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# Developments in California Private Legal Services Plans

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## INTRODUCTION

In August, 1973, the United States Congress passed an amendment to an existing act. The amendment which was to add section 302(c)(8) to the Taft-Hartley Act[1] has the potential of changing the way attorneys will go about the business of practicing law. The details of the amendment will be discussed later in this article. The effect of the amendment was to make private legal services plans subject to mandatory collective bargaining. The practical result of this amendment is to engage a funding mechanism, through the use of union-employer trusts, which has enough financial substance to make private legal services plans a widespread reality. At the same time, the practical problems of the various alternative plans can be resolved by reference to usage data which heretofore has been unavailable.

This article will attempt to explain some of the reasons why the private legal services concept will have such an effect on the practice of law. In achieving that goal, there will be a discussion of the applicable regulatory structure and a description of a representative group of plans.

Before proceeding, it will be necessary to discuss and define the terms which will be used throughout the article. The term, "private legal services plans", is used to denote the entire class of legal service delivery systems which are not "public" methods such

1. Labor Management Relations Act (The Taft-Hartley Act) § 302(c) 29 U.S.C. § 186 (1973).

as Neighborhood Legal Assistance and others which rely upon public funds. This term has been selected as a result of much confusion over words such as "group legal services" or "prepaid legal services" which are often used interchangeably but have rather different meanings. The term, "delivery", refers to the way in which the legal services reach the individual client and are paid for. "Plan" or "arrangement" is used to describe the various methods of providing legal counsel to the individual and compensation to the attorney. The term, "group", refers to the organized body of individuals who may subscribe to a plan. The term, "individual" or "member", refers to that person within a given group to whom the legal services will be rendered. "Attorneys" refers to those who actually perform the legal service for the individual. "Regulators" refers to all official bodies which may regulate private legal services plans such as the State Bar Association, the State Insurance Commissioner, the Federal Department of Labor or the Federal Internal Revenue Service. As in all areas of the law, terms are important and here two different terms may describe the same person. When that person is both the regulator and the provider of the service, there may be a potential conflict of interest. An example of this would be plans which are sponsored as well as regulated by bar associations.

There are several additional terms which must also be distinguished. "Open panel plan" refers to a system in which the individual subscriber has a "free choice of attorney". In other words, the plan is primarily concerned with channeling funds and not with matching the individual to an attorney. Many open panel plans rely on the established Bar Association lawyer referral service for this function. "Closed panel plan" refers to a system under which the individual comes to the plan with his legal problem and the plan then refers him to an attorney who is part of a pre-selected group of attorneys. In addition to matching client to attorney, the closed panel plan will also channel funds from the group to the attorney by way of several methods discussed infra. The term, "prepaid" as in "prepaid legal services", refers to the method by which the individual pools his money along with others in the group. This money is paid into the plan on a regular basis over a period of time against the possibility that one day individual members of the group will require legal assistance. When that time comes, the financial burden upon the individual will not be nearly so onerous. To this extent, prepaid plans operate in a similar manner to health insur-

ance plans which are "risk-sharing" plans. This should be distinguished from "true" insurance which is "risk-bearing" and also plays a part in the private legal services spectrum. By way of contrast, a non-prepaid plan is generally one in which the group retains a number of attorneys pursuant to a plan. The retainer paid into the plan is generally much lower than amounts paid to prepaid plans. When the member needs legal counsel, he directs his problem to a screening attorney who works for the plan and who attempts to define the sort of problem the member has. If the problem is labeled as legal in nature, the screening attorney either resolves the problem at no cost to the member or directs the member toward one of the attorneys on the panel. Any work performed by that attorney is paid for directly by the member at a rate below the market rate in that community for the same services.

After the Supreme Court case of *NAACP v. Button*,[2] the die was cast and it has been only a matter of time until people have come to realize that they have a First Amendment right to association for the purpose of obtaining legal counsel. The question which was left open and to which this article addresses itself is how this group representation is to be provided. Since the decision in *Button*, the bar and a growing sector of the public have become increasingly aware that traditional methods of legal service delivery are inadequate for moderate income people and that traditional bar restraints on solicitation would have to be changed. As recently as *United Transportation Union v. State Bar of Michigan*,[3] the organized bar fought a losing battle against the forces of change. During the past several years, Bar Associations across the country have come to realize that the concept of private legal services plans is a good idea whose time has finally come. There has been much written about the theory of private legal services and the positive benefits of the concept[4] but only during the past year has there been enough data generated from working plans to make accurate predictions regarding the direction in which the concept is heading.

The problem which lies at the base of all private legal services

2. NAACP v. Button, 371 U.S. 415 (1963).
3. United States Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).
4. United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); *Litigation as a Protected Form of Expression*, 1963 DUKE L.J. 545; *Membership Associations as Attorney-Client Intermediaries*, 65 MICH. L. REV. 805 (1967); *The Emergence of Lay Intermediaries Furnishing Legal Services*, 1965 WASH. U.L.Q. 313; *Group Legal Services: The Case for BRT*, 12 U.C.L.A. L. REV. 438 (1965).

plans is one of economics. The plans are designed for people who have too much money to qualify for representation by a public sponsored legal services program, but who also have too little money to enable them to retain private counsel. On the other side of the same coin, is the fact that an attorney needs to be compensated for the services that he performs. The private legal services concept seems to strike a balance between these economic realities.

The material that is presented here is based on the latest predictions and cases generated by the regulators and the most recent information obtainable from plans already in existence. By far the most critical problem in evaluating the course of the private legal services industry is the lack of verifiable data about the plans. Recently, at the National Conference on the Future of Prepaid Legal Services,[5] the latest national developments were discussed in a general manner and an abundant amount of material was distributed about plans and regulations across the country. At about the same time, a group of University of California, Berkeley law students presented the results of a study that they made of closed panel plans in California.[6] Admittedly, their study was hampered by a lack of provable data, inaccurate statistical controls and a limited sample of plans.

The reason for the slow development of data accumulation is an obvious one. Firms and plans are reluctant to distribute financial information about themselves. The reason for this is that most plans have only been operative since late 1970 and it is too early for them to commit themselves to a financial package which they are not yet sure will be profitable. Furthermore, insurance companies are waiting until enough people utilize private legal services plans so that actuarial data may be charted.

Several years ago, Preble Stolz predicted the problems attendant with the lack of data when approaching the subject of private legal services from an insurance point of view.[7] More recently, Barlow Christensen presented an in depth study of the legal needs of those in the moderate income category.[8] A question presented

5. National Conference on the Future of Prepaid Legal Services, San Francisco, California, December 7-8, 1973, sponsored by the American Bar Association, Special Committee on Prepaid Legal Services; Staff Director: Philip J. Murphy, 205 East Carillo Street, Santa Barbara, California 93101.

6. Project on Group and Prepaid Legal Services, University of California, Berkeley, School of Law, Group Legal Services in California: A Survey Analysis.

7. Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 417 (1968).

8. B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970).

by both works was the extent of legal services needed by people of moderate income. The answer to this question is clouded by a lack of information about the legal needs of such people. However, based on the assumption that those of the moderate income category have a certain set of unfulfilled legal needs, the private legal services concept sets out to make legal help available to them.

## PART ONE: THE REGULATIONS

### *The Rules of Professional Conduct of the State Bar of California*

The State Bar operates ". . . merely as an arm of the court, for the purpose of taking evidence and making its recommendations."[9] Although created by the legislature's exercise of its police power, the State Bar's rule making and fact finding functions are only advisory to the California Supreme Court's exercise of its inherent power to regulate the conduct of attorneys.

At the present time there are twenty three Rules of Professional Conduct of the State Bar of California[10] which have been adopted by the Board of Governors and approved by the California Supreme Court.[11] The Rules establish the minimum standards of conduct for California attorneys.[12] A willful breach of any of the Rules is punishable ". . . by suspension from the practice of law for a period not to exceed three years."[13]

It seems clear because of the extensive litigation over this subject that most prepaid legal service arrangements violate traditional prohibitions regarding the solicitation of employment. In California the prohibited conduct is set forth in Rules 2 and 3 which state, *inter alia*, that a member of the State Bar shall not: ". . . Solicit professional employment by advertisement or otherwise . . .";[14] use any communication medium ". . . to advertise the name of the lawyer or his law firm or the fact that he is a member of the State

9. Johnson v. State Bar of California, 4 Cal. 2d 744, 758, 52 P.2d 928, 934 (1935).

10. Cal. Bus. & Prof. Code ofllowing § 6076 (West, 1972) (hereinafter cited as RULES). The Board of Governors has proposed to adopt new Rules of Professional Conduct. The proposed Rules follow a numbering scheme parallel to that found in the ABA Code of Professional Responsibility. The substance of the proposed Rules is derived from the present Rules, the ABA Code of Professional Responsibility, and judicial decisions. *See Comments of Members Requested on Proposed New Rules of Professional Conduct*, 48 CAL. S.B.J. 328 (May-June 1973).

11. RULES, Rule 1.

12. Because the Rules establish only the minimum standards of Acceptable conduct, ". . . the Code of professional Responsibility of the American Bar Association should be noted by the members of the State Bar." Rules, Rule 1.

13. RULES, Rule 1, Cal. Bus. & Prof. Code 6077 (West 1962).

14. RULES, Rule 2.

Bar or the bar of any jurisdiction . . .";[15] ". . . employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him . . .";[16] ". . . share compensation arising out of or incidental to professional employment . . .";[17] or ". . . knowingly accept professional employment offered to him as a result of or as an incident to the activities of any . . . non-attorney, association, or corportion . . . that for compensation controls, directs or influences such employment."[18]

Rules 2 and 3 contain certain exceptions to these prohibitions, but they do not apply to the circumstances involved in typical legal service plan arrangements. However, the United States Supreme Court has held in a series of cases that the First Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, prevents governmental suppression of group activity designed to provide access to the courts.[19] As stated in *United Transportation Union v. State Bar of Michigan*:[20]

> The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costsof legal representation.[21]

In an apparent response to these Supreme Court decisions, the Board of Governors of the California State Bar Association adopted, and the California Supreme Court approved, Rule 20[22] which specifies permissible and impermissible conduct with respect to legal ser-

15. RULES, Rule 2(2).
16. RULES, Rule 3.
17. *Id.*
18. *Id.*
19. United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mineworkers v. Illinois State Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).
20. 401 U.S. 576 (1971).
21. *Id.* at 585.
22. RULES, Rule 20; Rule 20 is set forth in Appendix A, *infra.* The substance of Rule 20 is retained in the proposed new Rules of Professional Conduct as Rule 2-104(D). For a glimpse of an earlier dispute in the organized bar regarding a substantively different but tentatively adopted Rule 20 which prohibited some conduct now protected by the First Amendment, *see The Rule of Controversy*, 36 L.A.B. BULL. 267 (1961).

vice plans established at the request of various groups.[23]

After Rule 20 was adopted, the growth of closed-panel arrangements was tremendous, and concern was expressed regarding the survival of the traditional attorney-client relationship which is characterized by the client's free choice of an attorney.[24] The State Bar Board of Governors appointed the Ad Hoc Committee re Prepaid Legal cost Insurance to study the situation, and the Committee proposed that a non-profit corporation composed of State Bar members should be formed to develop and administer open-panel legal service plans.[25] Rule 23 was subsequently adopted by the Board of Governors, and the California Supreme Court approved.[26]

*Regulation of Legal Service Plans in California Under Rules 20 and 23*

Rules 20 and 23 provide that under specified conditions certain conduct associated with legal service plan arrangements ". . . is not of itself in violation of Rule 2 or 3 of these Rules of Professional conduct . . ."[27]. The exceptions that Rules 20 and 23 create are directed at two intrinsically different types of plans.

Rule 20 governs arrangements established *at the request of a group* such as

> . . . a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise, whose primary purposes and activities are other than the rendering of legal services.[28]

Under this rule, attorneys may not solicit such groups with legal service arrangements that the attorneys are willing to offer; rather, attorneys must wait for a group to make an inquiry regarding the availability of an arrangement.

In contrast, Rule 23 a(2) deals with any arrangement ". . . developed, administered and operated by a non-profit organiza-

23. Rule 21 was simultaneously adopted. It deals with certain civil liberties legal service plans and is beyond the scope of the present article.
24. Robinson, *President's Message: Prepaid Legal Services*, 47 CAL. S.B.J. 8 (1972).
25. *Id.*
26. RULES, Rule 23; Rule 23 is set forth in Appendix A, *infra*. The substance of Rule 23 is retained in the proposed new Rules of Professional Conduct as Rule 2-104(E).
27. RULES, Rule 20 and Rule 23 a.
28. RULES, Rule 20(1), (3).

tion . . . ."[29] Any legal service plans of such an organization must be

> . . . so developed, administered and operated as to prevent . . . al publicizing and solicting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the non-profit organization or the nature and extent of the benefits pursuant to the arrangement or both, without any identification of the member or members of the State Bar rendering or to render legal services; provided that all such publicizing and soliciting activities are in good faith engaged in solely for the purpose of developing, administering or operating the arrangement, and not for the purpose of soliciting business for, or for the self-aggrandizement of, any specific member or members of the State Bar.[30]

Thus the non-profit organization may initiate contacts with groups that may be receptive to legal service plans.

The apparent justification for the different treatment afforded the two types of arrangements with respect to solicitation is that the promotional activities of a non-profit organization under Rule 23 a(2) cannot benefit any specific member of the profession in a direct fashion since participation in such a plan must be open to all active members of the State Bar practicing in the geographical area served by the plan.[31] However, solicitation by attorneys with respect to a Rule 20 plan would directly benefit the attorneys participating in the plan, and such participation would not be generally available to all members of the bar.[32]

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29. RULES, Rule 23 a(2). Rule 23 regulated the conduct of attorneys with respect to Rule 23 a(2) arrangements and Rule 20 arrangements. *See* Rule 23 a(1), b(1)(b), b(2), c, and d regarding Rule 23 a(2) arrangements.

30. RULES, Rule 23 a(2)(c)(iv).

31. RULES, Rule 23 a(2)(b), (c)(iv).

32. For elaborate arguments regarding the differences between Rule 20 and Rule 23 a(2) arrangements see *Petition for Rehearing on the Adoption of Rule 23 of the Rules of Professional Conduct and Statement in Opposition to Petition for a Rehearing on the Adoption of Rule 23 of the Rules of Professional Conduct*, Bar Misc. 3572 (Cal. Sup. Ct., *filed* July 13, 1973) (*reprinted*, in part, in ABA Special Committee on Prepaid Legal Services, Compilation of Reference Materials on Prepaid Legal Services, Ethics, Workpapers on Reconsideration of Adoption of Rule 23 of Professional Conduct by Supreme Court of the State of California (Supp. 1973). This petition for rehearing was denied, January 31, 1974 on the ground that there were proper procedures for change within the California State Bar Association. It is not likely that this controversy is yet dead.

Both Rules 20 & 23 provide for the following: The arrangement must allow the client to obtain counsel of choice independent of the arrangement even though such services may not be covered;[33] third parties may not interfere with the attorney-client relationship;[34] third parties may not share in the compensation paid to the attorney for legal services;[35] unlicensed persons may not practice law under the arrangement;[36] and the identity of the attorneys who are rendering or will be rendering services under the plan may be disclosed in response to individual inquiries.[37]

In addition to these provisions, Rules 20 and 23 require that certain reports respecting the plan arrangement be made to the State Bar. When a member of the State Bar agrees to furnish legal services under a Rule 20 or Rule 23 a(2) arrangement, notice thereof must be filed with the State Bar within 60 days.[38] After such notice has been filed, the State Bar will provide forms for reporting detailed information about the structure of the arrangement.

If the arrangement was established at the request of a group pursuant to Rule 20, the report shall include

> . . . the name and office address of the group, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar has entered into with the group respecting the arrangement; if a person or entity other than the group itself is administering the arrangement, the name and office address of such person or entity, whether such person or entity is incorporated, a copy of any agreement the member of the State Bar has entered into with such person or entity respecting the arrangement, and a copy of any agreement such person or entity has entered into with the group respecting the arrangement; and
>
> a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys

33. RULES, Rule 20(1); Rule 23 a(2)(a).
34. RULES, Rule 20(2)(a); Rule 23 a(2)(c)(i).
35. RULES, Rule 20(2)(b); Rule 23 a(2)(c)(ii). *But see* Rule 3 and Rule 22.
36. RULES, Rule 20(2)(c); Rule 23 a(2)(c)(iii).
37. RULES, Rule 20 para. 2; Rule 23 a para. 2.
38. RULES, Rule 20 para. 4; Rule 23 b(1).

> furnishing legal services under the arrangement, (B) for periodically obtaining from those being served by the arrangement, their comments, evaluations and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.[39]

If the arrangement is developed, administered, and operated by a non-profit organization pursuant to Rule 23 a(2), the report shall include

> . . . the name and office address of the non-profit organization and, if incorporated, a copy of its articles and incorporation and by-laws: the geographical area served by the arrangement; a copy of any agreement between the member of the State Bar and the non-profit organization respecting the arrangement; the name and office address of any group being served by the arrangement, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar or the non-profit organization, or both, has entered into with the group respecting the arrangement; if individuals (as distinguished from members of a group) are being served by the arrangement, then the number of such individuals and a copy of each form of agreement entered into between the non-profit organization and such individuals respecting the arrangement; and
> . . .
> . . . a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement, (B) for periodically obtaining from those being served by the arrangement, their comments, evaluation and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.[40]

39. RULES, Rule 23b(1)(a).
40. RULES, Rule 23b(1)(b), b(1)(a)(iii).

After these initial reports have been made, the attorney must make a report on January 30th of each year, to the State Bar which includes

> . . . the number of persons to whom he rendered legal services during the preceding calendar year pursuant to the arrangement, and the types of such services; and the changes, if any, in the information or documents he filed with the State Bar in his initial report.[41]

All of the notices, information, and documents filed with the State Bar are public,[42] and it may be surmised that the operation of legal service plans will be the subject of much scrutiny and controversy within and without the organized bar.

*The Question of Antitrust*

The effect of antitrust laws on private legal services is still an open question since no action has to date been commenced against any private legal services plan. However, the recent case of *Goldfarb v. Virginia State Bar*[43] has indicated that the commercial aspects of the legal profession are not exempt from antitrust regulation. Planning will be required on the part of private legal services plans to avoid antitrust problems.

Charges of price fixing and monopolization raise serious antitrust questions. There is some possibility that a private civil action could be commenced but the main concern of those persons organizing plans at present is with respect to the opinion of the Antitrust Division of the Justice Department.[44] The thrust of the antitrust questions which have been raised have been directed toward the

41. RULES, Rule 23b(2); It should be noted that Rule 23c contains provisions designed to eliminate unnecessary repetition in complying with the reporting requirements.

42. RULES, Rule 23d.

43. Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973). Minimum fee schedules of bar associations held violative of Section One of the Sherman Act as price fixing. [Note: As of the date of this writing, Goldfarb was overturned on appeal but the thrust of the antitrust argument remains unchanged.] *See also*, Steingold v. Martindale-Hubbell, Inc., Civil Action No. 72-1460 (N.D. Cal., filed August 11, 1972).

44. Lewis Bernstein, Chief, Special Litigation Section, Antitrust Division, Department of Justice, Minimum Fee Schedules and the Antitrust Laws, presentation for National Conference of Bar Presidents, Annual Meeting, Washington, D.C., August 4, 1973; Statement of Bruce B. Wilson, Acting Assistant Attorney General, Antitrust Division, before the Subcommittee on Representation of Citizen Interests, Committee on the Judiciary, United States Senate, concerning Minimum Fee Schedules for Legal Fees, September 20, 1973.

large plans which could potentially become dominant in a given geographic area.

The principal relevant antitrust law is the Sherman Act.[45] Section one of the Sherman Act declares illegal: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations . . ."[46] Section two deems "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monoplize any part of the trade or commerce among the several states, or with foreign nations" guilty of a misdemeanor.[47] The general purpose of this Act is to promote and preserve competitive markets so as to provide consumers with sufficient choices among the products and services available for purchase.[48]

The first problem to be examined is that of price fixing. In *United States v. Socony Vacuum Oil Co.*,[49] the Supreme Court held that section one of the Sherman Act makes it illegal per se for competitive suppliers of goods to agree on the prices charged to the consumer. This proscription was applied to services in *United States v. National Association of Real Estate Boards.*[50] The fact that the fee agreement was intended to prevent fees from becoming excessive or unreasonable is not a defense.[51] This argument would appear to carry over into the legal services area. In the operation of a legal service plan a majority of the controlling board of the plan may be composed of suppliers of the service (i.e. the attor-

45. 15 U.S.C. §§ 1-8 (1955).
46. 15 U.S.C. § 1 (1955).
47. 15 U.S.C. § 2 (1955).
48. United States v. Topco Associations, Inc., 405 U.S. 596 (1972); Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1957).
49. United States v. Socony Vacuum Oil Co., 310 U.S. 150, *reh. den.* 310 U.S. 658 (1940). *See also* Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941).
50. United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950).
51. In United States v. McKesson and Robbins, Inc., 351 U.S. 305, 310 (1956), the Court stated, "It [price fixing] does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable, It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or decrease prices."

In United States v. Trenton Potteries, 273 U.S. 392, 397 (1947) the Court stated, "The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business change become the unreasonable price of tomorrow."

neys). When that board unilaterally sets fees to be charged that fee setting agreement seems to be a violation of section one of the Sherman Act.[52] However, when the fee agreement has been the product of negotiations between the providers of the service and the consumers, then the agreement is not considered price fixing between competing suppliers. To avoid a charge of price fixing, the controlling board of a legal services plan should have a majority on non-attorneys.[53] The unilateral price fixing problem applies not only to monetary fee agreements but also to agreements such as relative value schedules which have as their effect the unilateral setting of fees.[54]

The second major antitrust problem is that of monopolization. In *United States v. Grinnel Corporation*,[55] the Supreme Court defined the offense of actual monopolization:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from the growth or development as consequence of superior product, business acumen, or historical accident.[56]

Monopolization and thus a violation of section two of the Sherman Act could occur where a large open panel plan[57] acquires a legal services financing monopoly to the exclusion of smaller, closed panel plans. This has not yet happened since no open panel plan has yet grown large enough, but since such plans do have a limited power to advertise, a potential problem exists.[58] There was much litigation over the issue of monopoly in the health services area when group and prepaid medical plans were new.[59] It remains to

52. United States v. Trenton Potteries, 273 U.S. 392 (1947); *see also* Blue Cross of Virginia v. Commonwealth of Virginia, 176 S.E.2d 439 (Va. 1970) where a prepaid drug plan was held to violate Section One of the Sherman Act by fixing prices of participating pharmacists.

53. Presentation by Lewis Bernstein, "A Word of Caution to Planners", Conference on the Future of Prepaid Legal Services, San Francisco, California, December 8, 1973.

54. A relative value schedule is one which attaches non-monetary values to tasks performed. At some later date these values are totaled and participating attorneys are paid based on a monetary value affixed to that total. For an example, see the Discussion of California Lawyers' Service, text accompanying notes 129-155, *infra*.

55. United States v. Grinnel Corporation, 384 U.S. 563 (1966).

56. *Id.* at 570-71.

57. For example, any plan which by definition must encompass a large group of people such as those plans operated pursuant to the California Rules of Professional Conduct; RULES, *supra* note 10, Rule 23.

58. RULES, Rule 23.

59. *See* Hubbard v. Medical Service Corporation, 367 P.2d 1003, 1004 (Wash.

be seen whether private legal services plans will undergo the same experience.

One possible approach to solving this problem would be to put the closed panel plans on the same competitive footing with the open panel plans. The way in which this could be accomplished would be to grant closed panel plans the same limited right to advertise, to solicit groups, that open panel plans enjoy under Rule 23.[60] This answer, however, creates a policy problem within the organized bar. The power to advertise was granted to open panel plans under Rule 23 because such plans are financing vehicles and do not actually render the legal services. Most closed panel plans are operated by or in conjunction with law firms which are governed by the rules against solicitation.[61] A policy conflict exists between prevention of monopolization by large, open panel plans on the one hand and maintenance of the anti-solicitation rules on the other.

As in most antitrust situations, there is concern for the position of the enforcement agency, the Justice Department, as well as for the possibility of private civil actions. Because most large, prepaid open panel plans such as California Lawyers' Service[62] are still in their infancy, the Justice Department has not made a formal policy announcement to date. However, evident by analogy to the fee schedule problems of bar associations[63] and to prepaid prescription drug programs,[64] its position seems clear. The antitrust laws were enacted to affect the policy of preservation of free competition among suppliers of goods and services and free choice among consumers. When violations of the two basic antitrust principles (price-fixing and monopolization) occurs, so as to disrupt this policy, the Justice Department will take action. It is likely that any action taken by the Justice Department will remain, for the time being, informal. This follows because the organized bar views the private legal services concept in general as a social good.[65] As a result the bar will more than likely make recommendations to

1962); *see also* Travelers Insurance Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969).

60. *See* text accompanying notes 10-42, *supra* for a discussion of Rule 23.

61. RULES, Rule 2.

62. For the discussion of California Lawyers' Service, *see* text accompanying notes 129-155, *infra.*

63. *See* note 44, *supra.*

64. Testimony of Bruce B. Wilson Deputy Assistant Attorney General, Antitrust Division, Department of Justice, "Issues of Third Party Prepaid Prescription Drug Programs" before the Subcommittee on Environmental Problems Affecting Small Business of the House Select Committee on Small Business, June 22, 1973.

65. *House of Delegates on Group Legal Services,* 60 A.B.A.J. 446 (1974).

potential offenders so as to eliminate the problem before the Justice Department is forced to become involved.

Should a plan develop to the point where an antitrust violation actually existed, an action could be brought by the Justice Department or by aggrieved private parties.[66] In order to bring an action, several jurisdictional elements would need to be satisfied. If the action was brought by the Justice Department it would first be required to show that they were engaged in a "trade or commerce". The question of whether the business of rendering professional services satisfies the definition of "trade or commerce" seems to have been resolved in the case of *The Nymph*.[67] In that case, the Supreme Court seemed to give the definition of "trade or business" a broad interpretation to cover all endeavors entered into for a livelihood. The question was left open as to whether the "learned professions" would be excluded from this definition. The question came to the Supreme Court again when an antitrust issue was raised with respect to a group health plan in the case of *United States v. American Medical Association*.[68] The facts of that case are analogous to the private legal services plan situation since it involved a plan by which medical care and hospitalization were to be provided on a prepaid basis. The Court did not decide whether the medical *profession* was a "trade or business" but that the *business* of the group health plan was restrained and that business was sufficient to confer jurisdiction. Likewise, the business of financing legal services should be sufficient to come within the jurisdictional definition.

The second necessary jurisdictional element, regardless of the nature of the plaintiff, is that the conduct complained of affects interstate commerce. This requirement is satisfied if the services affected are part of the interstate flow of commerce. Because of the increasing amount of legal work involving more than one state and the increased mobility of persons requiring legal services, the requirement that services affected be a part of interstate commerce should not be difficult to satisfy. In *Goldfarb v. Virginia State Bar*,[69] the court determined that title examination, a common activity in the practice of law, sufficiently affected commerce to sustain jurisdiction under the Sherman Act. The funds used for the purchase of the land in question came from out of state and guarantors

66. *For example*, non-participating attorneys or other private legal service plans.
67. The Nymph, 18 Fed. Cas. 506, Case No. 10388 (1834).
68. United States v. American Medical Association, 317 U.S. 519 (1943).
69. Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

of the loans were often federal agencies. Consequently, it appears that it would not be difficult to establish antitrust jurisdiction with respect to most private legal services plans.

There are two major defenses which may be raised to charges of conduct in violation of the Sherman Act. The first is the defense that the activity complained of is exempt from the federal antitrust laws because it involves state action. This defense, which was raised in *Parker v. Brown*,[70] is based on the ground that the federal antitrust laws are designed to suppress private conduct in restraint of competition and not actions by the state or action directed by the state.[71] The courts consider each case on its facts to determine whether the anticompetitive conduct is truly a consequence of state action.[72] The relevant factors are the nature and breadth of the controlling statutes and regulations and the state's interest in regulating the activity.[73] In California, for example, regulations covering non-insurance plans do not discuss matters such as fee schedules or monopolization.[74] Any plans sponsored by local bar associations (e.g. city and county) would be unable to claim a state action defense since they are only associations of private individuals.[75] Likewise, the California State Bar would not be able to claim this defense in connection with any plans which it sponsors because the rules defining the role of the State Bar with respect to private legal services plans do not grant it the authority to engage in or authorize anti-competitive practices.[76] That is not to say however that the State Bar cannot impose any competitive restrictions upon the practice of law. It is only prevented from imposing regulations which would result in an anti-competitive situation.

The second major defense to claims of anti-competitive conduct would lie within the McCarran-Ferguson Act.[77] This Act, with some exceptions, states that the federal antitrust laws shall not be construed to invalidate, impair or supersede state laws for the pur-

70. Parker v. Brown, 317 U.S. 341 (1942). *See also*, Wagner, *Antitrust Immunity: State Action Protection Under Parker v. Brown*, 7 U.S.F.L. REV. 453 (1973).
71. 317 U.S. 341, 350-352 (1942).
72. Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1111-1112 (W.D. Pa. 1969).
73. The cases in this area turn on the facts. *See* United States v. Pacific Southeast Airlines, 358 F. Supp. 1224 (C.D. Cal. 1973); International Telephone and Telegraph v. General Telephone and Electric, 351 F. Supp. 1153 (D. Hawaii, 1972).
74. RULES, Rules 20 and 23.
75. *See* Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 494-495 (1973).
76. RULES, Rules 20 and 23; *see also*, Chronicle Pub. Co. v. Superior Court, 54 Cal. 2d 548, 7 Cal. Rptr. 104 (1960).
77. 15 U.S.C. §§ 1011-1015 (1958).

pose of regulating or taxing the business of insurance.[78] The intent of the Act is to give support to the state systems for regulating and taxing the business of insurance.[79] Under this Act, the state is supreme in regulating those activities of insurance companies pertaining to the specific business of insurance such as the fixing of rates.[80] To the extent that the insurance company provides legal services insurance and to the extent that the state regulates those activities, a private legal services plan provided by an insurance company would seem immune from antitrust prosecution.[81]

The antitrust question seems to pose only a potential problem to the development of private legal services plans. With some advance planning on the part of the developers, all such problems should be avoided and hopefully the plans can prosper without the litigation experienced by the prior health care plans.

*The Taft-Hartley Act and its Effect on Private Legal Services Plans*

On August 15, 1973, Section 302 of the Taft-Hartley Act[82] was amended to include subsection (c)(8).[83] In effect, this amendment will allow an employer to contribute to a trust for the purpose of defraying costs of legal services incurred by the employee. This contribution can now be made pursuant to a collective bargaining agreement between the employer and the employee's labor union. Prior to this amendment, private legal services plans were not authorized for collective bargaining by the Taft-Hartley Act.[84] Consequently, such plans had to be funded entirely from union dues[85] and as a practical matter, private legal services plans were not high on the priority list for dues expenditures. As a result of this amendment, private legal services plans will be treated in much the same way that health plans, dental plans, pen sion plans, etc, are treated. The employee through his union, can now compel his employer to help finance a legal services plan as part of the collective bargaining agreement. The effect of this will

78. 15 U.S.C. § 1012 (1958).
79. Prudential Ins. Co. v. Benjamin, 326 U.S. 208 (1946).
80. S.E.C. v. National Securities, Inc., 393 U.S. 453, 459 (1969).
81. Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d (10th Cir. 1973); California League of Independent Insurance Producers v. Aetna Casualty and Surety Co., 175 F. Supp. 857 (N.D. Cal. 1957) (Cal. Ins. Code §§ 1853 and 1853.6 displace the Sherman Act).
82. National Labor Relations Act of 1947, 29 U.S.C. § 186 (1947).
83. P.L. 93-95; 87 Stat. 314 (1973).
84. 119 Cong. Rec. H. 4596, 4600 (daily ed., June 12, 1973).
85. Bartosic and Bernstein, *Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients through Collective Bargaining*, 59 VIRGINIA LAW REV. 436 (1973).

be to provide funding to carry the concept of private legal services forward through these intitial years during which the practical problems of the plans will be resolved.

The Congressional intent in passing the section 302(c)(8) amendment was to enable unions to negotiate with employers for legal care fringe benefit packages.[86] The amendment was required to make private legal services plans an element of mandatory collective bargaining so that the employer would be required to negotiate over this benefit.[87] Moreover, such plans had to be specified within the Act in order to avoid the proscription against employers contributing to funds which they do not control.[88] Section 302(a) of the Act is the basic section which keeps discretionary funds from labor union control.[89] Congress provided specific exceptions to section 302(a) which would permit jointly administered trusts for such benefits as: medical or hospital care, pensions, compensation for employment-related illness or injury, unemployment benefits, and life, health, and accident insurance.[90] Later amendments were added to permit an exception for: pooled vacation, holiday or severence benefits, training programs, scholarships, and child care centers.[91] The private legal services benefit was merely added to this list.

It is important to note that there is a substantial amount of money which can be potentially involved in the union trust financed private legal services. The Connecticut Laborer's Local 104 has put into effect one of the first plans under section 302(c)(8). This plan allocates five cents per hour per worker or about $104 per year per worker to a jointly administered trust.[92] These employer-provided funds are then used to finance a private legal services plan for the benefit of the union members. Since approximately 20 million U.S. workers belong to unions, if all were similarly covered, there would be a $2 billion plus pool of funds available to finance union legal services plans.[93]

86. 119 Cong. Rec. S 9266-75 (daily ed., June 12, 1973); 119 Cong. Rec. S 13747-49 (daily ed., July 25, 1973).
87. Bartosic and Bernstein, *supra* note 85.
88. Taft-Hartley Act § 302(a), 29 U.S.C. § 186(a) (1947); *see also*, Paramount Plastering Inc. v. Local No. 2, 195 F. Supp. 287 (D.C. Pa. 1961), *aff'd* 310 F.2d 179 (3rd Cir., 1962); Mechanical Contractors Assn. of Philadelphia, Inc. v. Local Union 420, 167 F. Supp. 35 (D.C. Pa., 1958), *aff'd* 265 F.2d 607 (3rd Cir. 1959).
89. *Id.*
90. 29 U.S.C. § 186(c)(5)(A) (1947).
91. 29 U.S.C. § 186(c)(6) (1959); 29 U.S.C. § 186(c)(7) (1969).
92. 83 CCH Labor Rel. Rptr. 309 (1973).
93. 83 L.R.R. 406 (1973) citing Bureau of Labor Statistics figures for 1972, esti-

From the Congressional debates over section 302(c)(8), it is clear that Congress did not want to replace state bar association rules regarding private legal services plans with federal procedures.[94] However, any plans which are created pursuant to section 302(c)(8) will be funded through a jointly administered labor-management trust and because of this will be required to comply with the applicable provisions of the Labor-Management Reporting and Disclosure Act (LMRDA).[95] As yet there are no special reporting requirements tailored for private legal services trusts. The details of the general requirements of the LMRDA are outside the scope of this article but should be of interest to anyone associated with a plan which is financed through a section 302(c)(8) trust.

*Income Taxation and its Consequences*

Several questions come to mind with respect to tax factors as they relate to private legal services plans. First, how will the plan be taxed? Second, now that such plans can become part of a mandatory collective bargaining package, how will the individual be taxed? This question evolves from the fact that Internal Revenue Code section 61 taxes income from whatever source derived and, unlike its health plan counterpart covered by INT. REV. CODE section 106, there is no specific exclusion, as yet, within the code to cover legal benefits. Finally, what is the effect on the employer who is making payments as part of an employee benefit?

So often in taxation questions, the manner in which the entity will be taxed often depends upon the classification it falls into. The entity in this case is that element of the private legal services spectrum which has previously been referred to as the "plan". This may include more than the conduit for fees as in the case of a small closed panel within a single law firm where the plan also encompasses the providers of the service. For such plans, the incoming fees would normally be treated like any other legal fees collected by a law firm.

Outside of the small closed panel plan there are, for tax purposes, several major categories of plans. These are voluntary participation non-profit corporations and employment related employee

mates the labor union affiliated work force at nearly 23 million. When compared to a total estimated work force in the U.S. of nearly 89 million, those workers with union affilitation amount to only about 22%.

94. 119 Cong. Rec. S 9267 (daily ed., May 16, 1973); 119 Cong. Rec. S 13748 (daily ed., July 17, 1973).

95. 29 U.S.C. § 153 et seq. (1959).

benefit associations which in turn may be classified as a form of insurance or may qualify for a charitable exemption. Naturally, the critical question for federal taxation classification is what the plan actually does and not how the state categorizes it.

From a tax standpoint, the least advantageous classification for any plan would be as a non-mutual, non-life insurance company.[96] Under this classification, the plan would be taxed at prevailing corporate rates[97] on its net underwriting income and investment income.[98] Net underwriting income means the difference between premiums taken in and losses and expenses incurred (including claims paid out).[99] The critical factor here is the additional fact that the plan could not take a deduction for reserves maintained to build up financial strength.[100]

Within the insurance category, a better alternative would be classification as a mutual insurance company.[101] Under this category, the plan would have to adopt articles and bylaws which would vest ownership of the assets and control of the plan's affairs in the subscribing policy holders exclusively.[102] The chief benefits of this classification are the ability to deduct amounts for reserve building and the fact that the plan would be taxed at a lower rate during the initial period.[103]

The significance of the insurance classifications is that if the entity looks like an insurance company (e.g. the plan is a risk-bearing rather than risk-sharing plan), it will not receive the favorable tax treatment allowing reserve building unless it satisfies rather strict requirements. The presumption is that the plan which looks like an insurance plan is "other" insurance as defined by Int. Rev. Code section 831.

Still, from the plan's point of view, there are some potentially favorable tax provisions. These would involve classification within the exemption provisions of Int. Rev. Code section 501. This would be the most desirable classification possible since plan income

96. Presentation by Stephen J. Martin, Pillsbury, Madison and Sutro, San Francisco, Calif., National Conference on the Future of Prepaid Legal Services, San Francisco, Calif., December 8, 1973.
97. INT. REV. CODE OF 1954 § 831.
98. INT. REV. CODE OF 1954 § 832(b)(1).
99. INT. REV. CODE OF 1954 § 832(b)(3).
100. INT. REV. CODE OF 1954 § 832(e).
101. *Supra* note 96.
102. INT. REV. CODE OF 1954 § 821 *et seq.*; Treas. Reg. § 1.821 *et seq.* (1956).
103. INT. REV. CODE OF 1954 § 821(a).

would be exempt from tax under section 501(a). The two major exemption provisions which might affect private legal services plans are the social welfare organization exemption under section 501 (c)(4) and the voluntary employees' benefit association exemption under section 501(c)(9). To gain classification as a social welfare organization, the plan must apply to the Internal Revenue Service and must be 1) engaged primarily in promoting the general good of an entire community and 2) not engaged in any activity which looks like a business competing with profit making concerns.[104] These requirements would effectively exclude the employment related closed panel plans unless they are large enough to benefit the entire community. Plans such as California Lawyers' Service and Consumers Group Legal Services, discussed infra, may qualify for this exemption; but to date, the Internal Revenue Service has not granted this status to these organizations.

The last category in which a plan might find more favorable tax treatment is one which involves a great deal of controversy.[105] This is the voluntary employees' benefit association classification under section 501(c)(9). The key to the controversy is the interpretation of the word "other".[106] The Internal Revenue Service articulated a "sufficiently similar" test in Revenue Ruling 58-442[107] which would include within the meaning of "other" only those benefits which are "sufficiently similar" to accident, sickness and death benefits. This test appears to have been adopted by the Treasury Regulations which were proposed in 1969.[108] Students of the history of this provision suggest that section 501(c)(9) should be read expansively to provide for future employee fringe benefits not contemplated, in 1928, by the original act.[109] There is a note of encouragement in the fact that the proposed Treasury Regulations under section 501(c)(9) have not been approved even though they have been proposed since 1969. Moreover, the same consumer groups which had a hand in the recent amendment to

104. Treas. Regs. § 1.501(c)(4)-1(a)(2) (1958).
105. Bartosic and Bernstein, *supra* note 85 at 454.
106. INT. REV. CODE OF 1954 § 501(c)(9) provides:
> Voluntary employees' benefit associations providing for the payment of life, sickness, accident, or *other* benefits . . . [Emphasis added.]

107. 1958-2 CUM. BULL. 194.
108. Proposed Treas. Regs. § 1.501(c)(9)-1(b)(3)(v) (1972) would include any benefit intended to safeguard or improve the health of the employee or protect against a contingency which interrupts earning power. Benefits for other contingencies, such as fire insurance, are specifically excluded.
109. For a complete history of the provision, *see* Bartosic and Bernstein, *supra* note 85 at 454-459.

the Taft Hartley Act, discussed supra, have had some influence in this area and in fact new regulations under this section will very likely be proposed this year.[110] Presumably, the new proposed regulations would contemplate inclusion of private legal services plan benefits within section 501(c)(9).

The individual, too, has considerable tax considerations. Any voluntary direct payments to a legal services plan will be treated as attorney's fees are normally treated under the Internal Revenue Code. That is, they will be deductible only if they are incident to a business engaged in by the individual.[111] This should prove important to those trade and business associations which may utilize the private legal services format for legal counsel. Benefits under a private legal services plan will be includible as ordinary income until there is enacted in the Internal Revenue Code a specific exclusion. Section 61 and the holding under *Commissioner v. Glenshaw Glass Co.*[112] would include the fair market value of legal services received through the plan (less any amounts paid into the plan). The remaining question here is what is the fair market value? The answer may well be that, at least in the early years of a given plan, the fair market value of the services the client receives exactly equals what he has paid. That is to say, as long as the concept is one of risk sharing, the subscribers to the plan are, in effect, bargaining for a lower individual cost of legal services and are paying for it on the installment basis. When the plan is funded through an insurance (risk-bearing) concept, where the individual is more likely to be receiving benefits which have a value in excess of the amounts paid into the plan, the applicability of taxation on windfall gains will be more significant. By the time the private legal services concept becomes developed enough to provide such gains it is likely that an exemption, similar to the accident, health and wage continuation benefit exemptions of sections 104 & 105, will be created.

Along this same line, unless a specific exception is enacted, the employee will be liable for the tax on amounts paid into a legal services plan for his benefit by his employer. An exemption, similar to INT. REV. CODE section 106 which provides for an exemption for employer accident and health plan contributions, is needed in this

110. Sandy Dement, National Consumer Center for Legal Services, 1750 New York Avenue, N.W., Washington, D.C. 20006.
111. INT. REV. CODE OF 1954 §§ 162 & 212.
112. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

area. There is a strong movement afoot, a change backed by labor unions and private organizations involved in legislative reform, to make such a change.[113]

For the employer paying into a private legal services plan for the benefit of employees, payments made will be deductible to the extent that they are ordinary and necessary to his trade or business.[114] However, as the regulations are evolved with respect to the treatment of trusts as the financing vehicle of private legal services plans, the method by which the employer may take the deduction may change. For the present time, however, the rules are simple and the employer can treat such payments in a similar manner as other fringe benefit payments are treated.

Congress has been historically slow to act in this area for a multitude of reasons but now there are numerous groups which have enough power to help transform theory into legislative reality. These groups include some of the largest labor unions,[115] some consumer interest groups[116] and some U.S. Senate subcommittees.[117] Members of these groups participated in amending the Taft-Hartley Act and it is likely that they will have similar success with the Internal Revenue Code.

*State Insurance Regulation*

Because the private legal services concept is so new and be cause the major insurance carriers are awaiting statistical data before developing wide spread legal services insurance plans, the insurance laws in most states (including California) do not have special provisions for this type of insurance. However, any plan which is funded through an insurance carrier will no doubt be required to comply with existing state insurance laws.[118] In California, Insurance Commissioner, Gleeson L. Payne, has considered private legal services insurance plans to fall within the "Miscellaneous" category of insurance as defined by California Insurance Code sec-

113. *For example, see* note 110.
114. INT. REV. CODE OF 1954 § 162(a).
115. Laborers' International Union of North America, 905 16th St. N.W., Washington, D.C. 20005.
116. *See* note 110 *supra*; *see also* National Consumer Law Center, Inc., One Court Street, Boston, Massachusetts 02108.
117. Subcommittee on Labor, Committee on Labor and Public Welfare, United States Senate, Washington, D.C. 20510; Subcommittee on Representation of Citizens Interests, Committee on the Judiciary, United States Senate, Washington, D.C. 20510.
118. Van Hooser, *Problems of Regulation and Supervision of Prepaid Legal Services Plans*, 9 THE DOCKET (Virginia Bar Association) 14 (Winter, 1973).

tion 120.[119] This would make legal services insurance plans subject to the same rating laws as are applicable to property and liability insurance.

There are three major unresolved issues relating to the insurance aspects of legal services plans. The first is the need to develop legal services insurance plans which do not inadvertently violate state insurance laws. This problem is currently being solved through the coordination of insurance companies with the state insurance commissioners.

The second issue is definitional. California Insurance Code section 22 defines insurance as "a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event."[120] The problem here is that a legal services plan contract may be deemed insurance under the statutory definition even though it was not designed as insurance. Legal expenses often do not depend on some contingent event. Legal costs are commonly encountered by many individuals. The only question is one of timing of the costs and accumulation, by the individual, of funds with which to pay them. Is a plan which provides for the disbursement of these funds an insurance plan? There is a need for greater certainty in the laws so that a plan which was designed as a "risk-sharing" plan for the prepayment of legal services will not be construed as a "risk-bearing" plan of insurance. This distinction is important for purposes of determining how the regulatory laws will treat the plan.

Finally, there is the issue of cost inflation which was encountered by health plans at their inception.[121] When health plans were first marketed, the providers of the service (i.e. the physicians) raised their prices at an increasingly rapid rate. The apparent reason for this was that the persons served did not object to the increased prices so long as the services were covered by insurance. One of the strongest supporters of the private legal services concept is Pennsylvania Insurance Commissioner Herbert S. Denenberg. He believes that this potential cost escalation must be controlled and that to do this, substantial quality and cost regulations must be

119. Payne, *California Insurance Department Calls Conference on Legal Services Insurance*, California Insurance Department Press Release, March 19, 1973.

120. CALIF. INS. CODE § 22 (West, 1973); CAL. CIV. CODE § 2722 (West, 1973) defines indemnity as "a contract by which one engages to save another from the legal consequences of one of the parties, or some other person."

121. *See, The Role of Prepaid Group Practice in Relieving the Medical Care Crisis*, 84 HARV. L. REV. 887, 893, 899 (1971).

established at the outset.[122] His theory, which was proven by the health insurance experience, is that it is easier and more efficient to have a good program of regulation and control to begin with than to try to install one at a later date.

A proposal which addresses itself to all three of these problems is in the form of a model piece of legislation designed to cover all of the types of private legal services plans.[123] A major benefit of this type of legislation would be that a plan could be more easily classified and thus be more certain of its obligations. The proposed regulations would divide legal services plans into three categories: 1) legal services cost insurance plans, 2) legal services delivery plans, and 3) other legal services plans. This type of division is another way of getting around the definitional problems which have been referred to before. The proposed regulation for "legal services cost insurance plans" would provide, in addition to existing state insurance laws, special reserve fund requirements, prior insurance commission approval before plans could go into operation, and regulation of both premiums and fees charged. "Legal services delivery plans" would encompass most closed panel plans and those open panel plans which do not act like insurance. In the area of fee regulation, the model act would only exempt insurers from antitrust to the extent allowed by the McCarran-Ferguson Act.[124] This type of legislation is what is needed to eliminate the remaining insurance questions concerning private legal services plans.

## PART TWO: THE PLANS

The balance of this article will discuss some representative plans currently in existence in California. The first plan discussed is the California Bar Association sponsored lawyer reference service which functions like an open-panel plan and has been in existence for many years. The second plan is the California Lawyers' Service, a large open panel plan, which is also sponsored by the California Bar Association. The third plan examined is a closed-panel plan which functions through the law firm, of Lorenz, Blicker,

122. Pennsylvania Insurance Commissioner, Herbert S. Denenberg, *INA Files Legal Insurance Policy*, Press Release, Commonwealth of Pennsylvania Insurance Department, April 5, 1973. [Dr. Denenberg has since left the Insurance Department.]

123. G. COLE, GROUP LEGAL SERVICES: THE NEED FOR AN APPROACH TO REGULATION; National Consumer Law Center, One Court Street, Boston, Massachusetts 02108.

124. 15 U.S.C. § 1012 (1958); *see generally*, Gardner, *Insurance and the Antitrust Laws—A Problem in Synthesis*, 61 HARV. L. REV. 245 (1948).

Buhai, Ballachey & Webb. The fourth type of plan discussed is National Legal Care Program, Inc., a closed-panel plan which acts as an administrative agent between several law firm participants. A fifth type is a closed-panel plan utilizing the "staff-clinic" approach of which Consumers' Group Legal Services is representative. And finally, a plan sponsored by Insurance Company of North America (INA) is discussed. This selection of plans is by no means exhaustive of the possibilities for private legal services plans but it does describe the major types which are currrently being developed and operated.

*Lawyer Reference Services*

Lawyer reference services are a public service authorized and controlled by the California State Bar Association.[125] They are discussed in the context of private legal services plans because they too are a method of matching a potential client and his problem to an attorney. The lawyer reference service is a type of open panel plan which predates all of the plans discussed herein. Because of the increase in numbers of available plans, it is likely that other private legal services plans will have a significant impact on the utilization of reference services. At this time, however, it is difficult to determine precisely what the effect will be.

Lawyer reference services are established and administered by local bar associations.[126] An attorney who wishes to join a reference panel usually must pay an annual fee which varies from ten dollars to several hundred dollars depending upon the locality of the service.[127] This range in fees is dependent upon the average number of referrals the attorney may expect annually.[128]

The method by which the lawyer reference service functions is simple. The potential client calls the reference service and is either placed in contact with a staff attorney (available only in large metropolitan areas) or is referred to a local member of the bar chosen from a list of participating attorneys maintained by the service. The attorney then meets with the client and conducts an initial consultation for which a nominal fee is charged. At this consul-

125. The full text of Minimum Standards for Lawyer Reference Services is set forth in CALIFORNIA STATE BAR REPORTS, March, 1973.
126. *Id.*
127. State Bar of California, Office of Legal Services, CALIFORNIA LAWYER REFERENCE SERVICE SURVEY, compiled May 19, 1973. In 1971, as low as $10 was charged in Fresno, California while $240 was charged in Long Beach.
128. *Id.* In Fresno the average number of referrals annually was 8.5 while in Long Beach that figure was 38.2.

tation, the client's problem is discussed and if further work need be done by the attorney, a fee is negotiated between them.

The lawyer referral service only performs part of the job done by most private legal services plans. That is, it brings an individual and an attorney together. Other open and closed panel plans make some provision for easing the client's financial burden. Closed panel plans provide the added benefit of an attorney screening and selection process to provide a greater likelihood that the attorney with whom the individual is placed in contact will be right for the particular legal problem. However, even though reference services are limited, open panel plans like California Lawyers' Service and the insurance plans are counting on them to handle the referral function.

*California Lawyers' Service*

California Lawyers' Service[129] (CLS) is a non-profit California membership corporation that was formed in 1972.[130] Its purpose is to develop, administer, and operate open panel arrangements designed to furnish prepaid legal services to the people of the State of California.

The mechanism employed for this purpose is the offering of legal service plans to various groups or associations of employers, employees, and individuals.[131] Under a typical CLS plan, monthly payments are made to CLS by the individual or his employer. Covered individuals may then go to participating attorneys at no additional cost for initial services. Those attorneys will have agreed to accept reimbursement from CLS as "payment in full" for certain covered services.

If more extensive services are necessary, the client may be re-

129. Information regarding California Lawyers' Service (CLS) was obtained from the Legal Services Department of the State Bar of California and from Peter F. Sloss of California Lawyers' Service. Their cooperation and provision of the following CLS publications is greatly appreciated: Your Prepaid Legal Services Program (undated pamphlet); Facts About California Lawyers' Service (August, 1973) (hereinafter cited as CLS Facts); Participating Attorneys' Handbook (Tentative draft October, 1973) (hereinafter cited as CLS Handbook); and an untilted pamphlet containing California Lawyers' Service Articles of Incorporation, By-Laws, Rules for Members and Participating Attorneys, Sample Benefit Plan Description, and Application for Membership (undated) (hereinafter cited as CLS Pamphlet).

130. The statutory authority for the formation of a non-profit corporation whose purpose is to administer plans to defray the costs of attorneys' professional services is CAL. CORP. CODE § 9201.2 (West 1955) and the General Non Profit Corporation Law, CAL. CORP. CODE § 9000 *et seq.* (West 1955).

131. At the present time CLS is developing legal service plans for groups only, but plans for individuals may be developed in the future.

quired to make "copayments" directly to the attorney at a plan' specified rate. However, the rate of copayments for covered services under a plan is substantially lower than the fees customarily charged by attorneys for their services. Subject to certain standard exclusions, covered services include the entire spectrum of attorney services, e.g., office or telephone consultations, adoption proceedings, bankruptcy, family law, real estate matters, estate planning, administrative hearings, civil or criminal litigation, etc.

If covered services are performed for a client by a non-participating attorney, the client makes an ordinary fee arrangement with the attorney and submits a claim for reimbursement to CLS. The reimbursement of the client is the same as those payments that would have been made by CLS to a participating attorney.

Through this process, a covered individual who otherwise might not be able to afford the cost of legal services may select a CLS participating attorney, or other attorney of his choice, and receive initial services at no cost other than the prepaid monthly amount. Furthermore, the individual is assured that additional covered services will be available at a know, reduced cost.

*Benefit Clauses*[132]

CLS plans will be tailored for the individual groups they service. Under a typical plan, each member of a group on whose behalf payments are made to CLS and his or her spouse and dependent children constitute a "Covered Family" entitled to services under the plan.[133] Benefit clauses offered by CLS include the Basic Benefit, Additional Benefit, Major Legal Benefit, and Standard Exclusions. Services ordinarily rendered by attorneys have been assigned "relative unit values" according to the expected complexity and time involved for a particular service. These unit values are contained in the Schedule of Services developed by CLS which lists the most common legal services likely to arise under the various plans.[134] The standard in the schedule is 100 units which is the equivalent of one hour of office or telephone consultation research,

132. The plans discussed here are illustrative of possible arrangements. Variations in the actuarial characteristics of a group, the interests of the group, and its budget will affect the availability of specific plans for a particular group. *See* CLS Facts 3; CLS Pamphlet, Sample Benefit Plan Description 1.

133. Specific plans include eligibility rules established by the group. Such rules include waiting periods, full-time or part-time employee definitions, provisions regarding retirees, age limits for dependents, and rules for layoffs, terminations, leaves of absence, etc. CLS Handbook 3(a).

134. CLS Handbook 1(a); CLS Facts 1.

and or preparation. Thus, a 45 minute office consultation is a service with a unit value of 75.[135]

Depending on the plan chosen, the Basic Benefit provides for one or two hours (100 or 200 units) of consultation and advice by a participating attorney on any legal subject. The consultation and advice may include a brief annual legal checkup, review or preparation of a single legal document, or the informal resolution of a legal dispute.[136]

The Additional Benefit Clause provides for legal services beyond those provided by the Basic Benefit but having not more than a specified total unit value. Additional services provided under the Additional Benefit clause are subject to a "copayment" by the client at the rate of $0.07 per unit, which under the Schedule of Services is the equivalent of $7.00 per hour.[137]

The Major Legal Benefit Clause allows for coverage of the litigation services of an attorney not to exceed a specified total unit value. Services under the Major Legal Benefit Clause are also subject to "copayment" by the client to the participating attorney. Services beyond the coverage of a plan may be provided under the attorney's usual fee arrangement.[138]

The Standard Exclusions applicable to all benefit clauses include customary contingent fee or court allowed fee matters; cases in which representation can and will be provided at no charge by a governmental agency or private attorney; and income tax return preparation. Standard Exclusions applicable only to the Additional Benefit and Major Legal Benefit Clauses are business expenses for which a federal income tax deduction would be allowable or expenses which may be added to the basis of property held for the production of income; Workman's Compensation proceedings; proceedings in which CLS, the covered member's employer or union, or their officers or agents are real parties in interest; matters arising under the National Labor Relations Act; any matter where prohibited by the Labor Management Disclosure Act of 1959; any case where representation is provided through any insurance policy; cases wherein the financial responsiblity requirements of the Cali-

135. The Schedule of Services lists the relative value of the services. Thus, a three hour office consultation has a unit value of 300, but a half day trial in a superior court has a unit valuie of 1150. *See* CLS Handbook app. One 1, 6.
136. CLS Pamphlet, Sample Benefit Plan Description 1; CLS Handbook 4(a).
137. CLS Pamphlet, Sample Benefit Plan Description 2; CLS Handbook 4(a).
138. CLS Handbook 5(a).

fornia Vehicle Code apply to the member; class actions, interventions, or *amicus curiae* matters not involving the immediate and direct interests of the member; cases in which representation can and will be otherwise provided without charge; and any expenses other than lawyer's fees for services, e.g., court costs, deposition fees, witnesses' fees, fines, assessments, etc.[139]

*Lawyer Referral*

Pursuant to Rule 23,[140] CLS may refer covered individuals to CLS Participating Attorneys. Referrals may also be made through a local bar association reference service, and

> . . . most Lawyer Reference Services will have copies of the CLS Participating Attorney list and have agreed to honor requests for referral to a CLS Participating Attorney. Otherwise, each Lawyer Reference Service operates in accordance with its own rules and procedures[141]

Any fee charged by the reference service must be paid by the attorney and will not increase the amount an attorney may charge under the CLS program, however CLS will reimburse the attorney for this expense.[142]

*Participation and Compensation of Attorneys*

Any active member of the State Bar of California may become a member of CLS by completing an application and paying the enrollment fee established by the CLS Board of Directors.[143] A CLS member attorney may become a participating attorney by agreeing to follow the Participating Attorney Rules.[144]

The general provisions of these rules are as follows: A participating attorney shall submit evidence of security for claims against him;[145] third party interference with the attorney-client relationship

139. RULES, Rule 23.
140. *Id.* Rules 23 a(2).
141. CLS Handbook 8(a).
142. *Id.*
143. CLS Pamphlet, Articles of Incorporation, Art. V. Pursuant to CLS By-Laws, charges and assessments may not exceed $50.00 per annum. CLS Pamphlet, By-Laws of California Lawyers' Service Art. II 1.
144. CLS Pamphlet, Rules for Members and Participating Attorneys 1.
145. The security required is errors or omissions insurance in the amount of $100,000 or a personal financial statement indicating an equivalent ability to respond in damages. This security requirement has been suspended until the CLS Board of Directors determines that such insurance is generally and reasonably available. *See also* notes 130, 131, *supra.*

is prohibited;[146] solicitation and advertising is prohibited except as permitted by the Rules of Professional Conduct of the State Bar of California;[147] fees charged to a client may not exceed plan specified amounts; plan specified amounts paid by a client and amounts paid by CLS to a participating attorney must be accepted as payment in full for covered services; clients may not be rejected for a perceived inadequacy of compensation under a plan; all disputes excluding damage claims are to be resolved through binding arbitration; and an attorney may terminate his CLS participation at any time but such termination does not affect obligations regarding previously undertaken services.[148]

When a client consults a CLS participating attorney and claims eligibility under a benefit plan, the attorney may obtain a determination of the benefits available to the client under the particular plan before the services are rendered.[149] If the necessary services are covered under the plan, the attorney submits a claim for payment to CLS after the services have been rendered.[150]

Payment by CLS to the attorney will be made according to a dollar value per unit applied to the total unit value of covered services performed, less any payments made directly to the attorney from the client under the terms of the plan. The actual dollar value of a "unit" will be determined by the operating experience of the program. As of August, 1973, CLS expected a value of $0.30 per unit, the equivalent of $30.00 per hour.[151]

*Illustrative Plans*[152]

The following are illustrative of benefit plans CLS has proposed to various groups:[153]

I. Benefit plan for a union group where prepaid legal services is an employer-paid "fringe" benefit negotiated through collective bargaining. The cost to the employer is approximately $10.00 per month per employee

146. *See* note 131, *supra.*
147. *See* note 131, *supra*; *see generally* RULES, Rule 2, 3, and 23a.
148. CLS Pamphlet, Rules for Members and Participating Attorneys 3-5.
149. CLS Handbook 10(a).
150. *Id.* at 14(a).
151. CLS Facts 1.
152. *Id.* at 5.
153. "Variations in the characteristics of different groups affect predictable costs of providing legal services so the rates quoted for the particular Benefit Plan would not necessarily apply to all groups." *Id.*

| Benefit | Units | Cost | |
|---|---|---|---|
| Basic Benefit | 100 | $120.00 | ($10.00 per month, paid by employer) |
| Additional Benefit | 1000 | 0.08 | per unit copayment (equivalent to $8.00 per hour, paid by employee) |
| Major Legal Benefit | 5000 | 0.08 | per unit copayment (equivalent to $8.00 per hour, paid by employee) |
| Maximum benefit under the plan | 6100 | $600.00 | ($120.00 employer paid, $480.00 employee paid copayment) |

Under such a plan, the employer pays the monthly cost of $10.00, and the client-employee makes no payment for services until the 100 unit Basic Benefit is exhausted. If the maximum benefits under the plan were used, the client would receive the equivalent of 61 hours of attorneys' services. For these services the client would make copayments to the attorney in the amount of $480.00 ($80.00 copayment for the Additional Benefit and $400.00 copayment for the Major Legal Benefit). Thus, the client would pay an average of $7.87 per hour ($480.00 for the equivalent of 61 hours of services) if the coverage of the plan was exhausted. If a value per unit of $0.30 is assumed,[154] the attorneys rendering the services under these circumstances would receive $1830.00 in fees ($480.00 copayment from the client and $1350.00 payment from CLS).

II. Benefit plans for a "voluntary group"—CLS contracts with an employer who makes payroll deductions for those employees who voluntarily enroll in the plan.

Plan A: Employee paid cost of $5.00 per month.

| Benefit | Units | Cost | |
|---|---|---|---|
| Basic Benefit | 100 | $60.00 | ($5.00 per month) |
| Additional Benefit | 400 | 0.15 | per unit copayment |
| Maximum benefit under the plan | 500 | $120.00 | |

154. *See* text accompanying note 151, *supra.*

Plan B: Employee paid cost of $4.50 per month.

| Benefit | Units | Cost | |
|---|---|---|---|
| Basic Benefit | 100 | $54.00 | ($4.50 per month) |
| Additional Benefit | 300 | 0.15 | per unit copayment |
| Maximum benefit under the plan | 400 | $99.00 | |

Plan C: Employee paid cost of $3.75 per month.

| Benefit | Units | Cost | |
|---|---|---|---|
| Basic Benefit | 100 | $45.00 | ($3.75 per month) |
| Additional Benefit | 150 | 0.15 | per unit copayment |
| Maximum benefit under the plan | 250 | $67.50 | |

A covered family under a "voluntary" plan would pay from $3.75 to $5.00 per month for the 100 unit Basic Benefit and the equivalent of $16.00 per hour copayment for services within the coverage of the Additional Benefit. Attorneys would be compensated according to the total unit value of the services rendered and the operating experience of the program.[155]

At the present time, California Lawyers' Service is in the process of registering participating attorneys. It will not begin the actual business of providing a prepayment service until it has a sufficient number of participating attorneys and affiliated groups to make the plan financially feasible.

*Lorenz, Blicker, Buhai, Ballachey & Webb*

The California law firm of Lorenz, Blicker, Buhai, Ballachey & Webb has instituted a rather novel form of law practice which began serving groups in a closed-panel format in May, 1973.[156] The firm is a general partnership with one resident partner in each office maintained throughout the state. Its offices are located in San Francisco, Los Angeles, San Diego, Sacramento and Berkeley.

155. *Id.*
156. Materials concerning Lorenz, Blicker, Buhai, Ballachey & Webb obtained from the San Francisco branch office of Lorenz, Greene and Kelley, 345 Franklin Street, San Francisco, California 94102.

Except for purposes of administration of the plan, each office acts as a separate firm. The advantages of this plan are that the attorneys can utilize certain economies of scale while giving client more individualized attention. In addition, the geographic diversity of offices can give a group subscribing to one of its plans nearly state-wide coverage.

Beyond the services (described below) which are offered under the plan at no extra charge to the individual member, the firm provides legal sevices to the subscriber at a rate approximately 15% lower than it would charge an individual client not covered under a plan. Matters that are ordinarily handled on a contingency basis will continue to be handled that way and the overall treatment of a group client will be identical to that of a non-group client.

Three separate plans are offered. They are: *Reduced Fee Legal Protection Plan* (Plan A); *Legal Protection Plan for Limited Prepayment* (Plan B); and *Comprehensive Legal Protection Plan* (Plan C). Each plan is administered under an annual contract between the firm and the group.

The *Reduced Fee Legal Protection Plan* (Plan A) offers the subscriber two one hour-long consultations annually, an annual legal check-up without charge and additional legal work performed and charged in accordance with a reduced fee schedule. The annual legal check-up consists of a questionnaire which is provided to the group for duplication and distribution to its members. The questionnaire provides a self-analysis of the member's personal family situation (eg. existence and location of will; insurance; etc.). The firm will then schedule a meeting of the group members to answer any questions they may have. The consultations offered under Plan A consist of a review of any legal problems faced by the member and a discussion with the member of what approach should be taken to resolve the problem. The plan does not provide for any documents, negotiations with third parties, court appearances or research.

Under Plan A there is no registration fee or prepayment required. The subscribing member pays only for services rendered. In civil cases involving fees of less than $100.00, the client must pay in full before the work will be undertaken. Where the fee will be more than $100.00, the client must pay one third in advance and the balance upon completion of the case or in accordance with

an advance agreement. All criminal work must be fully paid in advance.

Plan A is subject to certain exceptions. Any controversy between the member and the group will not be handled. Any case involving a conflict of interest within the firm will not be handled and any case which the firm deems to be without merit will not be undertaken.

*Legal Protection Plan for Limited Prepayment* (Plan B) offers the subscriber two one hour consultations annually, an annual legal check-up and two hours of legal work on any matter not requiring a court appearance. The legal work may include factual investigation, document drafting, letter writing, advice, conferences, negotiations and legal research. Any additional work will be performed by the firm in accordance with the reduced fee schedule. The charge for Plan B to the subscriber is $20 per year for each member of the group and for each person in the member's family who elects to be covered. The member, his or her spouse and each unmarried child under eighteen are eligible.

Plan B is subject to the same exceptions as Plan A as well as some additional exceptions. The firm will not complete tax returns although it will give advice and information on any tax problem. The firm will not undertake any class action where the subscriber's interests are not immediately involved nor will the firm provide legal representation in any case where such representation is provided through an insurance policy under which the subscriber is not liable for legal fees. However, the firm will provide legal services to the extent necessary to protect the member's interest in connection with questions of coverage or liability beyond the policy limits.

In order for Plan B to go into operation, the firm requires at at east 50% of the group membership to participate. If the group does not obtain 50% participation within tweve months, the agreement between the firm and the group terminates. When the group arrives at 50% participation, the firm gives the group thirty days notice of the date the agreement will go into effect. The agreement then continues for one year from that date and continues from year to year, provided that the subscribers continue to make payments. In order to terminate the agreement, either the group or the firm must give thirty days notice in advance of the termination date. In the event of termination, the firm will continue with cases

in progress but will provide no additional services pursuant to the plan.

*Comprehensive Legal Protection Plan* (Plan C) offers the subscriber annually two one hour consultations annually, an annual legal check-up, and ten hours of legal work on any matter. In addition, the plan offers thirty eight hours of additional legal work for which the subscriber pays an amount equal to 25% of the value of the services rendered. Beyond that, the subscriber must pay for legal services based upon the same fee schedule used in Plan A and Plan B. The same exclusions apply to Plan C as Plan B.

The cost of Plan C is $54.00 per year for each subscriber who is a member of the group and $30.00 per year for each additional person in his family who elects to be covered. In order for Plan C to operate, the group must have 67% membership participation and a total of 3,000 enrolled persons living in the geographic area served by the firm's local office. If minimum participation is not secured, the agreement between the group and the firm will be terminated as in Plan B.

In order to resolve disputes among the subscriber, the group or the firm, a mediation committee is established at the beginning of the agreement between the group and the firm. This committee acts on disputes and reaches decisions without cost to either party to the dispute. If a matter submitted to the committee is not resolved to the satisfaction of the parties involved, the matter may be submitted to arbitration in accordance with the rules of the American Arbitration Association.

Each year an evaluation may be conducted by the group in accordance with procedures agreed upon between the group and the firm. The group may evaluate the quality of representation and other aspects of the plan including the cost. The firm will make available to the group financial data concerning the costs and fees associated with the services provided so that the group may decide whether the fees charged are reasonable.

In addition to the services outlined above, the firm provides two additional services under any of the plans. The first is emergency legal representation and the second is a preventive legal service. The emergency legal representation is offered when the office of the firm are normally closed and when the firm must take some action on short notice (within 72 hours of initial contact with

the firm). This service is facilitated by an answering service which will call one of the firm's attorneys who is on duty. The attorney will immediately contact the member and take the appropriate action. The fees charged for these services, however, would be equivalent to the prevailing fees in the locality served by the attorney's office. In addition, a prorata share of the cost of the answering service is borne by the group.

Preventive legal service is provided by the firm in the form of monthly news column discussing such diverse topics as: "How to Homestead Your House" and "What to do if You Are Arrested". These columns are meant for republication in the group's newsletter. The firm will also conduct legal seminars concerning a broad range of topics of interest to the membership.

Lorenz, Blicker, Buhai, Ballachey & Webb is an innovative firm which seems willing to tailor its various plans to the needs of the respective group memberships. The major benefit offered by the firm is that the group member can have "his" local legal counsel within most major metropolitan areas of California.

*National Legal Care Program, Inc.*

National Legal care Program, Inc. (Legalcare)[157] is a nonprofit corporation formed in January, 1971 for the purpose of arranging prepaid legal services for members of participating groups. Legalcare acts as an administrative groups on one hand and individual attorneys or law firms on the other. The arrangements are designed to place the individual member in contact with an attorney and to make some provision for the payment of subsequent legal fees. Legalcare does not practice law nor does it solicit on behalf of any particular attorney. The plan has not as yet begun actual operation since, like California Lawyers' Service, it is waiting until a substantial membership is reached before proceeding. The structure of Legalcare is similar to the structure of the Lorenz firm discussed earlier. The plan is administered by the "umbrella" partnership of Barnett, Jones, Miller, Seymour an Wdeldon with headquarters in Norwalk, California. The total partnership presently consists of representatives from ten law firms throughout the state of California.

157. Materials concerning National Legal Care Program, Inc., obtained from National Legal Care Program, Inc., 12749 Norwalk Blvd., Suite 201, Norwalk, California 90650.

Legalcare, under a service agreement with a given group will act as a clearing house for payment of monthly premiums. These premiums, in turn, will be used to reimburse participating attorneys for any work performed. The various plans offered by Legalcare cost between $4.00 and $14.00 per member per month. In addition, for each new case or consultation, the member must pay a registration fee of $2.00. This fee is normally paid to the participating attorney who passes it on to Legalcare.

The plan offers a simple referral system. The group members are given a card which lists a telephone number within their locality. When the member has a legal problem, he can telephone that number and from there be directed to an attorney who is nearby and hopefully knowledgeable in the member's type of problem. This type of system works fine in theory however not all legal problems fall into recognizable categories. If a major goal of a good referral system is to place the individual with the attorney best suited to handle his problem, then a system which does not utilize some sort of screening process performed by one qualified in legal diagnosis will probably fall short of this goal. Legalcare uses some care in the selection of its participating attorneys. This will bring to the group some of the advantages of a broad selection of attorneys offered by open panel plans which giving the security of reputation that a closed panel can offer. From the referral point of view, eventually the referring personnel of the plan will know the capabilities of the individual attorneys and can therefore do a better job.

Once the member is referred to a particular attorney and the necessary services are performed, the attorney will be compensated in a manner similar to that of the California Lawyers' Service plan. A relative value schedule has been established. The attorney will be assigned a certain number of points based upon the nature of the services accomplished. At the end of the month, the attorney will be compensated to the extent that his total point value entitles him. The actual money value of each point will be allowed to fluctuate from time to time based on the funds available for distribution to the attorneys.

From the consumer's standpoint, there is some confusion as to what the plan covers. At the outset, Legalcare proposes a complicated system of benefits and exclusions which change based on the amount of the premium paid by the member. It appears, however,

that performance of any substantial work beyond the consultation stage will be billed directly by the attorney to the client. There is, in that event, no specific provision for a reduced fee below that normally charged. This is a marked difference from the usual closed panel plan.

Unlike other plans which are principally directed toward the benefit of the consumer, Legalcare seems intended primarily for the attorney's benefit. This, however, is not necessarily a bad thing. A lawyer who is not concerned about getting business and collecting his fees may be more apt to do a better job. Moreover, the plan anticipated uniting numerous small firms so that they can reap the benefits of long range estate planning, group health and life insurance, group malpractice insurance, and the like. The client is presumably protected by numerous grievance procedures and a credentials committee which makes sure that the firms within the plan perform in a manner which will satisfy the groups served.

*Consumers' Group Legal Services*

Consumers' Group Legal Services (herinafter referred to as CGLS) is one of the most innovative and ambitious private legal service plans in the country.[158] It is located in Berkeley, California and utilizes "staff clinic" approach in offering a closed panel plan. The chief staff attorney and guiding force of CGLS is Harriet Whitman Thayer who is a well known advocate of private legal services and who has appeared as a panelist in the several American Bar Association conferences in this field.

CGLS was formed in October 1971 as a non-profit corporation under California law and presently considers itself social welfare organization. It was however, recently denied tax-exampt status by the Internal Revenue Service and an appeal is currently pending.

Until March 1973 CGLS existed solely for the benefit of members of Consumers' Cooperative of Berkeley, Inc. hereinafter referred to as Co-op; since that time it has opened its doors to other groups as well, and its membership has grown rather steadily to over one thousand two hundred (1200) persons. However, individual persons who are neither members of Co-op nor of another participating group are not eligible for membership.

158. Materials concerning CGLS obtained from Consumers' Group Legal Services, 1414 University Avenue, Berkeley, California 94702.

CGLS is governed by a board of directors which is elected by its members. The administrative staff consists of two salaried staff attorneys who may not maintain an outside practice, and several salaried paralegal assistants and secretaries.

From its inception, the plan adopted the closed-panel system of lawyer referral and presently has contracts with nineteen attorneys to serve as its panel. The panel attorneys were chosen first, for their recognized expertise in various areas of the law thought to be most useful to CGLS members, and second, for their commitment to achieving the goals of CGLS.

Use of the closed-panel system has enabled CGLS to achieve at least two goals it would otherwise have been unable to attain. First, a thorough screening procedure for prospective panel attorneys has been developed, with the result being that the panel consists of attorneys whose abilities and philosophies are closely aligned to the needs of the members of Co-op. Second, the number of panel attorneys is sufficiently small and stable to have enabled the staff attorneys to develop a sophisticated referral procedure, which has resulted in a higher proportion of successes in matching members with attorneys than could have occurred under an open-panel system.

The turnover of panel attorneys has been small; only a few (approximately four or five) have left, and the partings have been by mutual agreement. It is likely that the low turnover is due to the initial careful selection.

Grievances between members and panel attorneys are few. In those cases where grievance resolution is necessary, the staff attorney acts as mediator. The procedure is as follows: when a member's case has been refused by three panel attorneys, it is reviewed for merit by a staff attorney, who either takes the case personally or persuades the member that it is not a case which can be appropriately handled by CGLS.

Recently, however, an intermediary body designated the Panel Attorney Committee has been established. This committee's function is to review the needs of the membership as a whole at six-month intervals, to establish a perpetual evaluation system, and to arbitrate all disputes among members, CGLS, and panel attorneys, thereby relieving the staff attorneys of that burden. The Committee is a subcommittee of the Board of Directors, and is comprised of both lawyers and laymen.

One problem CGLS has faced has been difficulty in obtaining satisfactory malpractice insurance. Although Ms. Thayer has argued that the staff attorneys' malpractice exposure is far less than if they were in private practice, many insurance companies have flatly turned CGLS down. The common reason given for refusal is that since CGLS is new and unique, it is not yet possible to actuarially determine the risks involved. A company which agreed to provide insurance was finally located, however its annual premiums are in excess of five hundred hundred dollars per attorney and "hold harmless" agreements are required of each panel attorney. After much effort, another company has since been located and it is expected that the new premium will be substantially lower than the present figure.

Of particular interest is the extent to which CGLS uses paralegal assistants. Currently, four separate services are completely staffed by paralegals: (1) Divorce Assistance Service, (2) Homestead and Bankruptcy Service, (3) Change of Name Service, and (4) CGLS Information Service, which answers the heavy volume of complex inquiries about CGLS received from interested lawyers and groups throughout the United States. A fifth unit, Wills and Trust Service, is planned for the near future. Each unit is directly supervised by the staff attorneys.

The basis for establishing these services within the administrative staff was the concept that certain legal services of a relatively low complexity and of a highly repetitive nature could be adequately performed by a non-lawyer, resulting in substantial monetary saving to the member. The *caveat* to this, of course, is that the non-lawyers must be directly supervised by a member of the Bar. Interesting questions are also raised concerning increased malpractice exposure for the supervising attorney and the possibility of charges of unauthorized practice.

The following quotation from the *CGLS Schedule of Fees for Legal Services* provides insight into the view taken by CGLS on the use of paralegals:

"CGLS is able to provide these very low fees because the DAS [Divorce Assistance Service] relies primarily on highly trained legal assistants rather than attorneys. These assistants have a thorough knowledge of court procedures and are also trained to assist communications between the parties on a limited basis. Cases are not referred to the DAS unless they are within the capability of the legal

assistant to handle with limited supervision and assistance of an attorney. Those cases which are not eligible for the Service because of their complexity are referred directly to panel attorneys specializing in these problems."

Of further interest is the fact that staff attorney Thayer prefers not to use law students in the positions of paralegal assistants; she believes that the abilities and functions of a law student are sufficiently different from those of a paralegal to warrant a separation of the two. To date, law students have been employed primarily to do legal research. An additional benefit from separating the two is that the extensive proscription of activities imposed upon law students who are "certified" by the California State Bar Association is neatly avoided, since no similar certification procedure for paralegals has yet been adopted by the Bar. However, this paucity of regulation is about to change.[159]

CGLS is primarily funded though annual membership fees. Other sources, listed in order by amount, are fees paid through the Divorce Assistance Unit, fees paid for services rendered by the staff attorneys, and fees paid for the drawing of will and trusts.

At the beginning, Co-op advanced a five thousand dollar line of credit to CGLS (nearly all of which was used by August 1973), donated office space, provided phone service, and offered the use of its printing shop. Presently, Co-op continues to provide a portion of the required office space, use of the printing shop, and several other small services.

From the beginning, one of the unique difficulties experienced by CGLS has been persons who join the plan when they know they have an active legal problem and withdraw as soon as it is solved. This problem is known as adverse selection and occurs because CGLS, by its nature, is a voluntary group. This problem would not be experienced by a plan involving a more non-voluntary, employment-related group. Among the corrective proposals have been institution of an initial waiting period before services may be utilized and establishment of exclusions for certain problems existing at time of entry. Recently staff attorney Thayer has considered proposing a split-level fee schedule, which would provide greater benefits to members who had completed a certain period of membership time. One rather minor corrective procedure already insti-

159. Proposed Business and Professions Code § 6032.

tuted is that of giving priority in scheduling appointments between members and staff or panel attorneys to the senior members.

CGLS benefits may be classed under three general headings: (1) private consultations, (2) fee schedule benefits, and (3) the preventive law program.

Private consultations: A member is entitled to two half-hour consultations per year, with additional consultations available at ten dollars each. If the consultation runs over a half hour, the excess is billed at thirty dollars per hour.

In a consultation, the member's legal problem is considered by the staff attorney and a plan of action recommended. If the problem may be solved by advice, a letter, or phone call, the appropriate action is taken and billed at thirty dollars per hour.

Fee schedule benefits: If the member's problem requires services beyond the initial consultation, it is billed at the rate listed in the *Schedule of Fees for Legal Services*. The types of actions included in the fee schedule are extensive, covering most of the civil legal problems which may confront a member. Exclusions from the plan fall within three classes. First, if a member requires services not included in the *Schedule of Fees for Legal Services*, the member may nevertheless use a consultation with a staff attorney to determine where the case should be referred. However, the fees and terms of payment must then be negotiated between the member and panel attorney. Second, cases arising from a profit-making activity generally are excluded unless the profit involved is merely incidental to the member's livelihood. Third, criminal matters are excluded, except for minor traffic violations and certain Selective Service and military matters. However, it is anticipated that the scope of benefits concerning criminal matters will be widened somewhat in the near future.

The current membership fee is twenty-five dollars per member per year, or forty dollars for two years, payable in cash at the time application is made. The term "member" includes individual Co-op members, members of a family related by blood or marriage, and groups of not more than three unrelated adults who share a Co-op membership. Special "associate" memberships are offered to members of the California Bar and full-time law students for an annual fee of five dollars. In addition, members of other groups affiliated with CGLS are included in this term "member."

If services are rendered by the staff attorneys or a staff paralegal service, fees are requested in advance. If services are rendered by a panel attorney, that attorney decides the mode and time of payment for his/her services rendered under the fee schedule.

The *CGLS Schedule of Fees for Legal Services* contains the maximum amounts which may be charged for a given service; the actual charge may be less. In most cases, the fees are considerably less than would be charged by an attorney not affiliated with CGLS.

Immediately preceding the list of benefits and amounts of fees, the *CGLS Schedule of Fees for Legal Services* devotes substantial space to explaining that "legal costs" are not included as a benefit in the plan, and must be advanced by the member. Costs are thoroughly defined, and numerous examples are given.

Perhaps the most unusual feature of CGLS is its Preventive Law Program. In actively seeking to prevent legal problems from arising, the scope of the plan is different from all others. CGLS sponsors on a regular basis seminars and news releases published in the *Co-op News* designed to assist the members in learning their important legal rights and responsibilities, as well as current developments in the law which affect them. For example, seminars have been held nearly every month since the inception of CGLS on such topics as *What to Look for in Buying or Selling a House, How to Use the Small Claims Court, Having Your Furniture Moved,* and *Wills and Estate Planning.* The news releases have included articles on current consumer legislation, declaration of homestead, and analysis of legislative proposals concerning no-fault insurance, and an explanation of "complaint" and "answer", to name several.

Additionally, the news releases serve to keep the members informed of new services, changes in procedure or policy, and group legal services news in general. They also serve to increase the "visibility" of CGLS to Co-op members who are not CGLS members.

The seminars are prepared and conducted by the panel attorneys on a non-compensatory basis. The amount of time required for seminar preparation and occasional gratuitous counseling by the panel attorneys is substantial. For this reason the panel is maintained at a maximum of twenty attorneys so that each will receive sufficient fee-generating cases to help compensate for his/her investment of time in the Preventive Law Program.

Response to the seminars has been satisfactory. Attendance

has ranged from over three hundred to less than ten, depending on the topic, with an average attendance of approximately thirty.

Finally, a comprehensive examination of each new member's total legal situation is in the planning stage. This legal check-up will be administered to a member upon joining CGLS. It is expected that affirmative attention to new members' existing and potential legal problems, will be a large step toward achieving the goal of preventive legal care, and will impress upon the members the value of the entire program.

*Insurance Company of North America*

Finally, we will examine some of the insurance methods of delivery of private legal services. To date, all of the insurance plans are still in the planning stages. They are actively seeking groups and it is likely that as new union contracts are negotiated, these plans will play an active part.

The insurance industry has remained primarily in the background for several reasons. First, there is a dearth of actuarial data upon which the insurance can be based. Second, it is not clear what the final stand of the various state insurance commissioners will be as to regulatory requirements. Third, many of the companies are awaiting the results of a "test case". The Insurance Company of North America (INA) has a plan which it wants to market in Pennsylvania and which requires prior approval from the Pennsylvania Insurance Commission. Dr. Herbert S. Denenberg, the former Pennsylvania Insurance Commissioner is a well-known consumer advocate. No doubt INA feels that if its "legal insurance" policy can meet Pennsylvania's insurance standards, it will be likely to meet other states' standards.

Dr. Lee R. Morris, Vice-President of INA recently discussed what he believes to be the role of the insurance company in legal services delivery.[160] Some of the critical problems which are currently being worked out are: Matching the payments collected to the costs incurred; timing the incoming funds to the output of services; disseminating information through marketing; and efficiently determining the actual costs so as to bring the price to the consumer down. Dr. Morris asserts that the insurance industry is in a much

160. Presentation by Dr. Lee R. Morris, Vice President, Insurance Company of North America, National Conference on the Future of Prepaid Legal Services, San Francisco, California, December 7, 1973.

better position to perform these tasks than a grouping of the providers of the services. This makes sense from several points of view. First, insurance companies have the capital resources to insure that, when necessary, the user will receive the services for which he has contracted. Secondly, insurance companies are professionals in the area of marketing and therefore can more efficiently educate the public regarding their legal needs. Third, at some point a determination must be made whether private legal service plans can be best administered on a risk-sharing or risk-bearing basis. If it is the latter, then insurance companies are better able to perform that function.

The structure of INA's plan is similar to otherplans which have been examined here with a few notable exceptions. The plan is open panel in that the subscriber has a free choice of attorney but the plan offers no method by which the subscriber can select the attorney assuming he does not already have one. INA will reimburse the member directly for legal fees which he incurs in five major areas but in differing amounts.

The INA plan will reimburse the member for fees expended by him in civil actions where the member is a respondent or defendant and damages are sought; when the member is a plaintiff and claims direct loss or damage as a consumer; or when the member files under the bankruptcy laws. In criminal matters, the plan will reimburse the member for legal fees for such tasks as arranging bail, appearing in court, legal research and pleading preparation and the preparation of appeals. In both civil and criminal actions, certain specified expenses such as investigative expenses, court costs and witness fees are covered as well.

In the domestic relations area, the INA plan will pay a flat amount for reimbursement of attorney's fees. For general consultation, the member will be reimbursed at a specified hourly rate. For preparation of documents, the member will be reimbursed for the cost of the document including time for preparation.

The plan includes numerous exclusions which are similar to other plans, but in time this list should become shorter as the actuarial data for the less common services increases.

The benefit limits are in two categories. The plan will establish an amount considered adequate to obtain counsel in the area of coverage and apply a coverage limit per type of service accord-

ingly. Secondly, the policies will come in annual maximum benefit limits in increments of $1000 depending, of course, on the premium paid.

The projected premium cost will be between $6.50 and $10.00 per member per month for between $1000 and $3000 of annual maximum benefits. Naturally, the premium figure will be adjusted by such variables as the member's average income, geographic location and occupation.

*Other Insurance Offerings*

There are several other insurance companies active in the private legal services area. Among them are Stuyvesant Insurance Company of New York, New York and Stonewall Insurance Company of Birmingham, Alabama. The policy provisions of these offerings are basically the same as in the INA plan and the premium costs are within the same range. It should be noted that different insurance companies have individual ways of handling the policy coverages and exclusions. Some utilize separate policy types and others simply add or subtract clauses depending on the premium amount. The result is substantially the same and the coverage will undoubtedly be very conservative until more usage data is generated.

## CONCLUSION

Whether or not there is substantial unfulfilled demand for legal services by moderate income people is irrelevant. What is important is that legal services be available to people at a price that they can afford. The medical and dental profession found a way of accomplishing this through the use of insurance. The legal profession has finally taken some steps in that direction through the private legal services concept. The next several years should be a time of change and experimentation until a system is perfected which can most efficiently place an individual in contact with an attorney and at the same time provide an efficient method of payment of the legal fees.