

August 2012

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### Recommended Citation

Singleton, Gerald E. (1974) "Legal Service Plans--Coming of Age," *St. John's Law Review*. Vol. 49 : No. 1 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol49/iss1/6>

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## LEGAL SERVICE PLANS — COMING OF AGE

Chief Justice Marshall noted that “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”<sup>1</sup> As evidenced by the multitude of laws enacted yearly on all levels of government, the law has indeed become a dominant feature of our society. Very few of our daily transactions do not in some fashion carry legal implications. Yet, it is startling to discover that the majority of the population is unaware of its need for legal services<sup>2</sup> and, if cognizant of this need, lacks the financial means for attaining counsel.<sup>3</sup>

Recent surveys have indicated that people in the middle income group, *i.e.*, those earning between \$5,000 and \$15,000, constitute seventy percent of the population.<sup>4</sup> These individuals have been characterized as “legally indigent” in that their income, though exceeding the maximum eligibility standard for free or subsidized legal service programs, is insufficient to afford most legal services.<sup>5</sup> Private law firms may charge as much as \$200 a day for court attendance.<sup>6</sup> Most American budgets can finance neither this amount nor the added costs of case preparation. Adding to the dilemma are minimum fee schedules

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>2</sup> See AMERICAN BAR ASSOCIATION, REVISED HANDBOOK ON PREPAID LEGAL SERVICES 25 (1972) [hereinafter cited as REVISED HANDBOOK]; 170 N.Y.L.J. 110, Dec. 10, 1973, at 1, col. 3. See generally B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 128-72 (1970), for a discussion of the problem of bringing attorneys and clients together.

The American Bar Association (ABA) has recognized the public's need for legal services by promulgating Ethical Consideration (EC) 2-1 which states, *inter alia*:

[This] need . . . is met only if they [the public] recognize their legal problems, appreciate the importance of seeking legal assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (footnotes omitted) [hereinafter cited as ABA CODE].

<sup>3</sup> See Lefkowitz, *The Non-Availability of Legal Services to Persons of Moderate Income*, 27 RECORD OF N.Y.C.B.A. 144, 145 (1972) [hereinafter cited as Lefkowitz].

<sup>4</sup> See Opening Statement by Assemblyman Andrew Stein, Chairman of the New York Temporary State Commission on Living Costs and the Economy, at its Public Hearing on Prepaid Legal Services, Dec. 12, 1973, on file in St. John's Law Review Office; REVISED HANDBOOK, *supra* note 2, at 2; BUS. WEEK, Jan. 12, 1974, at 34. See generally B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970).

<sup>5</sup> 170 N.Y.L.J. 110, Dec. 10, 1973, at 1, col. 3. In 1970, to qualify for Legal Aid Society assistance in New York City, an individual's income could not exceed \$85 per week for a single person and \$100 per week for married persons, with additional allowances for dependents. Between five and six thousand persons were refused legal services in 1970 because their incomes exceeded the maximum allowed. Lefkowitz, *supra* note 3, at 145.

For eligibility under the Office of Economic Opportunity (OEO) Legal Services program, a federally funded program, an individual's yearly income could not exceed \$4,000, with an additional allowance of \$400 for each dependent. *Id.*

<sup>6</sup> See Lefkowitz, *supra* note 3, at 145.

promulgated by local bar associations.<sup>7</sup> Their use has resulted in the cost of legal services remaining uniformly high, thereby forcing an increasing number of people of moderate means to appear pro se in the courts.<sup>8</sup> Understandably, the inevitable result of such nonprofessional representation has been, and will continue to be, the loss of meritorious claims.

In addition to financial obstacles, the average person fails to realize when he is encountering a problem that requires legal assistance. Seldom does he turn to an attorney for counseling to prevent future problems. All too often, an attorney's first contact with his client takes place after a problem has reached proportions necessitating a costly lawsuit.<sup>9</sup> Clearly, programs designed to educate the public and to provide legal services at a moderate cost must be established.<sup>10</sup> Prepaid and group legal service plans offer a means for accomplishing these objectives.

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<sup>7</sup> Minimum fee schedules establish "suggested" minimum charges for services rendered. The validity of these schedules has been questioned because of possible antitrust violations. However, there is no consensus among courts regarding the applicability of federal antitrust laws to the legal profession. Compare *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974), *aff'g in part, rev'g in part* 355 F. Supp. 491 (E.D. Va. 1973) (bar association fee schedules deemed to fall within "learned profession" exemption to the Sherman Act), *cert. granted*, 43 U.S.L.W. 3255 (U.S. Oct. 29, 1974) (No. 74-70), with *United States v. Oregon State Bar*, — F. Supp. — (D. Ore. 1974) (minimum fee schedules held violative of federal law). See note 129 *infra*. Cf. *In re Lincoln Rochester Trust Co.*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974) (New York State's antitrust laws held inapplicable to minimum fee schedules). See generally Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

Since certiorari has been granted in *Goldfarb*, 43 U.S.L.W. 3255 (U.S. Oct. 29, 1974) (No. 74-70), the Supreme Court may soon decide whether the legal profession is exempt from federal antitrust regulation.

<sup>8</sup> According to one New York judge, each year more than 6,000 people appear pro se before the Civil Court of the City of New York in the prosecution or defense of civil claims of up to \$10,000. Furthermore, of the 500,000 landlord-tenant cases commenced annually, the tenant's side is unrepresented by counsel in approximately 50,000 cases. Lefkowitz, *supra* note 3, at 145-46.

<sup>9</sup> See REVISED HANDBOOK, *supra* note 2, at 2, wherein the American Bar Association recognizes the failure of the profession to adequately serve the middle class in this regard.

<sup>10</sup> *Id.* The ABA has reaffirmed its February, 1965 resolution to "develop more effective means of assuring that legal services are in fact available at reasonable cost to all who need them . . ." 60 A.B.A.J. 446, 449 (1974). The ABA, the world's largest professional organization with 180,000 members, considers the delivery of legal services as one of its foremost problems and presently has eleven select committees working on this area. These are: the Special Committees on Delivery of Legal Services, Survey of Legal Needs, Prepaid Legal Services, Public Interest Practices, Professional Utilization, and the Standing Committees on Economics of Law Practice, Ethics and Professional Responsibility, Law and Technology, Lawyer Referral Service, Legal Aid and Indigent Defendants, and Legal Assistance for Servicemen. Smith, *The American Bar Association and Delivery of Legal Services—A General Overview*, 45 PA. B. ASS'N Q. 343 (1974). In addition, more than 40 state bar associations have committees considering prepaid legal services. See Edley, *Contributions of the Organized Bar*, 45 PA. B. ASS'N Q. 353 (1974).

## THE EVOLUTION OF GROUP AND PREPAID LEGAL SERVICES

*Group and Prepaid Legal Services Distinguished*

Prepaid legal services are programs through which "legal services are rendered to large members [*sic*] of the public who are associated in groups rather than to individuals" outside the groups.<sup>11</sup> Such plans are distinguishable from group legal services. One distinction lies in the mode of payment. Under prepaid legal service plans, the individual recipient of the assistance, the group, or a third party, such as an employer, pays in advance the organization furnishing the services.<sup>12</sup> The phrase "group legal services" describes arrangements between groups, *e.g.*, labor unions or consumer organizations, and a lawyer or lawyers whereby legal assistance is rendered to the members on a fee for services basis. No advance compensation is required, but rather, the members pay for services as needed under predetermined reduced fee arrangements.<sup>13</sup>

In the past, further distinctions could be discerned. The scope of services available through group legal plans was restricted to job related matters, such as workmen's compensation claims.<sup>14</sup> They operated on a "closed panel" basis, *i.e.*, the group entered into arrangements with selected attorneys for the rendition of services and the member was restricted to the group's choice of counsel.<sup>15</sup> Prepaid plans, on the other hand, operated on an "open panel" basis, *i.e.*, the group member was free to choose any attorney.<sup>16</sup> Additionally, the scope of coverage thereunder was not limited to work-related matters, but included personal legal problems.<sup>17</sup>

As the scope of services offered under these plans has expanded, the distinction between group and prepaid legal service plans has diminished. By increasing the extent of services offered without charge

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<sup>11</sup> REVISED HANDBOOK, *supra* note 2, at 1.

<sup>12</sup> *Id.*; Sloss, *Introduction*, in PRACTICING LAW INSTITUTE, PRE-PAID LEGAL PLANS 9 (1973) [hereinafter cited as Sloss]. Payment is usually made in periodic installments.

<sup>13</sup> For a more detailed discussion of the distinction between the terms "prepaid legal services" and "group legal services" and the future cessation of such distinction, see B. CHRISTENSEN, GROUP LEGAL SERVICES, 8-10 & n.21 (Tent. Draft 1967); Sloss, *supra* note 12, at 9-10; Comment, *Group and Prepaid Legal Services*, 45 Miss. L.J. 208, 209-10 (1974). See also Bartosic & Bernstein, *Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients Through Collective Bargaining*, 59 VA. L. REV. 410, 416-17 (1973) [hereinafter cited as Bartosic & Bernstein].

<sup>14</sup> See, *e.g.*, *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), discussed in text accompanying notes 30-34 *infra*. See also REVISED HANDBOOK, *supra* note 2, at 1.

<sup>15</sup> See REVISED HANDBOOK, *supra* note 2, at 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

to include such matters as consultation, group programs have come to resemble prepaid plans.<sup>18</sup> Furthermore, prepaid plans are presently operating through either open or closed panel structures.<sup>19</sup> Group legal plans, however, remain on a strictly closed panel basis since, by definition, they are predetermined fee arrangements with a select group of lawyers. Thus, an open panel structure cannot be employed.<sup>20</sup>

### *Historical Background of Legal Services Programs*

There has been a rapid growth in legal service plans. It is estimated that within a few years, seventy percent of the American public and fifty percent of the nation's lawyers will be involved in these programs.<sup>21</sup> Recently, a number of developments concerning their regulation and future direction have taken place. To fully appreciate the significance of these events, a review of the historical development of group and prepaid legal services is necessary.

### Judicial Intervention

The attorney-client relationship is based on trust, confidentiality, responsibility, and professional independence.<sup>22</sup> These special characteristics form the core of all legal practice and have caused the legal profession to stand vigilant watch against any variations in the form of practice that might disrupt this fiduciary relationship. Thus, to prevent possible conflict of interest problems and the dilution of the al-

<sup>18</sup> See Sloss, *supra* note 12, at 9-10.

<sup>19</sup> The Shreveport Plan, a prepaid legal plan in operation since 1971, is an open panel plan. See notes 43-51 and accompanying text *infra*. The Municipal Employees Legal Services Fund, Inc. exemplifies the prepaid plan operating on a closed panel basis. See note 61 *infra*.

<sup>20</sup> Cf. REVISED HANDBOOK, *supra* note 2, at 1, wherein the terms group legal services and closed plans are used interchangeably. But see Comment, *Group and Prepaid Legal Services*, 45 MISS. L.J. 208, 209-10 (1974), wherein the author states that both prepaid and group plans can utilize an open or closed structure.

<sup>21</sup> See Statement by Sandra DeMent, Executive Director of the National Consumer Center for Legal Services Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 15, 1974, at 3, quoting ABA, Report of the General Practice Section to ABA House of Delegates, Houston, Texas, Feb., 1974, at 13. In 1971, approximately 500 group legal service plans were in operation. Today, there are more than 2,500 plans in existence. BUS. WEEK, Jan. 12, 1974, at 34.

<sup>22</sup> See B. CHRISTENSEN, GROUP LEGAL SERVICES 1 (Tent. Draft 1967). Numerous cases have discussed the highly personal nature of the attorney-client relationship and the duties of the attorney with regard thereto. See, e.g., State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863, 870 (1958) ("The relation of an attorney to his client is pre-eminently confidential. It demands . . . undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interest of his client."); *In re Thomasson's Estate*, 346 Mo. 911, 144 S.W.2d 79, 83 (1940) ("The very nature of the lawyer's profession necessitates the utmost good faith toward his client and the highest loyalty and devotion to his client's interests.").

legiance owed by the attorney to his client, the profession has opposed arrangements whereby lay persons intervene in the relationship.<sup>23</sup> Additionally, many provisions governing lawyer conduct embodied in the former Canon of Ethics and the present Code of Professional Responsibility (the Code), can be traced to the preservation of the confidence inherent in this relationship. For example, the Code prohibits the attorney from advertising, soliciting, or initiating any contact with a prospective client.<sup>24</sup> Underlying this interdiction is the strong policy against fostering litigation and the belief that such practices arouse distrust and erode confidence in the entire legal system.<sup>25</sup>

During the past decade, the validity of these prohibitions, to the extent that they hinder collective effort protected by the Constitution, has been questioned. In *NAACP v. Button*,<sup>26</sup> the Supreme Court invalidated Virginia's champerty and maintenance laws,<sup>27</sup> deeming them unconstitutional insofar as they restricted freedom of speech and assembly. The NAACP had come into conflict with Virginia laws by

<sup>23</sup> In court actions, it has been argued that an arrangement under which one party retains legal counsel for another constitutes the unauthorized practice of law by such party. See, e.g., *People ex rel. Courtney v. Association of Real Estate Taxpayers*, 354 Ill. 102, 187 N.E. 823 (1933) (association providing legal representation for member in tax matters held guilty of unlawful practice of law); *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936) (illegal practice of law for corporation to employ counsel to represent members in automobile related matters); *In re Otterness*, 181 Minn. 254, 232 N.W. 318 (1930) (unauthorized practice of law where attorney was employed by a bank to render services not only to bank but to others with fees going to bank); *Dworken v. Apartment House Owners' Ass'n*, 38 Ohio App. 265, 176 N.E. 577 (1931) (unauthorized practice of law for association to employ attorneys and maintain legal department for use of others).

<sup>24</sup> See ABA CODE DR 2-101(B) (effective Mar. 1, 1974).

<sup>25</sup> For a discussion of the prohibitions against fostering litigation and the premise that such blanket rules are no longer justified, see B. CHRISTENSEN, *BRINGING LAWYERS AND CLIENTS TOGETHER* 19-24 (Tent. Draft 1968).

The rationale underlying the prohibition against advertising is contained in Ethical Consideration 2-9 of the Code of Professional Responsibility, which provides in pertinent part:

The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deception.

ABA CODE EC 2-9 (footnotes omitted).

<sup>26</sup> 371 U.S. 415 (1963).

<sup>27</sup> Champerty is defined as "[a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." BLACK'S LAW DICTIONARY 292 (rev. 4th ed. 1968). Maintenance is described as "[a] layman's furnishing money to permit a lawyer to provide, in part, costs and expenses in carrying on litigation for a third party . . ." *Id.* at 1106.

soliciting plaintiffs in desegregation cases and providing them with counsel.<sup>28</sup> The Court held that this technique was a form of political expression and, hence, constitutionally protected under the first and fourteenth amendments.<sup>29</sup> *Button* thereby became the first in a series of decisions laying the foundation for the implementation of group legal service plans.

In *Brotherhood of Railroad Trainmen v. Virginia*,<sup>30</sup> the Supreme Court confronted the issue whether constitutional protection extended to a plan whereby a union suggested that no member should settle Federal Employer Liability Act (FELA) claims without first consulting an attorney recommended by the union. The Court found this practice to be within rights guaranteed by the first and fourteenth amendments. Addressing itself to the matter of state power to regulate the professional conduct of an attorney, the Court noted: "[F]or [laymen] 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."<sup>31</sup>

In *United Mine Workers v. Illinois State Bar Association*,<sup>32</sup> the Illinois Bar challenged as an unauthorized practice of law the union's employment of attorneys on a salary basis to represent members in

<sup>28</sup> NAACP local branches would invite a member of the legal staff of the Virginia State Conference of NAACP Branches (the Conference) or the Defense Fund, a companion body to the NAACP, to a meeting of parents and children to explain steps necessary to achieve desegregation. Printed forms were distributed authorizing a member of the legal staff to represent the signer in desegregation litigation. While lawsuits were encouraged by the Conference, it appeared that the plaintiffs made their own decisions to institute proceedings. 371 U.S. at 421-22. The challenged portions of the Virginia law had been amended in 1956 to bring such activities within the meaning of improper solicitation of legal business. *Id.* at 423-25.

<sup>29</sup> In reaching its decision the Court stated:

We hold that the activities of the NAACP . . . are modes of expression and association protected by the First and Fourteenth Amendments . . . .

. . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government . . . .

. . . .

. . . [A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.

*Id.* at 428-29, 439.

<sup>30</sup> 377 U.S. 1 (1964). Under the Brotherhood's plan, lawyers and firms with reputations "for honesty and skill" in handling railroad personal injury litigation were selected and recommended to a member or his widow. *Id.* at 3-4. The purpose of the plan was to protect members from incompetent attorneys and claims adjusters willing to accept a cheap and hasty settlement. *Id.*

<sup>31</sup> *Id.* at 7. The Court further commented:

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.

*Id.*

<sup>32</sup> 389 U.S. 217 (1967).

state workmen's compensation claims. The Court rejected petitioner's contentions that this case was distinguishable from *Trainmen and Button*, and found the prior decisions controlling.<sup>33</sup> Holding that the union had a right to hire attorneys to assist its members, the Court remarked that first amendment freedoms would be little more than a "hollow promise" if states were permitted to "destroy or erode" these rights indirectly through regulation of professional conduct.<sup>34</sup>

In light of these three decisions, many provisions of the Canons of Ethics governing professional conduct of attorneys were in need of revision.<sup>35</sup> Such revision came in 1970 with the adoption by the American Bar Association (ABA) of the Code of Professional Responsibility. The new Code reflected an attempt by the ABA to restrict lawyer cooperation with group plans within the narrowest constitutionally permissible bounds.<sup>36</sup> So, for example, cooperation with nonprofit organizations could only exist to the extent that "controlling constitutional interpretation . . . require[d] the allowance of such legal service activities."<sup>37</sup>

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<sup>33</sup> *Id.* at 221-24.

<sup>34</sup> *Id.* at 222.

<sup>35</sup> Provisions relating to lay intervention and solicitation were especially in need of revision. See Comment, *Group and Prepaid Legal Services*, 45 Miss. L.J. 208, 212 n.21 (1974). For example, Canon 35 permitted an attorney to accept employment from an association or organization to render legal services directly to it as an entity, but prohibited the rendition of legal services to any of its members in regard to personal matters. ABA CANONS OF PROFESSIONAL ETHICS NO. 35.

<sup>36</sup> Fearful of abuses that could result from the unregulated growth of group plans, the ABA, in Disciplinary Rule 2-103, attempted to restrict the type of group plans a lawyer could join. The Rule permitted a lawyer to cooperate with legal aid offices, military legal assistance offices, lawyers referral services, and bar association plans. ABA CODE DR 2-103(D)(1)-(4) (superseded Mar. 1, 1974). Additionally, a lawyer could assist a nonprofit organization in recommending, furnishing, or paying for legal services for its members. Such cooperation, however, was to exist only "to the extent that controlling constitutional interpretation . . . requires the allowance of such legal service activities." *Id.* DR 2-103(D)(5). Furthermore, such participation was restricted by the following conditions. First, the organization could not have as its primary purpose the rendition of legal services. *Id.* DR 2-103(D)(5)(a). Second, the rendition of legal services had to be "incidental and reasonably related to the primary purpose of" the organization. *Id.* DR 2-103(D)(5)(b). Third, the rendition of legal services could not result in a financial benefit to the organization. *Id.* DR 2-103(D)(5)(c). Finally, the party to whom the services were rendered, rather than the organization, was to be recognized as the client of the attorney. *Id.* DR 2-103(D)(5)(d).

The rule was sharply criticized because of its restrictive language which drew fine lines between prohibited solicitation and permissible activities placing the attorney involved in a precarious position. The threat of possible disciplinary proceedings loomed over the attorney's participation in group plans. As the extent of the attorney's participation was limited by the vague concept of "controlling constitutional interpretation," this threat was extremely forceful. See, e.g., Nahstoll, *Limitations on Group Legal Service Arrangements Under the Code of Professional Responsibility*, DR 2-103(D)(5); *Stale Wine in New Bottles*, 48 TEX. L. REV. 334 (1970); Comment, *Group Legal Services and the New Code of Professional Responsibility*, 20 BUFFALO L. REV. 507 (1971).

<sup>37</sup> ABA CODE DR 2-103(D)(5) (superseded Mar. 1, 1974). See note 36 *supra*.



The constitutionality of these new provisions was placed in doubt by the Supreme Court's decision in *United Transportation Union v. State Bar of Michigan*.<sup>38</sup> The union obtained reduced fee arrangements with selected attorneys and recommended its members to these attorneys for representation in FELA cases.<sup>39</sup> In upholding these activities, the Court stated that its decision in *United Mine Workers* protected such arrangements.<sup>40</sup> Relying upon the premises advanced in its three prior decisions, the Court noted that "groups can unite to assert their legal rights *as effectively and economically as practicable*."<sup>41</sup> Moreover, the Court cast doubt upon the validity of limitations on similar arrangements by commenting:

[T]he principle here involved cannot be limited to the facts of this case. . . . [C]ollective 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.<sup>42</sup>

### The Shreveport Experiment

In the wake of Supreme Court approval of group legal arrangements, an experimental project testing the feasibility of legal service plans was instituted in 1971.<sup>43</sup> This project was brought to fruition

<sup>38</sup> 401 U.S. 576 (1971). The union was engaged in activities for the stated purpose of protecting its members from excessive legal fees at the hands of incompetent attorneys. *Id.* at 577.

<sup>39</sup> The attorneys selected and recommended to members had agreed to limit their fees to a maximum of 25% of the recovery. In addition, union members were reimbursed for out-of-pocket expenses and actual time spent in transporting injured members, or their families, to the attorney's office. *Id.* at 577-78.

<sup>40</sup> *Id.* at 585.

<sup>41</sup> *Id.* at 580 (emphasis added).

<sup>42</sup> *Id.* at 585-86 (emphasis added).

<sup>43</sup> See AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, A PRIMER OF PREPAID LEGAL SERVICES 5 (1974). The decision by the American Bar Association to experiment with prepaid plans was the fruit of an intensive study into the feasibility of insurance plans conducted by Professor Preble Stolz of the University of California School of Law at the behest of the ABA Special Committee on the Availability of Legal Services. See February, 1968, Report of ABA Special Committee on Availability of Legal Services, reprinted in REVISED HANDBOOK, *supra* note 2, app. 1A, at 25, 27; Roberts, *The Shreveport Plan for Prepaid Legal Services—A Unique Experiment*, 32 LA. L. REV. 45, 48 (1971) [hereinafter cited as Roberts]. For the findings and conclusions of Professor Stolz's study, see Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 417 (1968). Services under the proposed plan were restricted to the personal affairs of the participant. Preventive law services, which encourage greater utilization of an attorney's counseling services, were stressed as necessary components of such a plan. Thus, the client would discuss his current and proposed transactions and activities with a view toward preventing future legal problems from ever arising. See Roberts, *supra*, at 48-49. For further discussion of insurance concepts and legal services, see Barton,

through the joint efforts of the American Bar Association and the Ford Foundation in cooperation with the Louisiana Bar Association and Laborers' Local 229.<sup>44</sup> The Shreveport Legal Services Corporation, which is currently in operation, offers assistance to some six hundred members of Laborers' Local 229 and their dependents, based upon an open panel system.<sup>45</sup> Benefits under the plan include payment for office consultation on any subject, costs of judicial and administrative proceedings, and out-of-pocket expenses incurred in case preparation.<sup>46</sup> Additionally, a major legal expense benefit protects a client who is the defendant or respondent in litigation.<sup>47</sup>

The experience of the plan to date indicates that most participants take advantage of its benefits for automobile-related problems, real estate transactions, domestic relations matters, and consumer problems.<sup>48</sup>

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*Legal Expense Insurance Plan — A New Approach*, 1956 INS. L.J. 231; Brown, *Legal-Cost Insurance*, 1961 INS. L.J. 84.

<sup>44</sup> The American Bar Association committed \$31,000 toward the underwriting and administrative costs of the plan. The Ford Foundation granted \$75,000 to assure the solvency of the plan for its scheduled two-year test period. February, 1972, Report of ABA Special Committee on Prepaid Legal Services [hereinafter cited as 1972 Report], *reprinted in REVISED HANDBOOK*, *supra* note 2, app. 1D, at 53, 65.

<sup>45</sup> The member may select among the 270 practicing attorneys in Shreveport or any attorney outside the city. *Id.* at 62.

<sup>46</sup> *Id.* at 63-64. The recipient of services under the plan may pay the attorney and thereafter seek reimbursement or payments may be made by the corporation directly to the attorney. Shreveport Bar Association, A Plan For Prepaid Legal Services, *reprinted in PRACTICING LAW INSTITUTE, PREPAID LEGAL PLANS* 279, 299 (1973). The cost to the participant is 2¢ per hour dues checkoff, with a grant from the Ford Foundation underwriting the deficit between member contributions and the anticipated cost of 5¢ to 7¢ per hour. 1972 Report, *reprinted in REVISED HANDBOOK*, *supra* note 2, app. 1D, at 53, 61-62. Under the plan, \$100 per year per member is allocated for office consultation; however, such coverage may not exceed \$25 per visit. Where the need for additional services is indicated, up to \$250 per year worth of research and office work is covered with a \$10 deductible applicable. Coverage also includes allowances of \$325 for court appearances; \$40 for court costs; and \$150 for out-of-pocket case preparation expenses. The first \$25 worth of expenses is borne by the member when he initiates the action. *Id.* See Shreveport Bar Association, A Plan For Prepaid Legal Services, *reprinted in PRACTICING LAW INSTITUTE, PREPAID LEGAL PLANS* 279, 284-89 (1973); National Consumer Center for Legal Services, Group Legal Services: A Summary Paper 4 (1974) [hereinafter cited as NCCLS Summary Paper]; Bartosic & Bernstein, *supra* note 13, at 433-34; Roberts, *supra* note 43, at 51-52. See also Politz, *Prepaid Legal Services — The Shreveport Plan: The Long Sought Answer?*, 7 TRIAL 29 (1971); Yancy, *The Shreveport Experiment in Group Legal Services*, 44 PA. B. ASS'N Q. 236 (1973).

<sup>47</sup> See 1972 Report, *reprinted in REVISED HANDBOOK*, *supra* note 2, app. 1D, at 63-64. Where the client is the defendant or respondent in an action, this benefit covers 80% of the next \$1000 of court expenses incurred in excess of the policy's basic minimum protection. See note 46 *supra*.

<sup>48</sup> A summary of the Shreveport Plan for the period January 1971–December 1972 illustrates the breakdown of cases as follows:

Automobile	27%
Domestic Relations	16%
Real Property	10%
Criminal	7%

In the first two years of operation, the plan was used by 34 percent of the participants with the average claim amounting to \$142.<sup>49</sup> As pre-plan interviews had revealed that the group was, in large part, disinclined to use legal services,<sup>50</sup> these statistics evidence the overwhelming success of the program.

The success and smooth operation of the Shreveport plan demonstrate two important facts. First, such plans can be implemented at a reasonable cost. Second, the middle class is willing to take advantage of such programs. In this regard, it should be noted that the members of Laborers' Local 229 have voted to continue the plan on a voluntary basis.<sup>51</sup>

The Shreveport experiment further exemplifies the movement toward the availability of legal service plans to those desiring such protection. Unions and labor groups have worked untiringly to secure the constitutional right, as recognized by the Supreme Court in *United Transportation Workers*,<sup>52</sup> to organize collectively for legal services. As of 1972, it was estimated that between 1400 and 3000 plans were in operation.<sup>53</sup> Furthermore, the National Consumer Center for Legal Services (NCCLS), a coalition of 32 different consumer trade union groups, was organized in 1972 to promote the growth of prepaid legal services.<sup>54</sup> The NCCLS maintains a clearinghouse to disburse informa-

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Succession (probate)	6%
Retail Credit and Consumer Problems	5%
Bankruptcy	4%
Unemployment Compensation	16%
Miscellaneous (Insurance, Workmen's Compensation, Tort)	9%
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	100%

Politz, *Shreveport Prepaid Legal Plan*, in PRACTICING LAW INSTITUTE, PRE-PAID LEGAL PLANS 273, 277 (1973). The 16% figure for Unemployment Compensation cases is abnormally high and is attributable to a strike situation during 1971. See 1972 REPORT, reprinted in REVISED HANDBOOK, *supra* note 2, app. 1D, at 67.

<sup>49</sup> Politz, *Shreveport Prepaid Legal Plan*, in PRACTICING LAW INSTITUTE, PRE-PAID LEGAL PLANS 273, 277 (1973).

<sup>50</sup> See 1972 Report, *supra* note 44, reprinted in REVISED HANDBOOK, *supra* note 2, app. 1D, at 66.

<sup>51</sup> See NEWSWEEK, June 10, 1974, at 48, col. 1. The cost of plan membership will be approximately \$40 per family per year.

<sup>52</sup> See notes 38-42 and accompanying text *supra*.

<sup>53</sup> See 1972 Report, *supra* note 44, reprinted in REVISED HANDBOOK, *supra*, note 2, app. 1D, at 59. California registration requirements revealed that there were 210 group plans in operation serving members estimated at 300,000 to 750,000. *Id.* California's Rules of Professional Conduct requires filing by members of the state bar who furnish legal services to individual members of a group pursuant to an agreement with the group. A report must be filed within 60 days of the making of the agreement stating the name and purpose of the group, the number of its members, and a general description of the type of services to be offered. CAL. RULES OF PROFESSIONAL CONDUCT, Rule 20 (Deering Supp. 1974).

<sup>54</sup> See AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON PRE-PAID LEGAL SERVICES, A

tion to groups interested in developing or buying legal services, and has, through its lobbying operations, been instrumental in labor-related legal service legislation.<sup>55</sup>

### Legislative Encouragement

In August, 1973, section 302(c) of the Labor Management Relations Act of 1947,<sup>56</sup> also known as the Taft-Hartley Act, was amended to permit a new fringe benefit in collective bargaining agreements.<sup>57</sup> Section 302(c) specifically enumerates which payments by employers to employee representatives are permissible, *e.g.*, payments to trust funds for medical care, retirement pensions, education allowances, apprenticeship programs, life and accident insurance, and child day care centers. The amendment to section 302(c) permits the establishment of jointly administered management-labor trust funds to defray the cost of legal services.<sup>58</sup>

The amendment neither requires the establishment of such programs, nor does it regulate such plans. Within the limits contained in the section itself, the parties, through collective bargaining, can determine the types of benefits and the method in which they will be provided, *i.e.*, by open or closed panels.<sup>59</sup> The only prohibition contained within the amendment is a ban on the utilization of funds for the initiation of any suit bearing directly on the employer-employee relation.<sup>60</sup> The amendment is in no way intended to affect the traditional attorney-client relationship or the duties owed thereunder. In view of such legislation, the continued growth of legal service plans is likely.<sup>61</sup>

PRIMER OF PREPAID LEGAL SERVICES 7 (1974); Fellers, *The Challenges of Supplying Legal Services*, 60 A.B.A.J. 43, 44 (1974).

<sup>55</sup> NATIONAL CONSUMER CENTER FOR LEGAL SERVICES, *PREPAID LEGAL SERVICES: AN IDEA WHOSE TIME HAS COME* (1974).

<sup>56</sup> 29 U.S.C. § 186(c)(1)-(7) (1970).

<sup>57</sup> Pub. L. No. 93-95, 87 Stat. 314 (Aug. 15, 1973). See 171 N.Y.L.J. 61, Jan. 30, 1974, at 1, col. 3, wherein Theodore W. Kheel, labor mediator, described the amendment as the most significant development in labor relations in his lifetime.

<sup>58</sup> 2 U.S. CODE CONG. & AD. NEWS 2004, 2005-06 (1973). The amendment was in response to a "growing recognition" by Congress of the inadequacy of present methods of delivery of legal services to the middle class and the strong sentiment that legal service programs are a major step in alleviating the problem. The legislation was also intended to increase productivity by reducing time lost and improving morale. *Id.* at 2006.

<sup>59</sup> *Id.* at 2007.

<sup>60</sup> *Id.* However, legal representation in workmen's compensation cases is specifically excepted from this prohibition. This exception is not meant to require the use of funds for such purposes, but rather to permit employers and unions to so utilize the funds if they wish. *Id.*

<sup>61</sup> Numerous legal service plans are currently either in the planning stage or at the point of commencing operations. For example, approval was recently given by the Florida

## RECENT DEVELOPMENTS — THE "HOUSTON AMENDMENTS"

At its meeting in Houston, Texas, in February, 1974, the ABA substantially amended provisions of the Code of Professional Responsibility regulating professional conduct with respect to prepaid and group legal services. The Disciplinary Rules enacted do not, in and of themselves, directly regulate legal service organizations. They do, however, regulate attorney conduct and define the types of organizations with which a lawyer may legitimately associate. Since no legal service plan can operate without the participation of attorneys, the Disciplinary Rules strongly influence the organization of such plans.

The amendments, commonly referred to as the "Houston Amendments," altered Disciplinary Rules (DR) 2-101, 2-103, and 2-104, provisions dealing with advertising, recommendations of professional employment, and suggestions of the need for legal services. These revisions are significant in two respects. First, they demonstrate a more relaxed attitude toward closed plans by the ABA. The Association has moved from its traditional position of outright hostility to the belief that such plans can be structured within the standards of the legal profession.<sup>62</sup> Second, the provisions demonstrate a recognition of the "desirability of having . . . legal services plans other than those whose activities are limited to the controlling constitutional interpretation."<sup>63</sup>

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Bar Board of Governors to the United Teachers of Dade for a one-year pilot project covering 9,000 public school teachers in Dade County, Florida. The annual cost per member is \$35 and covers up to four consultation interviews a year with a panel attorney. The member is also provided complete legal assistance in employment-related matters. This plan exemplifies the merging of the terms group legal services and prepaid legal services. The interviews are prepaid, yet the plan services a group on a closed panel basis. If a member chooses not to use the staff attorney, he does so at his own expense. See 1 FLA. B. NEWS, July 1974, at 1, col. 5.

On September 30, 1974, the State of New York began operation of a prepaid legal plan. The Municipal Employees Legal Service Fund, Inc., provides legal assistance, through five staff attorneys, to 26,000 state and city employees and their families. Under the traditional definition, it is a group legal service plan, *i.e.*, it involves a select group and closed panel. 172 N.Y.L.J. 62, Sept. 26, 1974, at 1, col. 3; FORD FOUNDATION LETTER, Sept. 15, 1974, at 1, col. 3.

<sup>62</sup> See Smith, *President's Page*, 60 A.B.A.J. 369, 394 (1974). The resolution adopted at the ABA midyear meeting acknowledged the need for all types of plans, both open and closed, and stated in part:

Further Resolved, That the American Bar Association does not oppose, but on the contrary encourages, the development of any prepaid legal service plan designed to make legal services more truly available to individuals if it provides assurance of quality services at reasonable cost and is consonant with the highest professional standards and the best interest of the public.

60 A.B.A.J. 446, 449 (1974). See also ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 320 (1968), which states:

It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity.

<sup>63</sup> Smith, *President's Page*, 60 A.B.A.J. 369, 394 (1974).

*Distinguishing Qualified from Nonqualified Organizations*

The amendments to DR 2-103(D),<sup>64</sup> which describe the types of organizations an attorney may assist, divide legal service organizations

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<sup>64</sup> DR 2-103(D), as amended, provides in part:

(D) A lawyer shall not knowingly assist a person or organization that furnishes, or pays for legal services to others, to promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as permitted in DR 2-101(B). However, this does not prohibit a lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, from being employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, if his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

- (1) A legal aid office or public defender office . . . .
- (2) A military legal assistance office.
- (3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
- (4) A bar association representative of the general bar of the geographical area in which the association exists or an organization operated, sponsored or approved by such a bar association.
- (5) Any other organization that furnishes, renders, or pays for legal services to its members or beneficiaries, provided the following conditions are satisfied:
  - (a) As to such organizations other than a qualified legal assistance organization:
    - (i) Such organization is not organized for profit and its primary purposes do not include the recommending, furnishing, rendering of or paying for legal services.
    - (ii) Said services must be only incidental and reasonably related to the primary purposes of such organization.
    - (iii) Such organization or its parent or affiliated organization does not derive a profit or commercial benefit from the rendition of legal services by the lawyer.
    - (iv) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.
    - (v) Any of the organization's members or beneficiaries is free to select counsel of his or her own choice, provided that if such independent selection is made by the client, then such organization, if it customarily provides legal services through counsel it preselects, shall promptly reimburse the member or beneficiary in the fair and equitable amount said services would have cost such organization if rendered by counsel selected by said organization.
    - (vi) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.
    - (vii) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.
    - (viii) The articles of organization, by-laws, agreement with counsel, and the schedule of benefits and subscription charges are filed along with any amendments or changes within sixty days of the effective date with the court or other authority having final jurisdiction for the discipline of lawyers within the state, and within sixty days of the end of each fiscal year a financial statement showing, with respect to its legal service activities, the income received and the expenses and benefits paid or incurred are filed in the form such authority may prescribe.

into two categories: qualified legal assistance organizations,<sup>65</sup> and those other than qualified legal assistance organizations. Significant consequences for both the assisting attorney and the organization itself flow from qualified or nonqualified status.<sup>66</sup>

An organization may be classified as a "qualified legal assistance organization" in one of two ways. First, qualified status attaches to those organizations enumerated in DR 2-103(D)(1)-(4). The list includes legal aid, public defender, and military legal assistance offices, as well as bar-approved lawyer referral services.<sup>67</sup> Also included are "organization[s] operated, sponsored or approved" by "a bar association representative of the general bar of the geographical area in which the association exists."<sup>68</sup> The latter provision offers the only means under the first method whereby a legal service organization operating a group or prepaid plan can achieve qualified status. This method of qualification is not dependent upon structure or form, but rather the sole criterion is operation, sponsorship, or approval by a bar association. Theoretically, any plan,

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- (ix) Provided, however, that any non-profit organization which is organized to secure and protect Constitutionally guaranteed rights shall be exempt from the requirements of (v) and (viii).
  - (b) As to a qualified legal assistance organization (not described in DR 2-102 [sic] (D)(1) through (4)):
    - (i) The primary purposes of such organization may be profit or non-profit and it may include the recommending, furnishing, rendering of or paying for legal services of all kinds.
    - (ii) The member or beneficiary, for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.
    - (iii) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.
    - (iv) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

ABA CODE DR 2-103(D) (effective Mar. 1, 1974).

<sup>65</sup> The definitional section accompanying the Code was amended by adopting the following:

"Qualified legal assistance organization" is an organization described in DR 2-103(D)(1) through (4) or which recommends, furnishes, renders or pays for legal services to its members or beneficiaries under a plan operated, administered or funded by an insurance company or other organization which plan provides that the members or beneficiaries may select their counsel from lawyers representative of the general bar of the geographical area in which the plan is offered.

ABA CODE DEFINITION No. 8 (effective Mar. 1, 1974).

<sup>66</sup> See text accompanying notes 77-85 *infra*.

<sup>67</sup> ABA CODE DR 2-103(D)(1)-(3).

<sup>68</sup> *Id.* DR 2-103(D)(4). The following definition was also added to the Code:

A bar association representative of the general bar of the geographical area in which the association exists is a bar association, the membership of which is open to any lawyer in good standing in the geographical area and which has a membership at least equal to the lesser of three hundred members or twenty percent of the lawyers licensed to practice in the geographical area.

*Id.* DEFINITION No. 7.

open or closed, could qualify under this approach. However, programs operated or sponsored by bar associations, such as the Shreveport plan,<sup>69</sup> typically involve open panels. Furthermore, the organized bar has yet to operate, sponsor, or approve a closed panel and, in light of its long-standing opposition to such plans, it is highly unlikely that it will do so in the future.<sup>70</sup> Moreover, Ethical Consideration (EC) 2-33, adopted in conjunction with the Houston Amendments, specifically warns that

an attorney interested in maintaining the historic traditions of the profession . . . should carefully consider the risks involved before accepting employment by groups under plans which do not provide their members with a free choice of counsel.<sup>71</sup>

This Ethical Consideration, together with a resolution adopted at the ABA mid-year meeting "urging state and local bar associations to design free choice of lawyer plans of prepaid legal service,"<sup>72</sup> lend little support to the argument that a bar association would sanction the utilization of a closed panel.

The second method for attaining qualified status is dependent upon the panel structure. The plan's beneficiaries or members must be allowed to select counsel from "lawyers representative of the general bar of the geographical area in which the plan is offered."<sup>73</sup> Lawyers representative of the general bar are defined as "lawyers in good standing numbering not less than *the greater of three hundred or twenty percent* of those licensed to practice in the geographical area."<sup>74</sup> Thus, the panel must consist of an absolute minimum of 300 attorneys.

In terms of open versus closed panels, this method of achieving

<sup>69</sup> See text accompanying notes 43-51 *supra*.

<sup>70</sup> Cf. notes 36 *supra* & 71-72 *infra* and accompanying text.

<sup>71</sup> EC 2-33 grudgingly gives recognition to the fact that certain legal service arrangements not allowing free choice of attorney selection have been sanctioned by the Supreme Court. However, it capsulizes the basic arguments against lawyer participation in closed plans. After reciting the fundamental principles of the profession, *i.e.*, integrity, competence and total devotion to the interests of the client, it states that "[t]here is substantial danger that lawyers rendering services under . . . [closed] plans . . . will not be able to meet these standards." *Id.* The foreboding thoughts expressed in the Ethical Consideration are that

[t]he independence of the lawyer may be seriously affected by the fact that he is employed by the group and by virtue of that employment cannot give his full devotion to the interest of the member he represents . . . . It is probable that attorneys employed by groups will be directed as to what cases they may handle and in the manner in which they handle the cases referred to them. It is also possible that the standards of the profession and quality of legal service to the public will suffer because consideration for economy rather than experience and competence will determine the attorneys to be employed by the group.

ABA CODE EC 2-33.

<sup>72</sup> 60 A.B.A.J. 446, 449 (1974).

<sup>73</sup> ABA CODE DEFINITION No. 8. See note 65 *supra*.

<sup>74</sup> *Id.* DEFINITION No. 9 (emphasis added).



qualified status virtually necessitates that the organization employ an open panel structure, permitting the member to select any attorney in the area. By definition, open plans are qualified because of their free selection characteristics. Freedom to select any attorney would certainly appear to encompass the right to choose from lawyers representative of the general bar.

For a closed panel to qualify under this approach, an extremely large panel would be required. In numbers alone, this could prove unrealistic for an organization in both sparsely and densely populated geographical areas. The requisite number of lawyers — no less than 300 — in a thinly populated area could conceivably comprise the area's entire complement of attorneys.<sup>75</sup> In a densely populated area, the minimum panel membership based on the twenty percent requirement, could reach such staggering proportions as to make it impossible to organize a closed plan.<sup>76</sup> Even if a closed panel organization could enter into fee arrangements with a sufficiently large group of attorneys, the distinction between open and closed panels in terms of selection would virtually disappear. Such an organization would be utilizing a closed panel only in theory: permitting members to select from no less than 300 attorneys would, in effect, create an open panel.

### *Ramifications of Qualified v. Nonqualified Status*

The distinction between qualified and nonqualified status is important to the organization because of the regulatory consequences under the amended Code of Professional Responsibility. Qualified plans have a distinct advantage over nonqualified plans with respect to organization, operation, and promotion. A qualified or open panel plan may be offered by an organization operating on a profit basis, such as an insurance company, and may include the recommending or furnish-

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<sup>75</sup> Under such circumstances, such an arrangement would constitute an open panel structure.

<sup>76</sup> For example, New York's Municipal Employees Legal Services Fund, Inc., is a pilot prepaid legal service plan, organized on a closed panel basis. The Fund offers legal services to 26,000 members of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, through five staff lawyers aided by paraprofessionals. The program is statewide. 172 N.Y.L.J. 62, Sept. 26, 1974, at 1, col. 3. Since the membership of the New York State Bar Association now exceeds 22,000, the required membership of such a closed plan under the "twenty percent" rule would, at minimum, exceed 4,400. Other closed panel plans, likewise, currently have a small number of staff attorneys representing a large number of potential clients. For example, Laborers Local 423, Columbus Ohio, has three staff attorneys representing 2,600 members; Laborers District Council Legal Services Plan, Washington, D.C., has seven staff attorneys representing 26,000 members. See NCCLS Summary Paper, *supra* note 46, at 3-4.

ing of legal services of any kind whatsoever.<sup>77</sup> Organizations failing to attain qualified status, on the other hand, must be nonprofit in nature and the legal services provided must be incidental and reasonably related to the purpose of the organization.<sup>78</sup> Furthermore, neither the nonqualified organization nor its parent or affiliate may "derive a profit or commercial benefit from the rendition of the legal services."<sup>79</sup> Arguably, this provision would prevent an employer from organizing a closed panel plan for his employees, even if provided without any cost to them, since the employee fringe benefit would be an incentive to work, and, thus, a commercial benefit to the employer. Nonunionized workers, generally lacking the strong collective drive necessary to organize closed plans on their own and depending, by necessity, on the fringe benefit packages offered by their employers, will suffer the most hardship under such a limitation.

DR 2-103(D)(5) further restricts the operation of nonqualified organizations by affording the recipient of legal services the option to select counsel of his choice. If the legal services under the program are customarily provided through preselected counsel and the attorney chosen is outside the panel, the organization must reimburse the member or beneficiary an amount equal to the cost of such services if rendered by preselected counsel.<sup>80</sup> This provision, which removes the only distinction between open and closed plans, burdens the closed plan with added administrative costs.<sup>81</sup> The rule also requires the nonqualified organization to file with the court its bylaws, agreement with counsel, schedule of benefits, and subscription charges, as well as financial statements showing income received and benefits and expenses paid or in-

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<sup>77</sup> ABA CODE DR 2-103(D)(5)(b)(i).

<sup>78</sup> *Id.* DR 2-103(D)(5)(a)(i), (ii).

<sup>79</sup> *Id.* DR 2-103(D)(5)(a)(iii).

<sup>80</sup> *Id.* DR 2-103(D)(5)(a)(v).

<sup>81</sup> Under the traditional group legal service plan, utilizing reduced fee arrangements, the organization would incur additional administrative costs arising from processing claims and maintaining records for the services rendered by "outside" counsel. Under more contemporary closed prepaid plans which retain counsel on a salary basis, the organization would be faced with substantial additional legal fees in addition to the aforementioned administrative burden. Since salaries are for the most part a fixed cost—perhaps flexible upward but never downward—reimbursements to clients for "outside" counsel would clearly represent an additional cost.

Opponents of closed plans may argue that the added administrative costs are minimal and would not place an undue burden on such arrangements. Yet, such a burden apparently would require a compelling justification when applied to a group seeking to secure constitutionally protected rights. It is evident that the drafters of the Houston Amendments were sensitive to this fact, since such groups are specifically exempted from this provision. *See id.* DR 2-103(D)(5)(a)(ix).

curred.<sup>82</sup> However, these provisions are inapplicable to nonprofit plans organized to secure constitutionally guaranteed rights.<sup>83</sup>

DR 2-104, relating to suggestions of the need for legal services, also tends to discriminate against nonqualified organizations. The amended provision prohibits any lawyer connected with a nonqualified plan from accepting employment from a member or beneficiary on any matter outside the scope of the program's coverage if such individual has previously been a client of the attorney under the plan.<sup>84</sup> This provision is significant to the group organizing a plan in terms of attracting lawyer participation. No similar prohibition exists where the member or beneficiary has been a client under a qualified plan.<sup>85</sup>

The remaining provisions of DR 2-103(D) affected by the Houston Amendments are general in scope and apply uniformly to both qualified and nonqualified plans. Thus, in both cases the attorney-client relationship is to be preserved by a mandate that the member or beneficiary be recognized as the client of the lawyer rather than the organization rendering or paying for the services.<sup>86</sup> The provision thereby seeks to avoid conflict of interest questions that could arise where an organization is the moving force in bringing the member and attorney together and a later suit involves the interests of the organization. The attorney in such situations would have a duty to work in the best interests of his client, the member or beneficiary, irrespective of the position of the organization. Additionally, the lawyer cannot initiate either type of organization for his own or another's financial benefit.<sup>87</sup> Finally, DR 2-101(B) was amended to permit a lawyer affiliated with a prepaid or group legal service organization within DR 2-103(D) to assist such organization in using commercial publicity to describe the nature and availability of its legal services, provided the advertising does not identify any lawyer by name.<sup>88</sup>

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<sup>82</sup> *Id.* DR 2-103(D)(5)(a)(viii).

<sup>83</sup> *Id.* DR 2-103(D)(5)(a)(ix).

<sup>84</sup> DR 2-104(A)(3) was amended by adding the following sentence:

A lawyer whose legal services are currently being recommended, furnished or paid for by a legal assistance organization defined in DR 2-103(D)(5)(a) [nonqualified] may not accept employment as a private practitioner from a member or beneficiary of such a legal assistance organization in any matter not covered by the benefits provided under the plan of such organization when such member or beneficiary has been his client under such plan.

ABA CODE DR 2-104(A)(3).

<sup>85</sup> *Id.* DR 2-104(A)(2).

<sup>86</sup> *Id.* DR 2-103(D)(5)(a)(iv), (b)(ii). These provisions are a carry-over from the former DR 2-103(D)(5)(d).

<sup>87</sup> *See id.* DR 2-103(D)(5)(a)(vii), (b)(iv).

<sup>88</sup> DR 2-101(B), as amended, provides in pertinent part:

[A] lawyer recommended by, paid by, or whose legal services are furnished by, any of the offices or organizations enumerated in DR 2-103(D)(1) through (5)

In sum, the Houston Amendments evidence a changing attitude by the legal profession toward legal service organizations.<sup>89</sup> The former Disciplinary Rules sought to limit such plans within the narrowest bounds possible.<sup>90</sup> The new Rules, along with newly-adopted resolutions, place only minor restrictions on open panel and other qualified plans and actively encourage their development.<sup>91</sup> With respect to closed plans, the new Rules represent a grudging acceptance of their existence. However, because of the impracticalities of the twenty percent rule, it is virtually impossible for such plans to become qualified and thereby avoid the restrictions placed on nonqualified plans.<sup>92</sup> The alternative method for achieving the favored status — approval by a bar association — gives the association tremendous leverage,<sup>93</sup> thereby diminishing the likelihood of closed panels acquiring such status.

#### SHORTCOMINGS OF THE HOUSTON AMENDMENTS

The Houston Amendments have been severely criticized for their discriminatory treatment of closed panels.<sup>94</sup> One commentator asserted that the amendments are patently unconstitutional as they fail to meet the requirements "of a precise, narrowly-defined regulation designed to protect a clearly perceived valid public interest."<sup>95</sup> The validity of

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may authorize or permit or assist such organization to use such means of commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(6) In private communications by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), along with the biographical information permitted under DR 2-102(A)(6), in response to inquiries from a member or beneficiary of such office or organization.

*Id.* DR 2-101(B)(6).

<sup>89</sup> See notes 62-63 and accompanying text *supra*.

<sup>90</sup> See note 36 and accompanying text *supra*.

<sup>91</sup> See notes 65-85 and accompanying text *supra*.

<sup>92</sup> See notes 73-76 and accompanying text *supra*.

<sup>93</sup> Such power, as labor representatives point out, "gives unfettered authority to a bar to give a 'good housekeeping' seal of approval to any plan which pleases it." Memorandum of Senator John V. Tunney, Chairman of the Subcomm. on Representation of Citizen Interests, to State and Local Bar Associations, May 28, 1974, at 5 [hereinafter cited as Tunney Memorandum] (on file in the St. John's Law Review Office), quoting Statement by Robert Connerton, General Counsel of Laborers' International Union of North America, AFL-CIO, Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 15, 1974.

<sup>94</sup> See, e.g., 172 N.Y.L.J. 19, July 26, 1974, at 1, col. 6. Critics, such as Stephen L. Kass, Chairman of the New York City Bar's Special Committee on Consumer Affairs characterized the Houston Amendments as "an unworkable and unwise attempt to decide economic and operational questions relating to prepaid programs under the guise of ethical considerations" and called for their rejection "in the strongest possible terms." *Id.* at 4, col. 6.

<sup>95</sup> Statement by F. William McCalpin, past President of the ABA Special Committee

this statement, however, depends on whether the restrictions placed on nonqualified or closed plans are justified in terms of protecting a substantial interest.<sup>96</sup> The substantial interest sought to be protected is the preservation of the attorney-client relationship. Heated debate has raged between proponents and opponents of open and closed plans concerning the advantages and disadvantages of each type and their ultimate effect on that relation.<sup>97</sup>

### *The Necessity for Both Open and Closed Panels*

Closed panels are tailored to meet the needs of a group or association. Both in theory and from the sparse statistical data available, they prove to be more economical than open panels.<sup>98</sup> The organization utilizing a closed panel has the ability to enter into reduced fee arrangements with selected attorneys. Where the organization maintains its own salaried staff of attorneys, costs can be further reduced by the utilization of paraprofessionals to handle clerical functions.<sup>99</sup> Addition-

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on Prepaid Legal Services, Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 15, 1974, summarized in Tunney Memorandum, *supra* note 93, at 9, 10. He also noted that should the amendments be legally challenged, courts would require a strong justification for a rule limiting the first amendment right to collectively organize for group legal services. This is especially true, he believed, because such a rule has far less public input than a legislative enactment and does not have the same presumption of constitutional validity. *Id.* at 10-11. See NAACP v. Button, 371 U.S. 415 (1963), wherein the Court stated that there must be a "substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which . . . [the state] has imposed." *Id.* at 444.

<sup>96</sup> See NAACP v. Button, 371 U.S. 415 (1963), wherein Justice Brennan, quoting earlier decisions, stated:

'[W]here there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. . . .'  
 '[R]egulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.'

*Id.* at 439, quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960), and *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961).

<sup>97</sup> See, e.g., 172 N.Y.L.J. 19, July 26, 1974, at 1, col. 6; 172 N.Y.L.J. 17, July 24, 1974, at 1, col. 6.

<sup>98</sup> See NCCLS Summary Paper, *supra* note 46, at 3. A legal services study by the Federal Office of Economic Opportunity (OEO) highlighted the cost variations between open and closed panels with respect to the costs of divorces and bankruptcies. Cost data for the Shreveport Laborers' Program was added by the National Consumer Center for Legal Services. See notes 43-55 and accompanying text *supra*. The figures were as follows:

Program	Cost of Divorce	Cost of Bankruptcy	Delivery Mechanism
Shreveport	\$258.47	\$330.57	Open Panel
Wisconsin Judicare	182.89	266.70	Open Panel
Maine	27.49	35.43	Closed Panel
Michigan	38.59	45.92	Closed Panel
Colorado	58.50	181.89	Closed Panel

NCCLS Summary Paper, *supra* note 46, at 2-3.

<sup>99</sup> This is not to say that open panel attorneys will not utilize the services of para-

ally, preselection of attorneys allows the group to choose those who specialize in areas where legal advice is generally most needed by the group.<sup>100</sup>

The subscription costs of an open panel will inevitably be higher. These panels will be subject to lawyers' fees regulated in large part by minimum fee schedules.<sup>101</sup> Furthermore, not only may the administrative costs be greater, but these plans may fall prey to the abusive billing practices that have accompanied open panel medical plans.<sup>102</sup> With respect to closed panels, it is argued that the "lawyer working on a retainer salary for a group has no motivation to inflate the amount of work that he does for any particular client."<sup>103</sup>

Closed panels can also operate more efficiently in delivering legal services by employing the organization's media to educate the members as to their rights and duties.<sup>104</sup> Furthermore, frequent contact with the attorney and development of preventive legal care programs can be encouraged and facilitated with greater ease.<sup>105</sup> The closed plan's structure can foster confidence in the legal system by permitting the client to become more familiar and comfortable with the group's attorney.<sup>106</sup> Finally, the structure provides a greater opportunity for reviewing group problems, maintaining class actions, and proposing legislation in aid of the group's position.<sup>107</sup>

An open panel of virtually unlimited size is ill-equipped to handle the massive educational drive that must accompany such a program.

professionals. In the case of the closed plan with salaried staff attorneys, the cost savings can be used to reduce the cost of the services to the consumer. In the case of the open plans, attorneys are guided by minimum fee schedules, and consequently, the cost savings from the utilization of paraprofessionals will only serve to increase the lawyers' profit margin. See NCCLS Summary Paper, *supra* note 46, at 2.

<sup>100</sup> See Greene, *Prepaid Legal Services: More Than an Open and Closed Case*, 22 CLEV. ST. L. REV. 425, 434 (1973) [hereinafter cited as Greene]. See also NCCLS Summary Paper, *supra* note 46, at 2. The closed panel can also employ nonlegal specialists, such as social workers and marriage counselors, as part of its preventive legal care program and thus offer a wider range of services. See, e.g., Municipal Employees Legal Services Fund, Inc., *Municipal Employees Legal Services: Schedule of Benefits* (1974).

<sup>101</sup> See note 7 and accompanying text *supra*.

<sup>102</sup> See Greene, *supra* note 100, at 434.

<sup>103</sup> *Id.* quoting Stolz, *Insurance for Legal Services*, 35 U. CHI. L. REV. 417, 472 (1968). For a discussion of the experience of the medical profession with prepaid medical plans and the development of prepaid legal services, see Statement of New York State Trial Lawyers Association, presented by Melvin Block, President, Before the New York Temporary State Comm'n on Living Costs and the Economy, Dec. 12, 1973 [hereinafter cited as Trial Lawyers Association Statement] (on file in St. John's Law Review Office).

<sup>104</sup> See Bartosic & Bernstein, *supra* note 13, at 432. The media used to help educate the members would include company trade and union newsletters, magazines, and journals.

<sup>105</sup> See Greene, *supra* note 100, at 433.

<sup>106</sup> *Id.*

<sup>107</sup> See Bartosic & Bernstein, *supra* note 13, at 432.

For example, insurance companies developing profit-oriented legal service plans apparently would be restricted to marketing open panel plans under the amendments. Such companies do possess the resources necessary for educating consumers of legal services. However, one would hardly expect an insurance company to encourage claims.<sup>108</sup> Bar associations could provide the answer, but their past performance tends to indicate that this is unlikely.<sup>109</sup> Additionally, the attorney under the open panel will be ill-suited to educate group members. He renders services to the client as a distinct individual without any group ties. Though there is feedback to the group in terms of bills and information as to the type of services rendered, the attorney will not develop an awareness of group needs unless he handles a significant portion of these clients. The failure of the open panel structure to present the attorney with an overall picture of the group's needs, together with the realization that such attorneys will be numerous and spatially separated, adds to the difficulty of coordinating group educational programs.<sup>110</sup>

Despite the stated advantages of the closed panel, open plan advocates maintain that open panels present the only viable means of preserving the free choice of attorneys. They contend that such freedom of selection is a valuable right which should not be denied the consumer of legal services. To the contrary, closed panel proponents argue that relinquishing the right of free choice of counsel is not too high a price to pay for the economy that can be achieved with preselection. Further, they contend that quality need not be sacrificed, but rather that employment of staff attorneys permits better control of both costs and quality.<sup>111</sup> It is argued that the preselection process permits the organization to choose highly skilled practitioners while allowing the member to reap the benefits of specialization.<sup>112</sup>

Perhaps too much emphasis is being placed upon "freedom of choice" and insufficient attention given to the class of people to whom such services are directed.<sup>113</sup> As a general rule, recipients of the benefits

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<sup>108</sup> See Greene, *supra* note 100, at 432.

<sup>109</sup> *Id.* at 432-33. But see Edley, *Contributions of the Organized Bar*, 45 PA. B. ASS'N Q. 353, 357 (1974), wherein the author notes that the bar has used nationwide television advertising in connection with the promotion of lawyer referral services.

<sup>110</sup> See Bartosic & Bernstein, *supra* note 13, at 432.

<sup>111</sup> See NCCLS Summary Paper, *supra* note 46, at 2.

<sup>112</sup> See text accompanying notes 99-100 *supra*.

<sup>113</sup> Historically, freedom of choice has been protected by the legal profession in order to insure the client the highest quality of legal services at the lowest possible price. Free choice promotes competition among lawyers and thereby raises the standards of the profession. Yet, in many areas, the bar has seen fit to forego freedom of choice in order to achieve some more socially desirable goal. For example, there is no freedom of choice for the indigent who turns to the legal aid clinic for assistance. This principle also re-

are persons who have not had occasion in the past to use professional legal services. Freedom of choice for these people would be an illusory benefit.<sup>114</sup> Since lawyers may not advertise,<sup>115</sup> many clients will make their choice without the aid of any information as to the attorney's qualifications or specializations.<sup>116</sup> Most often, a person, upon realizing he has a legal problem, will not know to whom he should turn for assistance. Frequently, he will be referred by a friend to an attorney with whom he has had no previous contact. At this point, he is in no better or worse position than he would have been under an open or closed plan.<sup>117</sup> The experience of the Shreveport experiment<sup>118</sup> tends to indicate that the group merely replaces the friend as the source of referral.<sup>119</sup> When it is recognized that freedom of choice plays little or no part in such individual's selection of a lawyer, the benefits of the closed panel become manifest. He has available to him a source of referral to services comparable to those of an open panel but at a more economical price.<sup>120</sup>

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ceives little consideration in the lawyer referral systems of many bar associations. In fact, under public liability automobile insurance, the practice of requiring the automobile driver to accept assigned counsel when sued is sanctioned by the American Bar Association Rules of Ethics. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 282 (1950).

It must be noted that the client can always choose not to use the benefits under the closed plan and can go to a lawyer of his choice. See Trial Lawyers Association Statement, *supra* note 103, at 15-17.

<sup>114</sup> See note 117 and accompanying text *infra*.

Of course, freedom of choice will tend to be important when the recipients constitute a class of legally educated individuals who have probably had occasion to develop lawyer contacts. Under such circumstances, freedom of choice becomes a real benefit, making an open panel desirable.

<sup>115</sup> See ABA CODE DR 2-104.

<sup>116</sup> See Bartosic & Bernstein, *supra* note 13, at 427.

<sup>117</sup> As one commentator has keenly noted:

How free, then, is the choice of the individual? Can it not also be asserted that for many there is a certain freedom in not having to choose; in knowing that the firm which handles the legal work for your group is staffed by competent attorneys specializing in the area of your needs? To those who presently have little inclination or understanding to consult with an attorney when needed, life can hold far more tragic consequences than those attendant to the loss of this largely illusory "freedom."

Greene, *supra* note 100, at 437-38.

Melvin Block, President of the New York State Trial Lawyers Association, believes that this freedom of choice is the right of the client and not of the lawyer. Recognizing this tenet, he suggests that any feasible method be utilized to serve the consumer-client on a prepaid basis. Full freedom of choice can only be achieved by permitting the consumer to choose the type of plan he desires. "*For the legal profession to deny the consumer-client this right would be tantamount to denying him freedom of choice.*" Trial Lawyers Association Statement, *supra* note 103, at 16 (emphasis in original).

<sup>118</sup> See notes 43-55 and accompanying text *supra*.

<sup>119</sup> See Greene, *supra* note 100, at 437.

<sup>120</sup> Many middle class Americans will have access to closed panels through union affiliation and other group membership. An equally large number may lack such group ties and insurance companies would provide the sole access to legal service plans. How-



Open panel partisans argue that there is more at stake than just the free choice of counsel. It is contended that the quality of legal services is being sacrificed for the sake of economy. Moreover, it is argued that the closed panel interferes with the traditional attorney-client relationship since the participating attorney may have mixed feelings as to whom he owes allegiance.<sup>121</sup> To be sure, it is essential that the practitioner exercise his independent professional judgment on behalf of his client without interference or control by any organization or other person.<sup>122</sup> Reflecting this tenet, the recent amendment to the Taft-Hartley Act prohibits maintenance of suits under the plan by members against the employer or the union arising out of matters other than workmen's compensation claims.<sup>123</sup> This prohibition is intended to prevent the lawyer from being placed in a compromising position between his client and employer, *i.e.*, the organization or union. Similar provisions in other plans may allay the fears of closed panel opponents in this regard.

It is apparent from this discussion that valid arguments supporting each type of plan can be advanced. Thus, the primary purpose behind legal service plans, *viz.*, to provide legal services at a reasonable cost, must be stressed. Toward this end, all plans, closed or open, group or prepaid, are necessary and appropriate in fulfilling the profession's goal of making legal services fully available.<sup>124</sup> Strict regulation of closed

ever, under the Code revision, insurance companies and other profit-making organizations would, in all probability, be barred from marketing closed plans. See ABA CODE DR 2-103(D)(5)(a)(i). Thus, many persons, *e.g.*, white collar workers who lack the collective impetus of a union, though maintaining the illusory benefit of free choice of counsel, will be denied the substantial economic benefits flowing from a closed panel program.

In defense of the limitation on profit-making organizations devoted exclusively to the rendition of legal services, Cullen Smith and Frederick G. Fisher, Chairman and Chairman-Elect of the ABA Section on General Practice, respectively, stated that its purpose is to prevent such organizations, as well as private law firms, from advertising legal services and soliciting business. Commercialization of the legal profession would not, in their opinion, improve public confidence in our system of justice nor increase the availability of quality legal services. Tunney Memorandum, *supra* note 93, at 8.

<sup>121</sup> See note 71 *supra*.

<sup>122</sup> See ABA CODE DR 2-103(C)(2)(b), which requires that

[t]he lawyer [must remain] free to exercise his independent professional judgment on behalf of his client without direction or regulation by the organization or any person connected with it.

Pub. L. No. 93-95, 87 Stat. 314 (Aug. 15, 1973).

<sup>123</sup> The amendment in pertinent part provides:

No such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workmen's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act.

*Id.*

<sup>124</sup> See 60 A.B.A.J. 446, 449 (1974).

plans through the Code of Professional Responsibility is inappropriate and should best be left to the legislature.<sup>125</sup> The legal profession would better serve the public by channeling its energies toward educating middle income groups as to the types and benefits of all plans available.

### *Antitrust Considerations*

In addition to evoking debate by nongovernmental parties, the Houston Amendments have elicited a great deal of concern from the Antitrust Division of the Department of Justice.<sup>126</sup> The Department's challenge to the amendments is not aimed at the right of bar associations to regulate conduct, but rather, at the restrictions which unduly inhibit competition and which are overly broad in terms of the desired goal.<sup>127</sup> It is contended that the amendments, viewed as a whole, give open plans a significant competitive advantage which may place such plans in a monopolistic position in the prepaid legal services market.<sup>128</sup> Accordingly, the Department has warned state and local bar associations adopting the Houston Amendments that they may be both enjoined from enforcing the amendments and held liable in money damages for violating federal antitrust laws.<sup>129</sup>

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<sup>125</sup> See notes 94-95 *supra*.

<sup>126</sup> See, e.g., Statement by Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 14, 1974 at 1-2, reprinted in 60 A.B.A.J. 791 (1974); 172 N.Y.L.J. 32, Aug. 14, 1974, at 1, col. 3; 60 A.B.A.J. 467 (1974).

<sup>127</sup> See 172 N.Y.L.J. 32, Aug. 14, 1974, at 4, col. 3.

<sup>128</sup> See Sims, *Prepaid Legal Plans: Antitrust Aspects*, 172 N.Y.L.J. 45, Sept. 3, 1974, at 4, col. 3 [hereinafter cited as Sims].

<sup>129</sup> See *id.* at 4, col. 1. In another context, however, it has been held that a state bar association is exempt from the provisions of the Sherman Act. In *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir.), cert. granted, 43 U.S.L.W. 3255 (U.S. Oct. 29, 1974) (No. 74-70), the Fourth Circuit agreed with the district court that the Fairfax County Bar Association's minimum fee schedule was a restraint on competition. However, the court ruled that a bar association falls within the judicially-created "learned profession" exemption to the Sherman Act. 497 F.2d at 13-15.

Despite the Fourth Circuit's ruling, the Department of Justice steadfastly asserts that the legal profession is subject to the antitrust laws. In *United States v. Oregon State Bar*, — F. Supp. — (D. Ore. 1974), the Department challenged the minimum fee schedule promulgated by the Oregon State Bar. In contrast to *Goldfarb*, the court rejected a claim that the activities fell within the "learned profession" exemption to the Sherman Act. The court also rejected the reasoning of the New York Court of Appeals' holding in *In re Lincoln Rochester Trust Co.*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 366 (1974), "that judicial control over the profession, rather than [state] antitrust law enforcement, was intended by the legislature." — F. Supp. at —. In addition, the "state action" exemption of *Parker v. Brown*, 317 U.S. 341 (1943), was held inapplicable. Notwithstanding the validity of defendant's policy arguments, the Oregon district court stated that "the creation of exemptions to the Sherman Act is the province of Congress, not the courts." — F. Supp. at —.

The applicability of the Oregon case to prepaid legal services is at least questionable in light of some closing dicta by the court. Judge Sharp noted that "[p]rice-fixing is a per se violation of the Sherman Act." *Id.* However, many other restraints on competition

The Department has expressed particular dissatisfaction with regulations which unduly restrict the operation of closed plans. Specifically, it cites DR 2-103(D)(5)(a)(v), which would, in effect, convert all closed plans into open plans by imposing a freedom of choice and reimbursement requirement.<sup>130</sup> This provision could effectively prevent the smooth functioning of the closed plan by requiring additional administrative machinery and personnel to handle claims for services of outside counsel. Most closed prepaid plans in operation today retain salaried staff attorneys with the result that costs are somewhat fixed. Efficient operation of the plans requires maximum utilization of resources; less than efficient use will increase costs. As a result, the provision not only hinders the attractiveness of closed plans to potential customers<sup>131</sup> by tending to equalize the costs of open and closed plans, but also may actually disrupt the operation of the closed plan.

The Justice Department indicates that potential antitrust violations can be avoided by subjecting open and closed plans to substantially the same regulations.<sup>132</sup> Thus, the Department has urged that local bar associations refuse to follow the ABA's amendments and to adopt, instead, the nondiscriminatory rules proposed by the Antitrust

are to be judged by the "Rule of Reason," which calls for balancing the various harms and benefits occasioned . . . by the conduct in question." *Id.* Thus, as the court noted:

[E]ven though fee schedules are not immune from Sherman Act scrutiny, the professional bans on solicitation and advertising may still survive—if the public benefit from these ethical canons outweighs the competitive harm.

*Id.*

<sup>130</sup> See text accompanying note 80 *supra*.

<sup>131</sup> See Sims, *supra* note 128, at 4, col. 3.

<sup>132</sup> See Statement by Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 14, 1974, at 7-8, reprinted in 60 A.B.A.J. 791, 792 (1974).

The Department suggests that in formulating rules, states should take special care with respect to provisions regulating advertising by such organization. Legal service plans, in order to be effective, must be promoted. Thus, serious antitrust problems could arise if one plan is given a significant competitive advantage through discriminatory advertising provisions. 172 N.Y.L.J. 32, Aug. 14, 1974, at 4, col. 3.

It should be noted that the Houston Amendments pass muster in this regard since DR 2-101 permits an attorney to assist the promotion of any organization under DR 2-103(D)(1) through (5). ABA CODE DR 2-101(B). The Department raises the point only because some states might formulate and adopt discriminatory rules on their own. See, e.g., CAL. RULES OF PROFESSIONAL CONDUCT, Rule 20 (Deering Supp. 1974), which would appear to permit solicitation only by open panel plans.

The Department contends that bar associations should not deny consumers the opportunity to receive unsolicited information concerning plans which offer more extensive coverage at a lower cost. See Sims, *supra* note 128, at 4, col. 3. Consumers must be permitted to consider all available information relative to the functioning of legal service plans. Therefore, the public should be informed as to the existence and distinguishing features of closed panels in order to permit intelligent selection from among the available plans. *Id.*

Division or the ABA Committee on Ethical and Professional Responsibility.<sup>133</sup> The Department believes that adoption of these rules, which would treat open and closed plans uniformly,<sup>134</sup> will provide sufficient regulation of professional conduct without restricting competition.<sup>135</sup>

### *An Alternative Approach to the Houston Amendments*

In light of the aforementioned shortcomings, and particularly the objections raised by the Justice Department, different approaches to legal service plan regulations should be seriously considered. For example, the ABA Standing Committee on Ethics and Professional Responsibility has proposed amendments to the Code of Professional Responsibility which would regulate legal services plans, open and closed, in a nondiscriminatory fashion.<sup>136</sup> Although as yet unenacted,

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<sup>133</sup> Statement by Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 14, 1974, at 11, reprinted in 60 A.B.A.J. 791, 792 (1974). For a discussion of the rules proposed by the Antitrust Department, see Sims, *supra* note 128, at 4, col. 6.

<sup>134</sup> See notes 139-50 and accompanying text *infra*.

<sup>135</sup> Lewis Bernstein, Chief of the Special Litigation Section of the Antitrust Division, has warned that

the rules must be modified in ways that will not restrict appropriate, dignified competition among lawyers, while at the same time will achieve the objectives of the ethical considerations involved . . . [B]ar associations can and should achieve these objectives without restricting dignified competition between open and closed plans, and among lawyers who wish to participate in the specified plans.

60 A.B.A.J. 467, 468 (1974).

<sup>136</sup> The amendments proposed by the ABA Standing Committee on Ethics and Professional Responsibility are as follows:

DR 2-103. Recommendation of Professional Employment.

. . . .

(D) A lawyer shall not knowingly assist a person or organization that furnishes, or pays for legal services to others to promote the use of his services or the services of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner. However, conduct permitted by DR 2-101 (B) does not violate this rule and mere acceptance of employment by or mere acceptance of payment from a person or organization that furnishes or pays for legal services to others does not per se violate this rule, and this rule does not prohibit a lawyer from cooperating with any of the following offices or organizations even though they promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, if his independent professional judgment is to be exercised in behalf of his client without direction or regulation by any organization or other person:

. . . .

(5) Any other organization that recommends, furnishes, or pays for legal services to its members or beneficiaries but only if the following conditions are met:

(a) The recommending, furnishing, or paying for legal services is not the primary purpose of such organization but is reasonably related thereto; provided, however, that this condition does not apply to a non-profit organization.

(b) Such organization, its parent organization, or its affiliated organization does not derive a profit or direct financial benefit from the rendition of legal services by the lawyer.

the proposals remain significant in that they offer a workable alternative to the problem of regulating legal assistance programs. The stated objective of the proposals is evenhanded regulation "achieved without unfair discrimination and without any tendency to stifle competition."<sup>137</sup> Toward this end, no distinctions are drawn between qualified and nonqualified plans.

The proposed DR 2-103(D) would eliminate the vague "controlling constitutional interpretation" language found in the former rule.<sup>138</sup> A lawyer would be permitted to assist an organization recommending, furnishing, or paying for legal services to its members, provided such activities are reasonably related to the organization's primary purpose.<sup>139</sup> With the exception of nonprofit organizations, such primary purpose cannot be the rendition of legal services.<sup>140</sup> The proposal contains the proviso that neither the organization, its parent, nor affiliate derive a profit or direct financial benefit from providing the legal assistance.<sup>141</sup> Additionally, the Committee recommends that each plan member be free to select counsel of his choice.<sup>142</sup> Such counsel, however, would be retained at the member's own expense, subject, of course, to any agreement with the organization requiring reimbursement.<sup>143</sup> In preserving

(d) . . . .  
 Any member or beneficiary is free to select counsel of his own choice and at his own expense, unless his arrangement with a qualified legal assistance organization requires it to pay such expenses. . . .

Report of ABA Special Comm. on Prepaid Legal Services to ABA House of Delegates, Honolulu, Hawaii, Aug. 1974, at 5-6 [hereinafter cited as ABA Special Comm. Report].

The proposed amendment to the definitional section reads as follows: "'Qualified legal assistance organization' means an office or organization of one of the five types listed in DR 2-103(D) that meets all the requirements thereof." *Id.* at 60.

The amendments were first submitted at Houston but were rejected in favor of the present amendments proposed by the Section of General Practice, 60 A.B.A.J. 446, 447 (1974). At the ABA midyear meeting in Honolulu, Hawaii, in August, 1974, the Special Committee on Prepaid Legal Services submitted recommendations that these proposals be adopted in lieu of the Houston Amendments, except that DR 2-103(D)(5)(a)(viii) and the definition of "bar association" be retained. ABA Special Comm. Report, *supra*, at 1. Action on the proposals was deferred, however, until an ad hoc study group, appointed at Honolulu, could present its recommendations. 60 A.B.A.J. 1207, 1211 (1974). The study group is directed to make inquiries of state and local bar associations regarding the Houston Amendments and to submit a report with recommendations to the House of Delegates at its February, 1975 meeting. *Id.*

<sup>137</sup> ABA Special Comm. Report, *supra* note 136, at 3.

<sup>138</sup> See note 36 *supra*.

<sup>139</sup> See DR 2-103(D)(5)(a) (proposed), *supra* note 136.

<sup>140</sup> *Id.*

<sup>141</sup> DR 2-103(D)(5)(b) (proposed), *supra* note 136. This provision would not prohibit employers from providing closed plans to employees under nonprofit arrangements because any commercial benefit accruing could only be said to yield an indirect financial benefit. See text accompanying note 79 *supra*.

<sup>142</sup> DR 2-103(D)(5)(d) (proposed), *supra* note 136.

<sup>143</sup> *Id.* In the absence of mandatory reimbursement, the closed panel avoids numerous administrative and economic burdens. See note 81 *supra*.

the right of free choice in this manner, the provision is similar to agreements found in closed prepaid plans currently in operation.<sup>144</sup>

The Houston Amendments have generated much confusion,<sup>145</sup> thereby resulting in their adoption by only two states.<sup>146</sup> Furthermore, controversy surrounding their discriminatory treatment of closed plans has delayed the development of all legal services plans.<sup>147</sup> In view of the unquestioned need for such programs, it is probable that revision will be forthcoming. In the interest of the consumer, any new provisions should follow more closely the scheme outlined in the proposals of the ABA Standing Committee on Ethics and Professional Responsibility.

#### ADDITIONAL AREAS REQUIRING RESOLUTION

The tax treatment to be afforded legal service plans, their contributors, and their beneficiaries is a problem in need of resolution. Presently, section 501(c)(9) of the Internal Revenue Code grants tax-exempt status to voluntary employee beneficiary plans providing health, accident, and "other benefits" to its members.<sup>148</sup> It is expected that this section will be construed to include within the definition of "other benefits" group legal service plans and legal service trust funds under the Taft-Hartley Act.<sup>149</sup> Thereafter, the income derived from the investments of these funds would be nontaxable.

Under section 106 of the Internal Revenue Code, contributions by an employer to accident and health plans are deductible by the employer and treated as nontaxable income to the employee.<sup>150</sup> Pursuant to section 105, benefits received under such plans, subject to certain

<sup>144</sup> See, e.g., *Municipal Employees Legal Services Fund, Inc., Municipal Employees Legal Services: Schedule of Benefits*, § VII(6) (1974); 1 FLORIDA BAR NEWS, July 1974, at 1, col. 5.

<sup>145</sup> See, e.g., 1 TRENDS IN LEGAL SERVICES, Aug. 1974, at 2 reprinting letter from William B. Pugh, Jr., Chairman of the Advisory Committee of the National Association of Insurance Commissioners and Assistant General Counsel of the Insurance Company of North America to Frederick G. Fisher, Jr., Chairman-Elect of the ABA Section of General Practice, July 3, 1974. Mr. Pugh expressed concern over the variety of interpretations of the Houston Amendments set forth by experts in the field and the difficulty attending an analysis of the provisions.

<sup>146</sup> Kansas and Tennessee have adopted the Houston Amendments. See 1 TRENDS IN LEGAL SERVICES, Oct. 1974, at 4. It should be noted that Tennessee has a policy of automatically adopting all ABA rules. Nebraska has also indicated that it will probably adopt the amendments. *Id.* at 3-4.

<sup>147</sup> For example, union plans in five states, serving potentially 55,000 members, have been stalled. See Tunney, *The Bar's Responsibility to the Public*, 58 J. AM. JUD. Soc'y 108, 111 (1974). In New York, the Appellate Division of the Supreme Court has refused to approve plans until the legislature acts and bar association rules are promulgated. *Id.* See, e.g., *In re Feinstein*, — App. Div. 2d —, 357 N.Y.S.2d 516 (1st Dep't 1974).

<sup>148</sup> INT. REV. CODE OF 1954 § 501(C)(9).

<sup>149</sup> See NATIONAL CONSUMER CENTER FOR LEGAL SERVICES, 1973 ANNUAL REPORT, at 3. See also Randolph, *What Bars Should Consider in Prepaid Legal Services Plans*, 60 A.B.A.J. 797 (1974).

<sup>150</sup> INT. REV. CODE OF 1954 § 106.

limitations, are treated as nontaxable income to the employee.<sup>151</sup> There are no comparable provisions with respect to employer contributions to, or employee benefits received from, legal service plans. Under present law, such contributions would probably be considered taxable income to the employee even though he has no vested right to the contribution. Additionally, the benefits received would apparently be taxable to the employee. To correct both of these situations, legislation has been introduced which would exempt employer contributions to such plans, as well as the value of legal services received thereunder, from inclusion in the employee's gross income subject to taxation.<sup>152</sup> Passage of such legislation is necessary to insure the continued growth of legal services programs.

Another important area of concern arises from the issue as to which governmental body will regulate legal service plans. For example, the recently-enacted pension reform bill<sup>153</sup> contains provisions governing the regulation of employment-related legal service plans. This federal legislation, where applicable, preempts state regulation by insurance commissions and bar associations, and hence, renders inapplicable any regulatory provisions adopted by the states.<sup>154</sup> However, by subjecting such plans to the same fiduciary obligations, reporting and disclosure requirements as applied to pension plans,<sup>155</sup> the federal statute sets forth more stringent requirements than previously encountered under state and bar association supervision. Those plans not falling within the ambit of the pension reform bill continue to be regulated under state insurance laws and rules of ethics. In some jurisdictions, however, it is uncertain whether legal service plans will be considered a form of insurance.<sup>156</sup> Therefore, in certain instances, legislation further clarifying the position of regulatory bodies appears mandated.

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<sup>151</sup> INT. REV. CODE OF 1954 § 105. The proceeds are nontaxable to the extent that they are actually expended for medical expenses or to compensate for permanent disability.

<sup>152</sup> S. 3787, 93d Cong., 2d Sess. (1974); H.R. 14894, 93d Cong., 2d Sess. (1974). See 1 TRENDS IN LEGAL SERVICES, Aug. 1974, at 6. The proposed bills would exclude from the employee's taxable income, amounts received directly or indirectly under group legal services plans, the value of services rendered, as well as any contributions by employers to such plans. The contributions themselves would be deductible by the employer as a business expense.

<sup>153</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 43 U.S.L.W. 7 (Sept. 17, 1974).

<sup>154</sup> *Id.* at §§ 3, 514. Section 514 provides in pertinent part:

Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or any other insurer . . . for purposes of any law of any state purporting to regulate such.

*Id.* See 1 TRENDS IN LEGAL SERVICES, Aug. 1974, at 1.

<sup>155</sup> For a discussion of these provisions as applied to legal services plans, see 1 TRENDS IN LEGAL SERVICES, Oct. 1974, at 1.

<sup>156</sup> See Cole, *A Model Act Providing for the Regulation of Group Legal Service Plans*,

If prepaid services are to be truly effective, concern should also be focused on educating the middle class on the benefits of the plans. To this end, the marketing of policies by commercial insurance carriers could be most useful. This industry possesses the experience and facilities to implement such an operation. If prepaid legal service plans are to be deemed a form of insurance, however, many jurisdictions will have to enact specific legislation to permit insurance companies to market such policies and to protect against abuses. Legislation of this type is essential to insure the uniform growth of both open and closed plans and to assure maximum availability of quality legal services to the middle class.

### CONCLUSION

In the next few months, new legislation and bar association regulations will be enacted which will direct the future of prepaid legal services.<sup>157</sup> Although strict regulation of such plans appears warranted,

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11 HARV. J. LEGIS. 68 (1973). Of 95 insurance commissioners responding to a poll conducted by the National Association of Insurance Commissioners, 25 considered prepaid legal service plans to be a form of insurance while only two maintained that it was not insurance. Randolph, *What Bars Should Consider in Prepaid Legal Services Plans*, 60 A.B.A.J. 797, 800 (1974).

Nine states have present or proposed legislation regarding legal services. These include California, Connecticut, Massachusetts, Minnesota, New Jersey, New York, Texas, Washington, and Wisconsin. For a discussion of each, see AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES, Legislation Section, at 1 (1973).

In New York, "legalcare" legislation has been proposed which would amend the insurance laws to permit the writing of insurance coverage in this area. N.Y.S. 4887-C (Mar. 6, 1973). The bill authorizes casualty insurance companies, as well as life insurance companies, to engage in a legalcare insurance business. "Legalcare" is defined as 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.

*Id.* Under the proposed bill, standard provisions in any legalcare policy would include a proviso that the insured be entitled to engage an attorney of his personal choice. The bill provides for filing and reserve requirements to be determined by the Superintendent of Insurance.

Unions and other nonprofit organizations could sponsor closed plans by structuring the plan outside the confines of the insurance law. However, where the union contracts with an insurer which is subject to the New York State Insurance Law, the plan would have to be an open panel system. Statement read on behalf of New York State Senator John R. Dunne, Before the Subcomm. on Representation of Citizens Interests of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., May 15, 1974, at 1-4. See also Dunne, *Prepaid Legal Services—For Whose Benefit?*, 46 N.Y.S.B.J. 167 (1974); Randolph, *What Bars Should Consider in Prepaid Legal Services Plans*, 60 A.B.A.J. 797, 799 (1974).

The National Association of Insurance Commissioners has prepared a model state code regulating prepaid legal insurance. The code would cover all legal service plans, by both professional and nonprofessional insurers. For a synopsis of the most pertinent provisions, see 1 GROUP LEGAL REV., June 1974, at 2-3.

<sup>157</sup> Many state bar associations have deferred action on the question of adopting the Houston Amendments. In a recent survey 19 of the 24 bar associations had either de-



legislatures and bar associations should not automatically disapprove of the closed arrangements; they should be receptive to both open and closed plans.<sup>158</sup> Both are vitally necessary and hold distinct advantages for various segments of society. The utility of each depends in part on the recipient of the services.<sup>159</sup> If the recipient has had occasion to develop frequent contact with attorneys, the open panel may be better suited to his needs since freedom of choice in such cases is meaningful. On the other hand, where the recipient has had infrequent attorney contact, the closed panel displays its virtues. Through the development of programs aimed at preventive legal care, the closed panel may instill in the client an awareness of the law and confidence in the legal profession.

Furthermore, prepaid legal services, especially closed plans, will encourage legislative reform. As people become more aware of their rights, great strides can be made in areas of the law where reform has been neglected. Prepaid group plans might facilitate the initiation of class actions and the promoting of legislation in areas of common need.<sup>160</sup>

The efforts of the bar association should be concentrated upon the adoption of rules aimed at the uniform development of all types of plans. The energy of the organized bar should be channeled toward developing educational programs to inform members of the public as to their rights under the law, and as to the availability and relative

ferred action or were studying the matter. 1 GROUP LEGAL REV., July 1974, at 1. See 173 N.Y.L.J. 17, July 24, 1974, at 1, col. 6.

<sup>158</sup> F. William McCalpin, past President of the ABA Special Committee on Prepaid Legal Services, offers the following sound advice:

Too much heat has been generated by the debate over how prepaid legal service plans shall function — open panel v. closed panel. We need both kinds, all kinds in infinite number and variety. We have too long engaged in endless and fruitless argument over how our objectives should be reached. The position of the bar must at a minimum be one of neutrality with respect to means. Ideally, it should be one of strong and enthusiastic support to every method, measure or proposal which gives any promise or hope of making legal services more readily available to the citizens of this country.

Tunney Memorandum, *supra* note 93, at 10.

<sup>159</sup> See Greene, *supra* note 100, at 436-38. See generally Bernstein, *The Advantages of a Closed Plan*, 44 PA. B. ASS'N Q. 249 (1973); Fisher, *Prepaid Legal Services — Open v. Closed Panels*, 58 MASS. L.Q. 243 (1973); Fisher, *The Advantages of a Closed Plan*, 44 PA. B. ASS'N Q. 256 (1973).

<sup>160</sup> See Note, *Legal Services — Past and Present*, 59 CORNELL L. REV. 960, 969-70 (1974). There is no reason to doubt that prepaid and group legal programs, when operated effectively, can produce achievements similar to those of the Legal Service Program of the Office of Economic Opportunity. The Legal Services Program has made significant contributions to advances in housing and welfare law. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Mun. Ct. App. 1968).

merits of the various programs. Only in this manner can the legal profession truly fulfill its resolution to make legal services "available at reasonable cost to all who need them."<sup>161</sup>

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<sup>161</sup> 60 A.B.A.J. 446, 449 (1974).