Tunney; and from high officials of the Justice Department who said that the disparate treatment of the open and closed panel plans, i.e., favoring open panels by placing more restrictions on closed panels, seemed to pose antitrust and constitutional problems.

Bruce Wilson, Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, stated:

By permitting open panel plans to solicit participation in their plans while prohibiting closed panels from doing likewise, state bar associations could restrict competition between closed panel plans and open panel plans.

... This may create antitrust problems for bar associations which propose to develop open panel plans.

Criticism of the February, 1974 amendments also arose within the organized bar. Few state bar associations adopted the new controversial amendments, and several states drafted alternatives to them. Before the ABA's annual meeting in August, 1974, the ABA Special Committee on Prepaid Legal Services recommended that the amendments originally submitted by the Ethics Committee be adopted in lieu of those adopted in Houston. At that meeting, the House of Delegates voted to create a

143. Id. at DR 2-103(D)(a)(v).
144. Testimony of Bruce Wilson, Deputy Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, before the Subcommittee on Representation of Citizen Interests as quoted in Memorandum from Senator John Tunney to State and Local Bar Associations, Hearings on Recent Developments in Prepaid Legal Services, May 28, 1974, at 2, a copy of which is on file in the office of the Hofstra Law Review. See also Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee, 60 A.B.A.J. 791 (1974).
seven-member ad hoc study group to decide whether the February restrictions on closed panel plans should be continued.

At its mid-winter meeting in February, 1975, the ABA adopted new rules. Acting under the threat of legal attacks on the previously adopted rules, the Association revised those rules so that the right of lawyers to participate in closed panel plans is now the same as the right of lawyers to participate in open panel plans. The action by the unanimous voice vote of the delegates articulated standards for lawyers working in both open and closed panels. Two of these standards are that the lawyer not know of any illegality in the operation of the legal services program, and that the person to whom the services are rendered, rather than the program, must be recognized as the client.\footnote{145. ABA \textsc{Code of Professional Responsibility}, DR 2-103(D)(4)(f) \& (d) (Feb. 1975). Several other standards are set forth as well. Only one, DR 2-103(D)(4)(a), retains any important distinction between open and closed panel plans. It says that if the organization furnishing legal services is profit making by design, a lawyer may only associate with it so long as "legal services are not rendered by lawyers employed, directed, supervised or selected by it." Thus, the Code restricts profit-making plans to the open panel form. See \textsc{Note, Prepaid Legal Services: Ethical Codes and the Snares of Antitrust}, 26 \textsc{Syracuse L. Rev.} 758, 759 (1975).}

In addition, Ethical Consideration EC 2-33 was revised to eliminate the reference to the closed panel plan. Under the new consideration, attorneys are cautioned "to avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members."\footnote{146. ABA \textsc{Code of Professional Responsibility}, EC 2-33 (Feb. 1975). The 1974 version of EC 2-33 took a markedly negative approach to closed panel plans. It stated, \textit{inter alia}, that:

\begin{quote}
There is substantial danger that lawyers rendering services under legal service plans which do not permit the beneficiaries to select their own attorneys . . . will not be able to meet basic standards of independence, integrity and total devotion to the interests of the client.
\end{quote}

Furthermore, the earlier version expresses the fear that,

the group which employs the attorney will \textit{inevitably} have the characteristic of a 'lay-intermediary' because of its control over the attorney inherent in the employment relationship (emphasis added).

Although the fear of outside control still finds expression in the 1975 version, it merely cautions lawyers to take care to avoid such situations.

Another concern expressed in the earlier version, and still present in the most recent, is that economic considerations may take precedence over competency in the closed panel situation, thus potentially depriving a beneficiary of the plan of adequate legal assistance. For a discussion of these considerations see Gilmore, \textit{The Organized Bar and Pre-Paid Legal Services}, 21 \textsc{Wayne L. Rev.} 213, 222-23 (1975). The author contends that both of these problems have been adequately dealt with in other areas of the Code. See DR 6-101, which prohibits a lawyer from handling a legal matter he is not competent to under-
removed the discrimination between open and closed panel plans, they still drew criticism from consumer groups for retaining some previous restrictions.

Many of the consumer representatives felt that the changes allowing "dignified commercial publicity"\textsuperscript{147} did not go far enough inasmuch as they did not lift the prohibition on the advertising and soliciting of prepaid legal services plans.\textsuperscript{148} In addition to this criticism, there was objection to the so-called "opt-out" condition contained in DR 2-103(D)(4)(e). Under this provision of the Code, the beneficiaries or members of closed panel plans are entitled to select counsel from outside the plan, providing they assert a claim that representation by a "panel" attorney would be "unethical, improper or inadequate."\textsuperscript{149} Although not strongly criticized, consumer representatives felt that this requirement could tend to discourage the development of some closed panel plans. Whether it will, remains to be seen.

Despite these objections, ABA Past President James D. Fellers contended that the amendments would further the development of prepaid legal plans. Philip J. Murphy, Staff Director of the ABA Special Committee on Prepaid Legal Services, was not so optimistic, characterizing the changes as "not a green light . . . but it turns off the red light,"\textsuperscript{150} thereby making expansion of prepaid legal services programs possible.

At the April, 1975, meeting of its House of Delegates, the New York State Bar Association adopted the amendments to the Code, so as to include its provisions in the code governing New York State practitioners.

\textsuperscript{147} ABA Code of Professional Responsibility, DR 2-101(b) (1975) permits a lawyer whose legal service is furnished through a qualified legal assistance organization to authorize the organization to "use means of dignified commercial publicity" to describe the nature of the services being offered. Cf. DR 2-101(A) which prohibits a lawyer from using "public communication" including, \textit{inter alia}, television, radio, motion pictures, newspapers, magazines, or books to make "self-laudatory" statements for the purpose of attracting clients.


\textsuperscript{149} When a beneficiary does "opt-out," the plan must provide "appropriate relief" as well as "appropriate procedure for seeking such relief." \textit{See Note, Prepaid Legal Services: Ethical Codes and the Snares of Antitrust}, 26 \textit{Syracuse L. Rev.} 754, 760 (1975).

\textsuperscript{150} \textit{N.Y. Times}, Feb. 25, 1975, at 17, col. 1.
B. Price-Fixing—Antitrust Considerations

Planners of prepaid legal services systems have been presented with yet another problem—the applicability of the antitrust laws. The question presented is whether the federal antitrust laws apply to such plans and thereby restrict the use of certain provisions or methods of paying legal fees thereunder.

The problem arises when a plan promulgates a list of fees to be paid to lawyers for various legal services covered under the plan. These lists are often described as maximum fees to be charged. If only one lawyer or law firm makes an agreement with the group served to use such a schedule, there is no anticompetitive problem. If, however, the fee schedule is to be followed by a substantial number of otherwise independent lawyers who perform services under the plan, such a maximum fee schedule could be said to be influencing the market for legal services and to constitute price-fixing. If the fee schedule is set by an insurance company, by a consumer group, or by any group other than lawyers who provide services for which they receive payment, the use of a maximum fee schedule might not present any problem. The problem, therefore, is restricted to those plans which are controlled by lawyers or the designated representatives of an organized bar association.

Charges of price-fixing by attorneys have also been raised in connection with minimum fee schedules. In October, 1974, the Supreme Court granted certiorari in Goldfarb v. Virginia State Bar,1 to review the question of whether a bar association’s minimum fee schedule constituted a form of illegal price-fixing barred by the Sherman Antitrust Act.2

The issue was raised by Mr. and Mrs. Lewis Goldfarb, who, in the course of purchasing a home in Fairfax County, Virginia, asked 36 different lawyers what it would cost to search the title of the house. Of the 19 attorneys who replied none quoted a fee less than that prescribed in the schedule of minimum charges which the Fairfax County Bar Association had established for various legal services.3 The Virginia State Bar Association, to which all practicing lawyers in the state must belong, required adherence to that schedule, thus making the minimum fee the standard fee. The Virginia Bar had issued two opinions threaten-

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ing disciplinary action against lawyers who charged less than the figures it had recommended for local adoption.154

The State Bar Association claimed that such fixed charges were justified because they prevented fee-cutting by the unscrupulous and thus upheld professional standards.155 The Goldfarb's claimed that the charges eliminated competition among lawyers and constituted an illegal and costly conspiracy.

In June of this year the Supreme Court, in deciding the case, rejected the bar association's claims of immunity and told the world's "second oldest profession" that its status as a "learned profession" did not exempt its involvement in interstate commerce from federal regulation.156 Chief Justice Burger, writing for a unanimous Court, stated that such minimum fee schedules "constitute a classic illustration of price-fixing" and, as such, violate the Sherman Act:157

Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes.

Having affirmatively answered the question of whether the state bar had engaged in price-fixing which affected interstate commerce, the Court turned its attention to whether the anticompetitive practices were exempt from the Sherman Act because they involved a "learned profession." The county bar suggested that Congress, "never intended to include the learned professions within the terms . . . of the Sherman Act . . . ."158 Furthermore, they argued that "competition is inconsistent with the practice of a profession."159 Chief Justice Burger settled the issue by

154. Id. at 2008. This fact is of particular importance in light of the Court's indication that had the fee schedule been merely advisory, it would have presented a "different question." Id. at 2010.
155. Id. at 2008 n.4.
156. Id. at 2012-13.
157. Id. at 2012.
158. Id.
159. Id. at 2013. The issue of whether the practice of a learned profession should be excluded from section 1 of the Sherman Act had previously been left open in United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489 (1950). In that case the members of a Washington real estate board were held to be engaging in a restraint of trade under the Sherman Act when they fixed brokerage commissions. The Court adopted the definition of trade first postulated by Justice Story in The Schooner Nymphs, 18 F. Cas. 506, 607 (No. 10,388) (C.C.D. Me. 1834):

Wherever any occupation, employment, or business is carried on for the purpose
stating:

Whether state regulation [of a learned profession] is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . .

. . . It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect . . . .

C. Insurance Regulation

Another frequently contested issue is whether prepaid legal services constitute "insurance" and thereby become subject to the applicable state statutes regulating the insurance industry. A number of state insurance departments have indicated that they intend to take jurisdiction of prepaid legal plans which, they believe, fall within the applicable definition of insurance. A survey contained in the ABA News last year determined that in 5 states prepaid legal services plans are held to be insurance, in 7 states they are not, and in 23 states a formal opinion on this question has not been issued. Six states reported having some sort

of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.

The court in Real Estate, however, declined to either accept or reject the exemption of "learned professions" from the concept of trade (and consequently from the antitrust laws). See also United States v. National Soc'y of Professional Engs., 389 F. Supp. 1193 (D.D.C. 1974), where the district court refused to apply a "learned profession" exemption to engineers, commenting that:

It would be a dangerous form of elitism, indeed, to dole out exemptions to our antitrust laws merely on the basis of the educational level needed to practice a given profession.

Id. at 1198.

160. Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2013 (1975). It should be noted that the Court did not say that the antitrust laws apply to professions in the same way they apply to businesses. In what must be considered a very significant footnote to the opinion, the Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id. at 2013 n.17.
of insurance department regulation of prepaid legal services plans.  

A more comprehensive survey conducted by a special committee of the National Association of Insurance Commissioners studied the attitudes of state regulators with regard to such plans. Sixty percent of the 35 regulators responding believed that legal services plans were within their jurisdiction. Of the remaining 40 percent, the majority had not been faced with the issue and had not reached any conclusion. Only 2 felt they had no authority to act under existing law.  

In New York State this question has developed into one of the major controversies surrounding prepaid legal services. It is particularly crucial since the New York Insurance Law defines with great specificity exactly what kinds of insurance may be sold in New York, and prepaid legal insurance is not among them.  

The former New York State Superintendent of Insurance, Benjamin Schenck, declared that he was strongly in favor of making prepaid legal services available, but took the position that two proposed pilot programs, one sponsored by the New York County Lawyers Association and the other by Teamsters Local 237, constituted the doing of an insurance business in violation of the New York Insurance Law.

In applying to the appellate division for approval of their plan, the County Lawyers Association argued that its program would be issuing contracts for "legal services" and not "insurance contracts." The Insurance Department contended that the

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161. AM. BAR NEWS, Nov. 1974, at 5. The ABA survey obtained responses from 38 states. It is interesting to note that 28 bar associations reported their belief that most of their members were largely unaware of the nature of prepaid legal services plans.

162. National Association of Insurance Commissioners (NAIC), Prepaid Legal Expense, Dec. 10, 1973. This survey was conducted by the Advisory Committee to the NAIC Prepaid Legal Expense (D5) Subcommittee, a copy of which is on file in the office of the Hofstra Law Review.

163. Id. at 26-31.

164. See N.Y. INS. LAW § 46 (McKinney 1966).


The new Superintendent of Insurance, Thomas A. Harnett, has also indicated his support for the development of prepaid legal insurance. "I think prepaid legal insurance is a concept whose time has come and which should be allowed." N.Y. Times, Sept. 7, 1976, § 3, at 7.


167. Id.
agreement to be executed with subscribers conferred benefits which would accrue upon the happening of a "fortuitous" event and thereby constituted an insurance contract as defined in section 41 of the New York Insurance Law, which states:168

The term "insurance contract" shall be deemed to include any agreement or other transaction whereby one party, herein called the insurer, is obligated to confer benefit of pecuniary value upon another party, herein called the insured or beneficiary, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event. A fortuitous event is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.

The County Lawyers maintained that, "[t]he retention of a lawyer is a deliberate voluntary act, whatever may be the motivation and however necessitous may be the circumstances."169 The Insurance Department conceded that the plans would be outside the jurisdiction of the Insurance Law if they were limited to consulting services of a general nature, drafting of wills and separation agreements, the purchase or sale of real property, and such other items "within the control of the subscriber."170 However, the Department claimed that the need to retain a lawyer is often beyond the control of an individual and, therefore, "fortuitous."171

It must be noted that the issue of insurance arose because the sponsors of these pioneer plans were required to petition the Appellate Division of the New York State Supreme Court for approval of their plans.172 The appellate division, which regulates the conduct of attorneys generally, is authorized to approve any entity organized for benevolent or charitable purposes and engaged in delivering legal services.173

170. Memorandum from Gemma, supra note 165, at 3.
171. Id.
In July of 1974, the court denied approval of the County Lawyers’ and the Teamsters’ programs on the grounds that it lacked the statutory authority, personnel, and resources to approve or oversee the plans which they found to be “in the nature of insurance.” In a lone dissent Justice Kupferman observed, “[w]hile a program for prepaid legal services . . . is not without problems, it is no solution to practice judicial abstinence,” and concluded, “[a]n idea whose time has come should not be suspended so that footnotes can be added.”

Their decision was reversed by the New York State Court of Appeals in March of 1975, when the state’s highest court remanded the proceedings, and directed that the appellate division concern itself with professional standards and responsibilities lawyers owe to the public. In a unanimous opinion rendered by Chief Judge Breitel, the court stated:

Despite the Appellate Division’s proper concern with the possible proliferation of prepaid legal services plans without adequate assessment of their fiscal implications by an agency capable of making that assessment, it lacked the power to withhold approval on that ground. Nor are prepaid legal services plans properly encompassed by the statutes regulating insurance. At least this is true, if one were to consider the essential purpose and scope of those statutes, although to be sure, there are elements of contingency and reimbursement in any such plan which bear a similarity to certain kinds of insurance or indemnity. On this view, the two plans were improperly excluded from approval, and the applications should be remitted to the Appellate Division for reconsideration.

One of the weaknesses of the opinion was its inadequate focus on the issue of whether future prepaid plans would be subject to

175. Id.
176. Id. at 444, 357 N.Y.S.2d at 520.
178. Id. at 203, 326 N.E.2d at 290, 366 N.Y.S.2d at 616. Chief Judge Breitel noted that the appellate division’s authority under N.Y. JUDICIARY LAW § 495(5) (McKinney 1968) to disapprove the proposed plans was rooted in a limited power to discern whether they would “violate professional standards or responsibilities owed to the public.” In re Feinstein, 36 N.Y.2d 199, 322 N.E.2d 288, 290, 366 N.Y.S.2d 613, 616 (1975). This analysis would include consideration of “the responsibility of the sponsors, the method of financing, the scope of activities proposed, and other factors which may affect the public interest.” Id. at 204, 326 N.E.2d at 291, 366 N.Y.S.2d at 617. See also In re Thom, 33 N.Y.2d 609, 301 N.E.2d 542, 347 N.Y.S.2d 571 (1973); In re Community Action for Legal Servs., 26 App. Div. 2d 354, 274 N.Y.S.2d 779 (1st Dep’t 1966).
Insurance Department regulation, for as noted by Chief Judge Breitel, in dicta: 

While there has been some briefing by the parties on the issue whether the plans are insurance schemes, the attack peculiarly has been addressed only to the Bar Association plan and not to the union plan. Moreover, the attack has not been developed in depth. Since, it is concluded that on their face, neither plan involves insurance, the plans should not be rejected out of hand. On any view of the matter if it should now or later appear to the Department of Insurance that either or both plans are prohibited by the Insurance Law, that department should be and is free to pursue the remedies available to it.

While it is by no means clear whether future prepaid legal services plans will be subject to Insurance Department or other regulation, the court noted that “early legislative attention is indicated” and “broader regulation, especially fiscal regulation . . . may well be appropriate, and may even become urgently needed as prepaid legal services plans become common.” It is encouraging that the court recognized the literature which is, largely unanimous that new paths must be staked out to make legal services available to persons between those served by poverty-level schemes and those rich enough to purchase legal services without assistance or extraordinary measures (citations omitted).


180. Chief Judge Breitel noted, though he did not decide, that the preemptive sweep of ERISA, see notes 105 & 106 supra, might exempt from state regulation the prepaid legal services plan submitted by Teamsters Local 237. The plan may well be considered an “employee benefit plan” as defined under ERISA. See 29 U.S.C.A. § 1002(1) (1975). Such a plan comes within the Act if it is established by an “employee organization” which is defined as “any labor union or any organization of any kind . . . in which employees participate . . . .” 29 U.S.C.A. § 1002(4) (1975).

The Chief Judge further noted that even if ERISA did preempt state regulation of the Teamsters Plan as far as content is concerned, the statute “does not reach the professional licensure and regulation of lawyers, qua lawyers, who would render legal services under the plans.” In re Feinstein, 36 N.Y.2d 199, 207, 326 N.E.2d 288, 292, 366 N.Y.S.2d 613, 618 (1975). Thus, in the view of the Chief Judge, the court would maintain ultimate authority to supervise the bounds of the attorney-client relationship despite federal control over the content of “employee benefit plans.”


182. Id. at 209-10, 326 N.E.2d at 294, 366 N.Y.S.2d at 621-22.

183. Id. at 206, 326 N.E.2d at 292, 366 N.Y.S.2d at 619.
Both the insurance industry and its regulators have demonstrated a growing interest in prepaid legal insurance. The National Association of Insurance Commissioners has had a subcommittee examining the subject since 1972 which has made recommendations for a proposed model law. While only a few companies presently offer this line of insurance, several other companies have developed, or are developing, group legal services policies.

The major impediment to the development of these plans by insurance companies is the New York Insurance Law which restricts underwriters, both domestic and foreign, from writing a form of insurance which is not authorized in New York. These restrictions apply wherever that company does business, including out-of-state underwriting. Since New York is the insurance center of the country, its laws virtually control the industry’s activities nationwide. Thus, without legislative sanction in New York, legal services insurance is faced with yet another formidable obstacle.

The Stonewall Insurance Company of Birmingham, Alabama, presently has three prepaid legal services programs in operation. One of these programs, the Maryland Credit Union League Legal Services Plan, was launched in 1973 and is available to the 600,000 members of the credit union. By paying 30 dollars semi-annually, any member of the credit union can join the plan, be eligible to select any licensed attorney, and receive cash allowances to help cover the cost for legal counsel.

The Midwest Mutual Insurance Company has three plans in operation, three in negotiation, and proposals for over 100 groups. Midwest offers two distinct plans: the indemnification,
fee-for-services approach and the direct service, closed panel approach. Under the first arrangement, the insured is able to select his own lawyer and the plan pays that lawyer a specified fee for representing the insured. Under the second arrangement, the insured can choose a lawyer or law firm designated by his group, e.g., bar association, labor union, or consumer organization. The group lawyer is then fully paid for all services performed on behalf of the insured, and within limits set out by the plan.\footnote{191}

The Insurance Company of North America (INA) has spent four years developing its group legal services policy. Several major proposals are now outstanding; none, however, is operational.\footnote{192}

The Connecticut General Life Insurance Company has developed a prototype group contract which will be filed shortly in both Connecticut and California. The prototype is based on an open panel indemnity concept, but it can also be modified to a closed panel system.\footnote{193} Connecticut General conceived of the policy as an added employee benefit and anticipates that a premium at the rate of six or seven cents per wage hour will be required to purchase the policy and that only groups with a minimum membership of 500 will be eligible for coverage.\footnote{194}

The Stuyvesant Insurance Company of Allentown, Pennsylvania, has received approval in 23 states to write legal services insurance.\footnote{195} Because the company is chartered in New York, however, it cannot sell this line of insurance unless authorized to do so under the New York State Insurance Law.\footnote{198} According to the New York State Insurance Department, this restriction on out-of-state operations is based on the rationale that a New York chartered company could jeopardize its assets and subsequently its ability to protect New York policyholders by writing a line of insurance considered to be "impermissible" under New York law. Therefore, in order for Stuyvesant to sell legal services insurance in New York or any other state, the New York Legislature must enact legislation which adds legal services insurance to the statutory list of the types of insurance authorized to be written in New York.

\footnote{191. ABA COMPILATION, supra note 27, at 52 (Plans Section).}
\footnote{192. Prepaid Legal Services, supra note 70, at 2486.}
\footnote{193. Id.}
\footnote{194. Id.}
\footnote{195. Interview with Gunther Dziallas, Vice-President of the Stuyvesant Insurance Co., in Allentown, Pa., Aug. 26, 1975.}
\footnote{196. See note 186 supra.}
IV. NEW YORK LEGISLATIVE HISTORY

A. Background

Recognizing the lack of ready access to lawyers and legal services among the middle class, I introduced legislation in March of 1973 which would have authorized the sale of "legalcare insurance." The bill, S. 4887, simply sought to amend section 46 of the Insurance Law by adding to the statutory list of specific types of insurance which can be sold in New York that of "legalcare insurance" which was defined as

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\text{insurance against legal liability of the insured of a portion or all of the fees or expenses arising out of the use of legal services by the insured and rendered to the insured by a person or persons duly admitted or permitted to practice law in the jurisdiction or jurisdictions in which such services were performed.}
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Later that year, I amended S. 4887 in favor of S. 4887-A which was based on a more comprehensive model submitted by the New York State Bar Association's Special Committee on the Availability of Legal Services. In addition to amending section 46, S. 4887-A authorized casualty and life companies to sell such insurance on either an individual or group basis. The bill further defined standards for approval of such policies and premium rates. And finally, it exempted bar association sponsored plans from the regulatory provisions. S. 4887-A was reported out of the Senate Insurance Committee but failed to be voted on by the full Senate during the 1973 session primarily because interest in the area of prepaid legal services had not yet surfaced.

Because of the significant Congressional action amending the Taft-Hartley Act in August, 1973, S. 4887-A received greater attention during the 1974 session. Not unlike the ABA debate on the Code of Professional Responsibility, controversy in 1974 centered around the question of the open and closed panels. Both S. 4887 and S. 4887-A were silent on this question, so as not to discourage the development of any meaningful plan. Strong lobbying efforts by state and county bar associations, however, resulted in an amendment (S. 4887-C) which somewhat re-

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stricted the closed panel plan. The New York State AFL-CIO, which opposed the bill from the beginning, interpreted this amendment as requiring all labor union prepaid legal services to employ an open panel system.

The bill passed the Senate but was not reported from the Assembly Rules Committee. At the close of the 1974 session, I placed top priority on improving this legislation with a view toward drafting a bill that would sufficiently accommodate the best interests of everyone affected by it. Accordingly, throughout the summer and fall months I held discussions with representatives of the State Insurance Department, consumer organizations, bar associations, and other interested parties.

Meanwhile, the federal government had assumed an increasingly active role in the regulation of legal services plans. On August 5, 1974, the Department of Justice denied the California Bar Association a favorable business review on their legal services plan. The reason for this denial was primarily based on the conclusion that the plan did not provide "a maximum opportunity for competition between open and closed panels."2

In anticipation of the Justice Department's denial of the California Bar Association's plan and in response to the suggestions made by several legal services experts, including Sandra DeMent, Executive Director for the National Consumer Center for Legal Services, I determined that the 1975 legal insurance bill should contain no restrictions on either the open or closed panel plans. Testifying before the State Bar Association's Committee on Professional Ethics on July 23, 1974, I further explained this decision:


201. Statement on behalf of State Senator John R. Dunne before the New York State Bar Ass'n Committee on Professional Ethics, July 23, 1974, a copy of which is on file in the office of the Hofstra Law Review.

[C]losed panel plans can be fertile ground for such legal reforms and innovations as quality control and preventive law. At the very least, a combination of open and closed panel legal services plans would appear necessary in order to reach the greatest number of citizens with the highest quality legal care possible. Witness the plans in existence now. Some are open panel and others are closed panel. Both types of plans should be allowed to develop freely.
In September of 1974, the federal government went further toward guaranteeing the existence of closed panel plans by enacting the Employment Retirement Income Security Act (ERISA). Thus, states are now precluded from regulating the form and content of legal services programs created and maintained for the members of private employee groups.202

B. 1975 Legislative Action

Aside from its “silence” on the open/closed panel issue, the first 1975 legal insurance bill (S. 1001) differed substantially from the previous year’s legislation.203 First, the new form of insurance was entitled “Legal Services Insurance” and covered legal services rendered to the insured “by or under the supervision of a person or persons duly admitted or permitted to practice law.”204 This expanded coverage was intended to accommodate the growing use of para-legals and other legal technicians by lawyers. Second, only casualty insurance companies were permitted to underwrite legal services insurance. The decision to exclude life insurance companies was based on the advice of the Superintendent of Insurance who felt, at the time, that legal services insurance was strictly a casualty-type line of insurance. Third, S. 1001 added a new Article IX-F to the Insurance Law to allow not-for-profit corporations to provide “legal services expense indemnity” and “prepaid legal services” and placed both types of corporations under the supervisory power of the Superintendent of Insurance. Legal services expense indemnity included “reimbursement” for legal services and “prepaid legal services” meant “the provision of legal services . . . provided in consideration for an advance or periodic charge.”205

Shortly after this legislation had been introduced, a public hearing was held in New York City to discuss its content. Those who testified were representatives from the organized bar, labor groups, consumer organizations, and the insurance industry. As

203. See Cole, An Act to Regulate Group Legal Service Plans, 11 HARV. J. LEGIS. 68-126 (1973) which contains the model statute upon which S. 1001 was based. Its author, Garrick C. Cole, is a staff attorney with the National Consumer Law Center, Boston, Mass.
205. Id. at § 309-(a)(2).
a result of the suggestions offered at this hearing, S. 1001 was amended to accomplish the following objectives:

1. Declare the legislative intent to be to encourage the development of all types of prepaid plans and specifically recognize certain federal preemption.
2. Limit the Insurance Superintendent’s regulation to the insurance aspects of the plan, excluding those aspects relating to the legal services provisions of such plans.
3. Redefine “legal service expense indemnity” and “prepaid legal services” to make it clear that corporations not doing an insurance business are not within the provisions of this bill.
4. Minimize what was described as a “chilling effect” of delay on approval of prepaid programs by setting a definite time limitation, viz. six months, for approval of such plans.
5. Amend Section 495 of the Judiciary Law to authorize Article IX-F corporations as an exception to the prohibition against corporations’ practicing law and to give the state Judicial Conference authority to approve such corporations.

Comment on the amended bill S. 1001-A was heard at a subsequent public hearing in Albany on March 19, 1975. Despite the modifications, S. 1001-A was criticized by labor and consumer representatives for containing too much regulatory control. Raymond Corbett, President of the New York State AFL-CIO, stated that prepaid legal services programs not exempted by the federal pension reform law should be exempted from state insurance regulation. Mr. Corbett contended that:

Imposing premium taxes and other onerous regulatory requirements on programs of services operated internally by unions or consumer groups would so restrict these programs that many would never get started. The net result of regulating internally operated programs as though they were insurance programs offered to the public would be to stifle needed experimentation and program development.

Two days after this public hearing, the court of appeals issued its ruling on the County Lawyers’ and Teamsters’ prepaid

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Recognizing the potential impact of the court of appeals decision and realizing the political implications of the testimony presented at the two public hearings, I made further amendments (S. 1001-B) and deleted the Article IX-F provision from the bill as well as the provision relating to Judicial Conference approval.

In addition to these changes, S. 1001-B authorized life insurance companies to underwrite legal services insurance. This decision, a reversal of an earlier one to exclude them, was made after I convinced the new Superintendent of Insurance that their inclusion could only benefit the development of prepaid programs in the state. After several technical amendments, S. 1001-D passed the Senate by a 38-18 margin on June 12, 1975. The bill's Assembly companion (A. 6106-C), however, again failed to reach the floor of that chamber for a vote.

In the closing days of the session, another proposal (S. 4640-E), patterned very much on the original S. 1001 but which mandated open panel plans, was passed by the Senate and received no action by the Assembly.

V. CONCLUSION

The current level of availability of legal services to the general public has resulted in an oversupply of lawyers and an underutilization of their services. If the expanding ranks of the bar are to survive financially as well as meet their obligations to the public, lawyers must seize the initiative and establish prepaid legal services programs as the vehicle for society to pursue the new paths which will be staked out to make legal services available to all.

Lawyers need not be reluctant to initiate a strong campaign to implement a program which holds promise of personal remuneration. Lawyers are in business to serve the public—and they are also in business to make a living. Chief Justice Burger stated quite clearly that the exchange of legal services for money is "'commerce' in the most common usage of that word" and that it is "no disparagement of the practice of law as a profession to

acknowledge that it has this business aspect.” Close adherence to the profession's ethical standards will prevent what is feared could relegate the practice of law to the level of a commercial enterprise.

Prepaid legal service plans hold the greatest promise for meeting the needs of both the public and the profession. Admittedly in their beginning stages, the plans are in need of flexibility to allow the evolution of different systems to reach all parts of the population according to their differing needs. A wide variety of plans have already been launched and many more are in the offing. While these and future programs present a wide variety of problems that might lead to abuse of the public that uses them, there are many groups and agencies in both the private and public sectors who believe that these plans will fulfill an honest and legitimate purpose of increasing the availability of legal services to the many Americans who are now unserved.

If the groups which have the most at stake—unions and consumer groups, state insurance departments, and state legislatures as well as the organized bar—fail to encourage or even set up roadblocks to the development of prepaid legal services before the plans have had a fair chance to develop, other forces, including various federal regulatory agencies and Congress, will seek means to make prepaid legal services, or some more radical changes, a reality.

The legal profession has too much at stake to allow its rightful role of leader to go by default. Soon the voices of neglected middle-income Americans will supersede the special interests of influential groups, and the changes that everyone knows are necessary will finally take effect on a far-reaching scale. And who can predict what will remain after those winds of change have run their course?

213. Id. at 2013.