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Cover Page Footnote
Professor of Law, University of Oklahoma. Invaluable research assistance was provided by Jonathan Grant Ellis (J.D. expected 2003, University of Oklahoma). Donald T. Bogan generously shared his understanding of the health care industry and ERISA. The University of Oklahoma provided research support. Of course, any mistakes or omissions are those of the author.

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IPRE-PAID AND GROUP LEGAL SERVICES:
THIRTY YEARS AFTER THE STORM

Judith L. Maute*

INTRODUCTION

Middle America considers reasonable access to adequate and affordable health care to be a necessity of life. Government-subsidized care provides a minimal safety net for the poor, disabled, elderly or underemployed who cannot afford either private health care insurance or medical care on a fee-for-services basis. Overwhelmingly, the middle class looks to some form of health insurance to assure access to medical care, whether through a third-party payer system, such as Blue Cross/Blue Shield, or a health maintenance program.1 Many people routinely take into account health care coverage as they make important life decisions about employment, choice of physicians and discretionary medical treatment. Access to health care is now considered so fundamental to quality of life that numerous federal and state statutes regulate the insurance aspects affecting delivery of services.2 Lack of adequate medical insurance can have disastrous effects on both personal and financial well-being.3

*Professor of Law, University of Oklahoma. Invaluable research assistance was provided by Jonathan Grant Ellis (J.D. expected 2003, University of Oklahoma). Donald T. Bogan generously shared his understanding of the health care industry and ERISA. The University of Oklahoma provided research support. Of course, any mistakes or omissions are those of the author.

1. Estimates vary, but it appears that between eleven percent and nineteen percent of Americans are not covered by health insurance. Teresa A. Sullivan, et al., The Fragile Middle Class: Americans in Debt 149 (2000).

2. Proposals for a federal Patient Bill of Rights, H.R. 2563 and S. 283, are being considered in Congress. See Donald T. Bogan, ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies, 42 Santa Clara L. Rev. 303 (forthcoming December 2001) (manuscript at 7 n.24, on file with author) [hereinafter Bogan, ERISA]; Bipartisan Patient Protection Act, H.R. 2563, 107th Cong. (2001). HMO reforms at the state level have been attempted, but their validity is open to question. See, e.g., Corp. Health Ins. v. Tex. Dept. of Ins., 215 F.3d 526 (5th Cir. 2000) (discussing Texas HMO reform law); Moran v. Rush Prudential, 230 F.3d 959 (7th Cir. 2000), cert. granted, 121 S. Ct. 2589 (June 29, 2001); cf. Donald T. Bogan, Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?, 74 Tul. L. Rev. 951, 952 (2000) [hereinafter Bogan, Protecting] (noting that ERISA deregulates the health care industry by pre-empting state health care reform laws)

3. Sullivan, et al., supra note 1, at 147-57 (describing role of uninsured medical
Similarly, an unsatisfied need for adequate quality legal services can be personally devastating, although the impact may not be manifested dramatically until it is too late to resolve the underlying problem. For over thirty years, the organized bar has studied, squabbled and lamented over how to address the unmet legal needs of the middle class. It appears that some headway has been made through the provision of group legal services and pre-paid legal insurance. Despite aggressive opposition from some segments of the bar, group legal services have gained a toehold. Estimates vary, but it appears that twenty-five to forty percent of Americans have some coverage through a legal services plan. Viewed from the perspectives of consumers, lawyers and public policy, this recent trend is a positive step. To the extent that consumer clients can be matched with lawyers who provide competent legal advice on routine matters at an affordable price, everyone benefits. The questions remain: why has it taken so long, and what barriers still exist to insuring the availability of competent counsel to middle America? This essay begins to consider those questions.

Part I explores the tortured history of group legal services, starting with the traditional fee-for-services paradigm which places the burden on the client to locate a competent attorney and reach agreement on the work to be done and the fee to be paid. Beginning in the 1960s, the consumer and legal services movements combined with a trilogy of Supreme Court decisions on closed panel group legal services to force an intransigent bar to relax strict ethics rules that rendered innovative forms of group legal practice illegal or financially unfeasible. In 1965, when the American Bar Association undertook to draft the Code of Professional Responsibility, group legal services was the most contentious issue. Since 1975, however, the ABA has embraced the concept, actively supporting the development of an industry and trade group committed to economical, quality delivery of legal services to middle-income persons through prepaid group plans. Part II describes recent developments in the group legal services industry. The intransigence of the organized bar has been replaced with formal support and perhaps benign indifference; most lawyers do

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4. See Brian Heid & Eitan Misulovin, *The Group Legal Plan Revolution: Bright Horizon or Dark Future?*, 18 Hofstra Lab. & Emp. L. J. 335 (2000); Alec M. Schwartz, *A Lawyer’s Guide to Prepaid Legal Services*, Legal Econ., July/Aug. 1989, at 43 (stating that as of 1987, thirteen million Americans enrolled in prepaid legal plans and another seventeen million in other group legal plans); James S. Wilbur, *Practicing Under a Prepaid Legal Plan: The Obstacles, Though Numerous, Are Surmountable*, Nat’l L. J., Jan. 21, 1991, at 15; The National Resource Center’s 2000 Legal Services Plan Census, at http://www.nrccls.org/Publications/Legal_Census/2001.html (last visited June 21, 2001) [hereinafter NRCCCLS website] (stating that 152 million people are covered by plans (fig. 4); that the number of persons with prepaid plan coverage is much smaller, 17.8 million (fig. 5); and that eight million military personnel also receive group legal services (fig. 4)).
not fully understand or appreciate that group legal services may be the wave of the future. These services hold the potential for fundamentally changing the legal marketplace by providing meaningful access to counsel at affordable prices, with an emphasis on preventive lawyering and dispute resolution. Non-lawyer promoters of group legal services are aggressively marketing their product, both to individual purchasers and through employee benefit packages. Because their success in the marketplace depends upon customer satisfaction, these plans are implementing managerial techniques to screen lawyer participants for competence and to monitor for timely, satisfactory performance of the legal work. A creative dynamic tension must be maintained between lawyers' professionalism and the entrepreneurship and management techniques that shape the prepaid legal services industry. Finally, Part II of this article discusses some of the problems that have hampered the health care industry since the advent of managed care and highlights some of the lessons that may be drawn from those experiences.

I. TORTURED HISTORY OF GROUP LEGAL SERVICES

A. The Traditional Client-Lawyer Paradigm

Rugged individualism has shaped most facets of American culture, including the client-lawyer paradigm. Until quite recently, prospective clients bore primary responsibility to recognize they had a legal problem, locate a lawyer willing to help, and hire that lawyer on the basis of fees-for-services. Ethical rules prohibiting advertising, solicitation and volunteering advice cast lawyers in a passive and reactive mode. The model worked reasonably well for some sophisticated consumers of legal services, particularly repeat users, who had established contacts with the legal community and access to reliable information about lawyers competent in their area of need. For many occasional users, however, finding a lawyer competent to provide a particular type of legal services at an affordable cost was a matter of pure serendipity.

Early in the twentieth century, legal aid offices formed in some cities to meet the pressing legal needs of the poor. The organized bar

gave some financial and symbolic support to those charitable programs. For example, the 1908 ABA Canons of Professional Ethics expressly excluded such "charitable societies" from the rule prohibiting interference by lay intermediaries. Otherwise, the traditional ethics rules stressed that "[a] lawyer's responsibilities and qualifications are individual." A lawyer could accept employment from an organization regarding its own legal matters, but could not render legal services to its members regarding their individual affairs.

B. Supreme Court's Constitutional Pressures for Change

A trilogy of Supreme Court decisions in the mid-1960s forced the organized bar to relax strict ethics rules prohibiting lawyers' involvement with group legal services. First, in *NAACP v. Button*, the Court held that the organization had a constitutionally-protected right of political association to make available attorneys willing to bring civil rights and desegregation cases on behalf of its members. The Commonwealth of Virginia had no compelling state interest sufficient to justify its strict antisolicitation statutes. Never before had the Court found "a fundamental and potentially absolute constitutional restriction upon the power of the states to regulate the practice of law." *Button* did not alarm most lawyers, who pigeonholed it as a special case involving civil rights. The bombshell came the next year, in 1964, with *Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar (BRT)*. The trainworkers' union established a program referring injured workers and their families to select lawyers who would prosecute claims against the railroad. Virginia sought an injunction, claiming it violated antisolicitation rules and constituted the unauthorized practice of law. Again the Supreme Court found the state's regulatory effort failed, because it violated protected rights of "free speech, petition and assembly." The surprised organized bar joined in opposition, with the ABA and forty state bars filing an application to appear as amicus curiae, seeking a rehearing. The final case in the trilogy was yet to come.

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10. Id.
11. Id.
14. Id.
16. Id. at 5.
C. ABA’s Ambitious Initiatives Encounter Political Realities

*BRT* gave the Bar a new urgency to improve delivery of legal services. In 1965, ABA President Lewis F. Powell, Jr. committed to revamp the outdated Canons in order to avert reformers’ efforts to create a government-subsidized legal service program that would undermine traditional professional concerns, and to improve access to services by the middle class.\(^{18}\) Powell’s extraordinary leadership set in motion three distinct efforts which consumed organizational efforts for much of the next five years. The Special Committee on Evaluation of Ethical Standards, or the “Wright Committee” (named for its chair, Edward L. Wright) undertook revision of the ethics rules. The Special Committee of Availability of Legal Services, also known as the “McCalpin Committee” or “Availability Committee” worked closely with Barlow Christensen, of the American Bar Foundation, to study the unmet needs of the middle class, and create viable mechanisms to address the issue. Finally, Powell forged a compromise between poverty law activists and the bar, which resulted in government funding of what became the Legal Services Program.\(^{19}\)


The Wright and McCalpin Committees worked steadily for several years.\(^{20}\) Texas attorney Paul Carrington served as liaison between them, officially representing the Availability Committee in the redrafting of the ethics code.\(^{21}\) Without a doubt, issues surrounding group legal services were the most controversial. Canon 2, on the professional duty to help make available legal services, consumed

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about half of the Wright Committee's time. While the ABA committees struggled with the issues, the Supreme Court dealt the final, resounding blow to conservative resistance to group legal services. *United Mine Workers v. Illinois State Bar Association* upheld the constitutionality of a closed panel plan in which the union referred injured members' compensation claims to a private lawyer salaried by the union.

Bar politics profoundly influenced the drafting and adoption of the provisions regulating group legal services. From the start, the Wright Committee clearly understood that Canon 35 on lay intermediaries required considerable revision to comply with BRT. While these two committees toiled on revisions, other forces within the bar tried to sidetrack their efforts. The Wright Committee worked in secret until January 1969, when it circulated 15,000 copies of the Preliminary Draft of the Code of Professional Responsibility. Bill McCalpin personally met twice with the Wright Committee, and "advocat[ed] rather vehemently" to abandon the traditional restraints on advertising and solicitation as applied to group legal services. His efforts met with initial success. The Preliminary Draft allowed lawyer involvement with referral services, and also provision of legal services through trade associations, unions, bona fide non-profit organizations, "reputable" bar associations and community organizations.


25. See, e.g., McCalpin Interview, supra note 20, at 9-11 (describing behind the scenes effort to restrict committee authority to draft revised rules on group legal services and referring to the General Practice Section as "our bete noir" on the issue); see also Vorhees Interview, supra note 20, at 24-27 (describing Unauthorized Practice Committee's opposition to group legal services as almost fanatical and discussing how this committee joined forces with the Committee on Economics of the Bar, which saw group legal services as a threat to the American system, and with the large and strong General Practice Section which opposed many innovations).

26. See Welpton Interview, supra note 24, at 18; Wright Interview, supra note 22.


28. Welpton Interview, supra note 24, at 19.

29. DR 2-101 Recommendation of Professional Employment reads, in part: (D) A lawyer shall not knowingly assist a person or group that furnishes, pays for, or recommends legal services to promote the use of his
lawyers registered objections to these provisions, with organized opposition led by the General Practice Section and others.\textsuperscript{30} When the opposition threatened to defeat the entire code revision, the Wright Committee had a change of heart.\textsuperscript{31} The Proposed Final Draft, issued in July 1969, contained compromise language that originated with former Supreme Court Justice Charles Whitaker, perhaps the most conservative member of the Wright Committee.\textsuperscript{32} Proposed DR 2-103(D)(5) allowed limited use of lawyer referral services, and

\begin{quote}
[A]ny other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and [subject to specified restrictive conditions] only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.
\end{quote}

30. Wright Interview, \textit{supra} note 22, at 25-6; Vorhees Interview, \textit{supra} note 20, at 24-27.
31. See Carrington Interview, \textit{supra} note 20, at 37 (expressing his opinion that the Wright Committee’s view “on this controversial subject was being dictated largely by a fear that opponents [to group legal services] . . . might destroy their entire Code”).
(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.33

Group legal services was the only issue seriously debated by the House of Delegates when it considered the Code's adoption at the 1969 Annual Meeting held in Dallas, Texas.34 Chairman Wright moved for its adoption, acknowledging it was not flawless, but was the product of conciliation and compromise.35 Speaking on behalf of the Availability Committee, William McCalpin argued the Code proposal on group legal services was "unsuitable and inadequate."36 It was practically unworkable, gave no affirmative guidance for the lawyer seeking to avoid discipline, and was an invitation for more judicial intervention in professional regulation.37 In its place, he moved for adoption of his committee's alternative, which began with the premise that lawyers' exclusive license to practice law creates a high obligation to make legal services readily available to all, subject only to safeguards necessary to protect a clearly defined public interest.38 Accordingly, the substitute language (later known as the "McCalpin Amendment") was advanced to replace the Wright Committee's restrictive and constitutionally uncertain standard with a detailed scheme of disclosure and regulation tailored to protect the legitimate public interest.39

Lively debate ensued. Philadelphia lawyer William J. Fuchs spoke out for independent general practitioners, whose interests were represented by the large and powerful ABA General Practice Section.40 The section, which he chaired, received an "outpouring of

34. See ABA Hearings, supra note 27.
35. Id. at 44.
36. Id. at 52-53.
37. Id. at 61-62.
38. Id. at 58.
39. Id. at 56-59; see Nahstoll, supra note 33, at 348-49 (reproducing text of McCalpin Amendment); see also Carrington Interview, supra note 20, at 39-41 (restating proposal).
40. Although Fuchs was part of a large firm, several persons interviewed as part of the ABF Oral History Project surmised that he felt obliged to look out for "poor members of the bar" in order to gain prominence and positions of bar leadership. See, e.g., Vorhees Interview, supra note 20, at 30; Wright Interview, supra note 22, at 12-13.
opinion” that “overwhelmingly... opposed... the McCalpin committee proposal for expanding group legal services.” He identified various evils that would follow from group legal services, with their “fundamental objection” being that “the laymen will run the practice and not the lawyers....”

Loss of the independence of the bar, loss of the traditional client-lawyer relationship, the encroachment of advertising, solicitation and the morals of the marketplace, a reduction in the quality of legal services. If there is some great unfulfilled need of the middle or lower income public for more legal services, the general practitioner says, “Let us try to provide for this need, not by choking our traditional system and concepts but by improving them and make a positive approach to this problem [if] it exists. Let’s make our traditional system work.”

These lofty ethical ideals were belied by Fuch’s suggested alternatives that protected general practitioners’ economic interests, including expanded lawyer referral and open panel legal insurance plans.

Former ABA President Chesterfield Smith, who served on the Availability Committee, undoubtedly stirred some laughter, if not support, for his position. Like Sancho, Don Quixote’s sidekick in the popular play, “Man of La Mancha,” Smith acknowledged the McCalpin amendment was a lost cause. He contended that opponents spread “heifer dust” over the issue, claiming the amendment expanded group legal services when it really only regulated them. Amidst the folksy charm, Smith challenged the Wright committee, which he thought had succumbed to the political demands of those hoping to ignore the Supreme Court decisions. The ABA must come to terms with the reality, that group legal services are constitutionally protected: “if we don’t want unbridled group legal services [we] must intelligently regulate [them] by pointing out the evils which are legitimate and proper for us to protect.”

Tones of economic protectionism resonated in the comments by a representative of the Illinois State Bar Association, who described the shocking possibilities of the amendment:

[I]t could encourage every large business corporation with a nudge perhaps from the union at the bargaining table for more fringe benefits, to furnish legal services which conceivably could include the writing of wills, the probating of estates, and the writing of

41. ABA Hearings, supra note 27, at 65-66.
42. Id. at 66.
43. Id. at 66-67.
44. Id. at 67-68.
45. Id. at 69.
46. Id. at 69, 74.
47. Id. at 78.
contracts to the employees of the corporation and their families through a staff of lawyers employed and paid by that corporation.

[It] would also encourage manufacturers associations, unions, farm bureaus, any kind of trade association to employ a staff of lawyers and to advertise to its members the availability of the services thereby provided by that lay agency.

[It] would encourage the organization of lay groups for the express and sole purpose of furnishing legal services....

....

Most shocking of all, if this amendment were adopted, it would permit any lawyer employed by the lay agency who has given advice to a layman in the performance of the lawyer's duties for that group, then to accept employment and fees from that layman.

....

These proposals, if adopted, in the view of many of us, would simply enrich lawyers who happen to be well-connected with trade associations or who might be aggressive enough, shall we say, to participate covertly in formation of a group; but this is not likely to provide better services to the modest income group which they purport to serve. 48

Apparently, the horror of such possibilities was not that they harmed potential clients or the public interest, but rather that such group arrangements might preclude other lawyers from serving those middle income clients. Arthur Leibold, representing the liberal Chicago Council of Lawyers, closed the debate with a colorful challenge to have a forward-looking attitude and not a wistful longing for return to the nineteenth century: "I am fearful... [that] the general public... will think we have turned a part of our anatomy, which is of great utilitarian value, but is not aesthetically appealing." 49

The House of Delegates soundly defeated the McCalpin amendment, and approved the Code as recommended by the Wright committee. 50 A new committee was promptly formed to encourage adoption by local jurisdictions. Midway through the adoption process, the Supreme Court again reaffirmed the broad constitutional protection for union legal service plans. 51 Legal commentators singled

48. Id. at 80-81, 83.
49. Id. at 85; see also Olavi Maru, Am. B. Found., Research on the Legal Profession: A Review of Work Done 59-64 (1986) (describing Chicago Council as a liberal bar organization). Maru's book is an extraordinary compilation that describes and evaluates existing sociological and historical research on the legal profession, including numerous unpublished manuscripts.
50. ABA Hearings, supra note 27, at 88.
out DR 2-105(D)(5) for harsh criticism. Although many jurisdictions adopted the Code verbatim, as recommended by the ABA, a substantial number revised or omitted the controversial provisions on group legal services.

For the life of the Code, amendments to the group legal services provisions attracted more attention and controversy than any others. By the time the ABA held its 1974 midyear meeting in Houston, there was a general consensus that an amendment was necessary. Nevertheless, sharp divisions remained on the substance of the amendment, specifically, whether to adopt uniform standards applicable to both closed and open plans, or to tighten regulations on those which were closed. The Standing Committee on Ethics and Professional Responsibility proposed regulations equally applicable to all group legal services. Once again, the General Practice Section offered a proposal that was hostile to group services, especially closed plans. Once again, its position prevailed, but by a narrow margin. The so-called “Houston amendments” substituted the hopelessly uncertain reference to controlling constitutional interpretations with detailed and discriminatory restrictions on closed panel plans. Although, in theory, the amendments allowed closed panels, by design they sought to evade the Supreme Court decisions, making them practically unfeasible. Use of lawyer referral services was essentially limited to open panel plans, foreclosing options that could shut out unaffiliated general practitioners from a prospective client base. The most outrageous provision, “totally devoid of ethical objectives,” according to one commentator, required that, if a member of a closed panel plan chose to hire an outside attorney, the plan must reimburse the member for the amount those services would have cost the plan if provided internally. Commentary promptly labeled this a method to limit closed panels, which were conceptually premised on “economies

52. See Nahstoll, supra note 33 (providing acerbic criticism by a former member of the Availability Committee); Smith, supra note 6, at 285 (predicting greatest controversy over Canon 2, and likelihood of early amendment to DR 2-103(D)).

53. ABA Special Comm. to Secure Adoption of the Code of Prof'l Responsibility, Report and Recommendation (August, 1972) (copy on file with the Fordham Law Review) (listing fourteen states that varied from ABA treatment on group legal services).


56. Id. at 623.

57. Id.

58. Id.

59. Id. (stating vote as 144-117).

60. Maru, supra note 54, at 74-75.


62. Id. at 633-36, 644 (reproducing the Houston Amendment to DR 2-103(D)(5)(a)(v)).
of scale and minimum use of personnel through specialization." 63 They required closed, but not open, plans to file extensive annual reports with the applicable state disciplinary authority. 64 Further details of the lengthy Houston amendments need not be addressed. Suffice it to say that they were roundly criticized inside and out of the bar, including by consumer groups, labor unions and the Department of Justice. 65 Obvious economic protectionism by the organized bar raised serious questions about the legitimacy of self-regulation. 66 Antitrust and constitutional considerations loomed large. 67

Because of the vocal criticism, no state adopted the Houston Amendments in the six months before the next meeting. 68 At the Honolulu Annual Meeting, the House of Delegates authorized a special Ad Hoc Study Group to re-evaluate. 69 At the Chicago 1975 midyear meeting, just a year after the maligned Houston Amendments, the House unanimously voted to replace them. 70 The new provisions in the Chicago Amendments generally applied to all group legal services, whether or not the plan was open. Attorneys could represent plan members on non-plan matters, so long as they did not engage in prohibited solicitation. 71 Both types of plans had to file annual reports. 72 Other discriminatory burdens imposed only on closed panel plans were eliminated. 73 The Chicago Amendments remained in force, essentially unchanged, for the life of the Code. 74

Several path-breaking scholarly works helped to improve the political climate for group legal services. During the 1960s, Elliott Cheatham wrote several articles that influenced the Wright

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63. Id. at 636.
64. Id. at 636, 644 (reproducing the Houston Amendment to DR 2-103(D)(5)(a)(viii)).
65. See McCalpin Interview, supra note 20, at 15 (calling "horrible" the General Practice Section substitute amendment adopted by House of Delegates); Memorandum from John V. Tunney, Chairman, U.S. Senate Subcommittee on Representation of Citizen Interests, to State and Local Bar Ass'ns, re Revisions to the ABA Code of Professional Responsibility 2-3, 11, 14 (May 28, 1974), cited in Kramer, supra note 55, at 623 nn.14-19.
67. McCalpin Interview, supra note 20, at 14.
69. Id. at 624; see also Maru, supra note 54, at 75; McCalpin Interview, supra note 20, at 15.
70. Kramer, supra note 55, at 624; see also Maru, supra note 54, at 75.
72. DR 2-103(D)(4)(g); Kramer, supra note 55, at 640.
73. Kramer, supra note 55, at 639-40 (concerning deleted provision requiring that closed panel plans be incidental, but reasonably related to large non-legal parent organizations); see also id. at 640 (discussing new DR 2-103(D)(4)(e), requiring that a plan "provide appropriate relief" and "appropriate procedure" where any plan member or beneficiary obtains outside assistance because counsel furnished by a plan could not ethically or competently render service).
74. Maru, supra note 54, at 75.
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committee's thinking about Canon 2 and the professional duty to make legal services more available to the middle class.\textsuperscript{75} The ABA Availability Committee and the American Bar Foundation supported important research projects by Barlow Christensen\textsuperscript{76} and Preble Stolz.\textsuperscript{77} The ABA Committee to Survey Legal Needs, appointed in 1971, collaborated with the American Bar Foundation to produce the first major empirical study on legal needs of the public.\textsuperscript{78} Project Director Barbara Curran worked with a team of social scientists to construct and implement a sophisticated research methodology, including personal interviews with a sample of more than two thousand people.\textsuperscript{79} In 1977, the Committee released the final report of the national survey. Consultation with a lawyer was found to vary based on the incidence and type of problem, patterns of problem solving associated with types of situations, and some demographic differences that related to variable exposure to risk.\textsuperscript{80} Thereafter, a Yale Law Journal Student Project statistically analyzed the raw data supplied by the ABF, finding that lawyer use primarily depended upon three variables: how often an individual experienced legal problems, ownership of real property and personal acquaintance with a lawyer.\textsuperscript{81} The Project encouraged preventive legal services and the use of alternative delivery systems, which would enhance contacts with lawyers.\textsuperscript{82} Regarding group legal services, the Project argued for expanded use of prepaid, closed-panel arrangements, which would maximize the legal information to members, at the "lowest search cost" to locate an attorney.\textsuperscript{83}

\textsuperscript{75} See, e.g., Cheatham, supra note 17.
\textsuperscript{76} See Barlow F. Christensen, Am. B. Found., Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services viii (1970) (collecting papers prepared for Availability Committee); Christensen, supra note 13, at 229. Christensen's research was based on extensive, systematic observation, not technically described as empirical, but rather analytical and polemical.
\textsuperscript{77} Preble Stolz, Insurance for Legal Services: A Preliminary Study of Feasibility, 35 U. Chi. L. Rev. 417, 422 (1968) (comparing proposals for legal expense insurance to medical insurance; legal insurance is more a device to prepay or budget legal expenses than one to pool risk of heavy losses).
\textsuperscript{78} Barbara A. Curran, ABA Special Comm. to Survey Legal Needs & Am. B. Found., The Legal Needs of the Public: The Final Report of a National Survey 9 (1977) (defining central purpose "to determine the circumstances under which the public seeks the advice or help of lawyers and to identify factors that appear to influence ... [whether or not] to consult lawyers").
\textsuperscript{79} Id. at 15-52 (describing survey design and implementation).
\textsuperscript{80} Id. at 260-64. Some interview questions focused specifically on prepaid legal insurance, which was sufficiently novel at the time to require detailed explanations before obtaining respondents' views on the issues. Id. at 31. Results were discussed in a preliminary report. Id. at 48 n.64.
\textsuperscript{82} Id. at 147.
\textsuperscript{83} Id. at 151-52.

Various factors combined to underscore serious difficulties with the Code of Professional Responsibility. In 1977, ABA President William B. Spann, Jr. appointed the Commission on Evaluation of Professional Standards, named the "Kutak Commission," after its chair Robert J. Kutak. Its initial efforts at private deliberation and visionary thinking were thwarted when Monroe Freedman publicly released the Preliminary Draft. Loud controversy swirled about proposed exceptions to confidentiality and mandatory pro bono.

By contrast, there was no advance, vocal opposition to the Kutak Commission's proposed Rule 5.4, although it could have profoundly shaped future law practice. Modeled after a California rule, it would have allowed lawyers to be employed by any kind of organization, provided that such organizations 1) did not interfere with lawyers' independent professional judgment; 2) protected client confidences; 3) complied with advertising and solicitation restrictions; and 4) charged only reasonable fees. Strong opposition surfaced at the last minute, when the rule was considered by the House of Delegates at the February 1983 midyear meeting. Of all the commission's final proposals, it alone "suffer[ed] total rejection at the hands of the delegates." Opposition to the draft and the substitute amendment came from the General Practice Section, whose vehement opposition to group legal services played such a pivotal role in the 1969 Code revision process. Critics argued that the Kutak proposal was an unwarranted, significant departure from existing law, and that profit motivations of nonlawyers with ownership interests in a law practice would undermine ethical considerations and not be subject to regulation. The section's floor amendment instead proposed retaining the strict rule banning nonlawyer intermediaries, taken verbatim from the old Code. Debate ended when it was conceded that the Commission proposal would allow Sears, Roebuck to open a

84. See Judith L. Maute, Changing Conceptions of Lawyers' Pro Bono Responsibilities 41 (July 26, 2001) (unpublished manuscript, on file with author).
85. Id.
86. Id.
90. Gillers & Simon, supra note 88; see supra text accompanying notes 30-66.
law office.\textsuperscript{92} As finally adopted, Rule 5.4 flatly prohibits partnerships with non-lawyers where any of the firm activities involve legal practice.\textsuperscript{93} The General Practice Section acknowledged that the rule “allowed for experimentation in methods of delivering legal services.”\textsuperscript{94}

Geoffrey Hazard, Reporter to the Kutak Commission and co-author of the respected treatise, Law of Lawyering, strongly criticized Rule 5.4.\textsuperscript{95} Other provisions adequately addressed the legitimate professional concerns, such as avoiding unauthorized practice and impermissible marketing activities, and preserving client confidences and independent professional judgment.\textsuperscript{96} Rule 5.3 required that lawyers monitor nonlawyer personnel, to ensure their conduct is compatible with the lawyers’ professional obligations.\textsuperscript{97} When someone other than the client pays a lawyer’s fee, Rule 1.8(f) required client consent, protection of confidential information and non-interference with the client-lawyer relationship and the lawyer’s independent professional judgment.\textsuperscript{98} By adopting a broad prophylactic rule banning nonlawyer involvement where a narrow rule would have sufficed, the House of Delegates revealed that illegitimate economic protectionism was decisive.\textsuperscript{99}

3. Ethics Opinions under the Rules

Restrictions on form of practice, advertising and solicitation presented continuing albeit more limited obstacles to expansion of prepaid and group legal services.\textsuperscript{100} Over time, as the organized bar became more comfortable with innovative referral and delivery systems, the restrictions were relaxed. Several local and ABA ethics


\textsuperscript{93} Model Rules of Prof’l Conduct R. 5.4 (1997) (containing Code Comparison that describes provisions as “substantially identical” with applicable Code predecessors).

\textsuperscript{94} ABA Model Rules Legislative History, \textit{supra} note 91, at 237. For example, Rule 7.2 comments recognized that lawyers could provide services under the auspices of a legal services plan that advertised, and could pay customary fees charged by not-for-profit lawyer referral programs. R. 7.2 cmt.

\textsuperscript{95} Hazard & Hodes, \textit{supra} note 89, §§ 45.2-45.10.

\textsuperscript{96} Id.

\textsuperscript{97} R. 5.3; Hazard & Hodes, \textit{supra} note 89, § 45.2.

\textsuperscript{98} R. 1.8(f); Hazard & Hodes, \textit{supra} note 89, § 45.2 (preventing lawyer from tailoring representation for paymaster).

\textsuperscript{99} Hazard & Hodes, \textit{supra} note 89, § 45.6.

\textsuperscript{100} Cramton, \textit{supra} note 92, at 576-77; Telephone Interview with Alec Schwartz, Director of American Prepaid Legal Services Institute (API), ABA affiliate (June 21, 2001) [hereinafter Schwartz Interview].
opinions in the mid-1980s marked a crucial turning point for the concept of prepaid legal services, subject to compliance with other ethical obligations.\footnote{101}{Besides the ABA ethics opinions, some local jurisdictions also endorsed the concept of prepaid legal services. See, e.g., D.C. Bar Legal Ethics Comm., Op. 170 [1986], 2 Law. Manual on Prof'l Conduct (ABA/BNA) No. 13, at 120 (July 23, 1986); Neb. State Bar Ass'n Advisory Comm., Op. 86-2 [1986], 2 Law. Manual on Prof'l Conduct (ABA/BNA) No. 13, at 120 (July 23, 1986) (allowing participation with legal services plan, conditioned on compliance with other ethics rules).} ABA Informal Opinion 85-1510 determined that the Model Rules permitted lawyer participation in a for-profit lawyer referral service, as long as the lawyer did not pay a fee or share legal fees with the service.\footnote{102}{ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 85-1510 (1985) (concluding specific proposal was allowed under Model Rules, but not Model Code, because for-profit corporation did not qualify as a permitted legal services organization under DR 2-103(D)(4)(a)); cf. ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 85-1512 (1985) (finding it permissible under both the Model Rules and the Model Code to participate in a religious organization's not-for-profit lawyer referral program).} The watershed was reached in ABA Formal Opinion 87-355, which allowed participation with any for-profit prepaid legal service plan that complied with other provisions of the Model Rules.\footnote{103}{ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-355 (1987).}\footnote{104}{Wolfram, supra note 87, § 2.6.6; see also Lawrence K. Helman, When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 Geo. J. Legal Ethics 317, 336 (1996) (criticizing ABA formal opinions for not supporting the text they purport to interpret).} Ethics opinions seek to interpret existing rules, do not purport to have the force of law, and are often criticized by commentators for addressing unimportant, peripheral questions.\footnote{104}{ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-355 (1987).} In light of the tortured regulatory history surrounding group legal services, however, these ethics opinions are significant because they endorse prepaid legal services plans without imposing heavy restrictions on them. Since professional self-regulation is infused with economic protectionism, the opinions reflect a notable shift in the organized bar's receptivity to group legal services.

ABA Formal Opinion 87-355 recognized increased interest in the subject of group services plans, noting the proliferation of various plans and their value to improving access to legal services. Accordingly, the opinion identified criteria and general guidelines for evaluating when involvement was permitted under the Rules.\footnote{105}{The Standing Committee acts under limited authority to answer questions of pressing importance, interpreting how the applicable ethical rules would apply to that situation.} Because the Committee's authority was limited, it could only analyze the broad factual questions under its interpretation of the Model Rules. Legislative history surrounding adoption of Rule 5.4 was significant, because it contemplated future experiments in delivery systems. Reminiscent of the rejected Kutak proposal, the opinion outlined five principal ethical concerns: independent judgment,
confidences, conflicts, competence and marketing. The requirement of maintaining lawyers’ independent professional judgment, embodied in Rule 5.4, was most important to the Committee. After referring a plan member to a lawyer, the plan sponsor should have no further dealings with the member on legal issues, the opinion cautioned. Thereafter, a traditional client-lawyer relationship would exist between the member and providing lawyer. Despite the inherent potential for sponsors to exercise economic control over participating lawyers, Rule 5.4(c) requires careful attention to the precise relationship so that the lawyer’s financial dependence does not affect professional judgment. Thus, the plan should not impose limits on the time permitted on each matter, fix a minimum caseload or restrict the permissible scope of representation. To the extent plans provided legal services through its employees, or through independent counsel, unauthorized practice issues could arise.

The remaining concerns of confidentiality, conflicts, competence and marketing received brief attention in the opinion. Quality control mechanisms that involved disclosure of confidential information were unacceptable. Plan restrictions could not supercede the applicable conflicts of interest provisions in the Model Rules. Although the plan could preclude subsidized actions against the plan sponsor or its members, in such cases the lawyer should advise the client to seek outside counsel. Referrals must be only in areas of the lawyer’s competence, in terms of both expertise and workload. At the time, Rule 7.3 contained an absolute ban on solicitation for pecuniary gain. As applied to group legal services, the Committee found that Rule 7.3 prohibited a lawyer’s involvement with a plan engaging a sales force that solicited members by phone or in-person. Following the Supreme Court’s decision in Shapero v. Kentucky State Bar, in 1989 the House of Delegates amended Rule 7.3, effectively overruling that aspect of Formal Opinion 87-355 and allowing attorneys to participate in such plans. Finally, the Committee addressed financial issues between the plan and the lawyer/provider. In the typical prepaid plan, the subscriber pays a monthly fee that covers overhead (including both administrative costs and payments to participating

106. This ban was held unconstitutional by the Supreme Court in Shapero v. Kentucky State Bar, 486 U.S. 466 (1988), prompting substantial revision of the rule in 1989. As amended, ABA Rule 7.3(d) allows lawyers to participate with prepaid or group legal service plans that use in-person or telephone contact to solicit memberships from persons not known to need specific types of legal services. These marketing activities are allowed, providing the organization is neither owned nor directed by any lawyer who participates in providing plan services. Model Rules of Prof’l Conduct R. 7.3 (1997). Thus, a lawyer may not “create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise.” Id. cmt. The amendment passed by voice vote, indicating the House was not closely divided. ABA Model Rules Legislative History, supra note 91, at 310.
lawyers) and profit. The plan sponsor compensates the lawyer for agreeing to render legal services to subscribers in accordance with its terms, and the lawyer does not compensate the plan, so the arrangement did not violate the Rule 7.2(c) prohibition against giving something of value in exchange for recommending the lawyer's services. Side-stepping the issue of whether the monthly fee was tantamount to advance payment of legal fees, the opinion found the arrangement did not involve prohibited fee sharing with nonlawyers because the evils of compromised independence and unreasonably high fees were absent. Despite possible criticism for its circular reasoning, Formal Opinion 87-355 supported emerging forms of prepaid group legal services, creating a friendlier climate for their further development.

4. Subsequent Reform Efforts

In recent years, ethics reformers have unsuccessfully tried to loosen the strictures on nonlawyer intermediaries. The ABA revisited issues of nonlawyer involvement in its debates on multidisciplinary ("MDP") practice. After extensive study and hearings, the ABA Commission on Multidisciplinary Practice recommended far-reaching proposals that would allow partnerships between lawyers and nonlawyers for delivery of multiple types of services, provided the nonlawyers deferred to the rules of legal ethics.107 By a three-to-one margin, at the 2000 Annual Meeting in New York, the House of Delegates dealt a crushing blow to MDP proponents, adopting instead a substitute measure reaffirming "core values" of the legal profession.108 Resolution 10F authorized the Standing Committee on Ethics and Professional Responsibility to assess the need for further amendments regarding strategic alliances and side-by-side partnerships between nonlawyers and lawyers.109

Since 1998, the ABA 2000 Ethics Commission has been evaluating whether the Model Rules need further amendments in light of developments in the law and ethics of lawyering. Because the MDP Commission functioned concurrently, there was no serious reconsideration of Rule 5.4. Debate in the House of Delegates on the Ethics 2000 final report and recommendations is underway.110 Compared to the earlier rancorous debates on group legal services, the plans are now almost a non-issue. Pre-paid legal insurance and

110. The ABA House of Delegates began consideration at the 2001 Annual Meeting and may complete its work at the 2002 Midyear Meeting.
group legal services are a fact of life, accepted by the organized bar with a degree of benign indifference. The American Prepaid Legal Services Institute ("API"), affiliated with the ABA, is a national umbrella organization committed to advancing the development of prepaid legal services. Only one proposed amendment is specifically directed to group legal services, Rule 7.2(b)(2), which would allow lawyers to pay fees to legal service plans and other approved qualified lawyer referral services, including for-profit plans.

II. PREPAID LEGAL SERVICES INDUSTRY TODAY

A. An Idea Whose Time Has Come? Success in the Marketplace

The organized bar's earlier intransigence towards group legal services is now gone. Since 1983, the ABA has officially encouraged the development of prepaid legal service plans, providing increased levels of support and endorsement. In a poll taken fifteen years ago, two-thirds of lawyers approved of prepaid plans, and more than half were willing to participate as service providers. Subsequent changes in the economy and competition within the legal profession have further kindled lawyers' interest in such plans as an effective way to expand business. What was once scorned in horror has now become commonplace. The number of Americans covered by some type of prepaid legal plan has blossomed from an estimated 13 million in 1987 to 152 million in 2000. Despite some mixed reviews from participants, prepaid plans are considered by some "an idea whose time may have arrived" and "the wave of the future."

111. Schwartz Interview, supra note 100.
113. Model Rules of Prof'l Conduct R. 7.2(b)(2) & cmt. (1997); Ethics 2000 Comm'n, supra note 109. API supported this amendment, and a new Rule 1.18, regarding duties to prospective clients. Schwartz Interview, supra note 100.
115. Lauren Rubenstein Reskin, Lawyers Like Solution to High Cost of Legal Services, 72 A.B.A. J., Mar. 1986, at 42 (quoting Alec M. Schwartz stating that younger lawyers were more likely to approve of plans, and, not surprisingly, lawyers in higher income brackets were less inclined to participate).
117. See supra text accompanying notes 40-44, 47-48 (comments by representatives of General Practice Section and Illinois State Bar Association).
118. Schwartz, supra note 4, at 43.
119. NRCCLS website, supra note 4, at 3 fig-4.
120. Thomas M. Domer, Expanding Your Practice Using Group and Prepaid Legal
The numbers can be deceiving, however. Included in the 152 million are 86 million people who are eligible to use "free plans" or "access plans" to which lawyer referral services and limited legal advice are provided as a routine membership benefit for large umbrella groups like the AFL-CIO, AARP and NEA. Enrollment in free plans is provided automatically to group members, without additional cost. Similarly, many employers offer "employee assistance plans" ("EAPs"), which include a variety of personal support programs, including lawyer referrals and free telephone consultation on certain matters. Forty million people are considered "covered" by EAPs. For both free plans and EAPs, the cost to sponsoring organizations is low, as is degree of coverage and utilization by members.

In some respects these plans may be considered analogous to "preferred provider" medical insurance. For example, service providers must agree to terms specified by the sponsor, and plan members receive coverage only by obtaining services from a limited number of approved service providers. Legal services plans differ from preferred provider plans, however, in that they operate primarily as lawyer referral services and do not charge members for such limited benefits. Despite their relatively low usage, these plans offer some efficiencies to middle income consumers who do not otherwise have legal representation, by reducing the high costs of searching for a competent attorney willing to provide services at specified rates. The plans are useful because they provide advance screening for experience in listed practice areas, and impose some cost controls and quality control mechanisms. Assuming that these are common attributes of free plans, they may enhance the consumer welfare of moderate-income clients through quality and price control mechanisms, as well as through malpractice insurance coverage. From

Services, Wis. Law., Nov. 1989, at 10 (noting concerns that growth is at a standstill).
121. Dahlgren, supra note 116, at 77.
123. NRCCCLS website, supra note 4, at 7 fig.12 ("Largest Free Plans") (indicating that there are forty million members of Union Plus Legal Service, sponsored by AFL-CIO and its member unions, twenty million with access to Elder Hotlines, thirteen million members of Association of Retired Persons Legal Services Network, and five million members of National Education Association). The costs of obtaining coverage under "access legal plans" are nominal. See API Technical Assistance Series 7 (1999) (stating that the individual member cost is three dollars per month, and group price is ten to fifty cents per month, depending on size of group).
124. NRCCCLS website, supra note 4, at 9 fig.15 ("Summary of Plan Characteristics by Type of Plan").
125. See, e.g., Mark Hansen, The Legal World According to AARP: Lawyers joining retiree discount program must undergo screening, pay fee, A.B.A. J., Mar. 1997, at 34 (stating requirements for lawyers to participate in AARP plan, including current malpractice insurance, four years experience in each listed practice area, screening and personal interview with established local lawyer, agreement to performance evaluations and to pay fee to sponsoring organization).
an economic standpoint, the private plans affect the legal marketplace in ways that the self-regulated legal profession has been unable to accomplish. Depending on the plan details, they might result in meaningful cost savings to clients.\footnote{126}{See Wolfram, \textit{supra} note 87, § 16.5.3 (stating that the limited access services by some plans may serve as "loss leaders," with fees for uncovered services perhaps higher than "community averages for comparable services").}

In contrast to free plans, enrollment in true prepaid legal service plans is far more limited, reaching 17.8 million people.\footnote{127}{NRCCLS website, \textit{supra} note 4, at 3 fig.5 (stating that this number includes persons covered as dependents, and those with duplicate coverage); \textit{see also id.} at 2 fig.2 (indicating that there is duplicate coverage of thirty-four million people, mostly in union households, AARP members, members of armed forces, employees of large companies or government).} Employer-paid programs cover 7.6 million Americans, with Hyatt Legal Plans and the United Auto Workers being the largest providers.\footnote{128}{NRCCLS website, \textit{supra} note 4, at 5 fig.8. UAW is the largest such provider, serving more than two million participants. \textit{Id.}} Enrollment is automatic for eligible employees as a part of their employment benefit package, with premiums paid based on the number of employees and terms of coverage. Some employer-paid plans offer limited legal services, while others are comprehensive in scope. "Comprehensive" legal service plans, similar to employer-paid health insurance, provide a wide variety of services at no additional charge to the client.\footnote{129}{Debra Cassens Moss, \textit{Prepaid Glossary}, \textit{A.B.A. J.}, May 1988, at 38.} Additional legal services are provided at a discount. For a relatively moderate cost to the employer, members receive significant coverage for their legal expenses.\footnote{130}{NRCCLS website, \textit{supra} note 4, at 8 fig.13, 9 fig.15.; \textit{see also id.} at 8 fig.14 (reporting utilization rate as above average).}

Since 1994, participation in employer-paid plans has remained constant. By contrast, participation in plans subsidized by payroll deductions or individual subscriptions has increased moderately.\footnote{131}{\textit{Id.} at 4 fig.7.} Currently, approximately 2.4 million Americans participate in prepaid plan coverage through payroll deductions while another 3.5 million purchase individual coverage, at costs ranging from fifteen to twenty-five dollars per month.\footnote{132}{\textit{Id.} at 3 fig.5, 4 fig.7.} The group payroll deduction plans are being marketed as "feel-good benefits" that cost employers almost nothing. Whereas employees would scoff at the prospect of a fifteen dollar monthly pay increase, that is all it could take to obtain legal insurance for a moderate size workforce.\footnote{133}{Beverly Goodman, \textit{Should You Shop for Insurance at Work?}, Money Mag., Sept. 1999, at 172; Alec M. Schwartz, \textit{Prepaid Legal Puts Experts in the Workers' Corner}, \textit{Nat'l. Underwriter}, Oct. 23, 2000, at S7 (stating that employees would pay $100 to $300 per year to legal services plans); \textit{see also} Heid & Misulovin, \textit{supra} note 4, at 338 (stating that group legal services plans are an affordable way to show concern for employees and cost approximately three dollars per week).}
Innovations in group-based delivery of legal services are profoundly changing the legal marketplace. Even when middle-class consumers recognize that they might benefit from a lawyer's services, they are reluctant to seek out legal assistance because they are concerned about the cost of legal services and they lack the requisite knowledge to find a competent lawyer. By 1977, when the Supreme Court decided *Bates v. Arizona*, legal advertising had gained some acceptance in the legal community as a method of enhancing access to legal services by educating consumers about their legal rights, overcoming price fears, and helping to match prospective clients with competent counsel willing to undertake matters in defined practice areas. In reality, although attorney advertising has raised consumer awareness of legal problems, it has been less effective in alleviating the price concerns and the matching problem. As one reporter noted, “[L]eafing through the Yellow Pages and muttering 'eeny meeny miney mo'” is a haphazard and unreliable method of selecting a lawyer. While advertising apparently yields good returns for the lawyers, as evidenced by the amount of money spent on prominent advertising placement, it does nothing to ensure quality performance for the clients. A 1994 ABA study surveyed how individual consumers found their lawyers: six percent used a lawyer referral service, while twenty-one percent found lawyers through the Yellow Pages or the print or electronic media. Most often, however, consumers were either referred to their lawyers by a friend or contacted someone they already knew. At the time of the study, only about four percent located lawyers through “other” means, including a prepaid legal plan. Albeit somewhat dated, this data empirically supports the common perception that most middle-class persons still use haphazard, shot-in-the-dark methods of selecting a lawyer. Thus, there is a tremendous, unmet potential for lawyers with entrepreneurial and managerial orientations to enlarge their client base by participating with a reputable, well-run prepaid legal service plan. Of course, lawyers' highest priority must be their professional obligations, including safeguarding the client's right to quality representation against the temptation to cut corners, or to provide "cookie cutter" services without regard to suitability for the individual client.

136. ABA, Findings of the Comprehensive Legal Needs Study: Study Conducted by the Inst. for Survey Research at Temple Univ. for the Consortium on Legal Services and the Public 55 tbl.5-11 (indicating that eighteen percent of lawyers are located through Yellow Pages while three percent are found through print or electronic media advertisements).
137. *Id.* (showing that thirty-two percent of clients already knew their attorneys while thirty-two percent were referred by a friend).
Standing alone, legal advertisements provide little in the way of quality control. By contrast, the marketing of legal services through pre-paid group plans is improving middle-class consumers' access to competent counsel at affordable costs. At present, these plans appear to be win/win solutions for both the legal profession and the potential middle-class consumers in need of legal advice. The developing prepaid legal services industry has drawn lessons from both the consumer and legal services movements of earlier times. Blending strands of professionalism with managerial and entrepreneurial ideology, these for-profit providers of group legal services are commercializing the traditional concept of the legal profession as a public calling to serve. In doing so, these providers are transforming the goal of increasing access to legal services into a private sector, commercial venture, and are recasting the political symbols from the consumer movement as a marketing strategy that emphasizes fair, reasonable and standard pricing, quality control and customer satisfaction.

It remains to be seen whether the plan promoters and their legal service providers can achieve the right balance in the dynamic tension between entrepreneurial zeal, managerial controls and lawyers' professional judgment. Plan promoters are reaching out to expand enrollment through direct mail and other aggressive marketing techniques. Participating lawyers must ensure that these plans comply with reasonable local restrictions on permissible advertising. Both lawyers and providers should also be aware of other regulatory schemes that may apply, including state insurance law, or the Employment Retirement Income Security Act ("ERISA").

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140. See generally id. at 69, 78, 87-88.

141. West Virginia St. Bar Disciplinary Board, Op. 97-03 [1997], 13 Law. Manual on Prof'l Conduct (ABA/BNA) No. 24, at 395 (Dec. 24, 1997); see Iowa Sup. Ct. Board of Prof'l Ethics & Conduct v. Beckman [1996], 13 Law. Manual on Prof'l Conduct (ABA/BNA) No. 1, at 13 (Feb. 5, 1997) (lawyer disciplined for failing to include warning language required by restrictive state rules). In return, states should evaluate whether their regulations on lawyer marketing activities are reasonably necessary to further important state interests in consumer welfare and access to legal services. See In re 1115 Legal Service Care, 541 A.2d 673 (N.J. 1988) (upholding use of legal service trade name, and directing amendment to state ethics rule, local counterpart to ABA Model Rule 7.5).

142. Whether or not a prepaid plan is considered "insurance" is a matter of local law, and beyond the scope of this essay. When group legal services are provided as an employer benefit, they also may be subject to scrutiny under state law, although the
Additionally, lawyers must be aware of the obligations they undertake when they agree to participate in group services plans. For example, in cases where plan promoters have not consistently delivered on their promises, participating lawyers have become ensnared with the disciplinary authorities. Recent cases imposing discipline on lawyers who aided the unauthorized practice of law present genuine issues of consumer harm. Where lawyers become closely aligned with businesses that market a certain product, such as living wills, there is substantial risk that lawyers will abdicate responsibility for evaluating the suitability of the product for each client, and may summarily channel each client through the same routine, without adequate inquiry, information or counseling.

Lawyers who agree to participate in such plans must retain their professional autonomy, preserve client confidences, and provide adequate information and legal advice necessary for the client to make sound choices. Attorneys who negligently provide services may be held civilly liable for damages to both the client and to the plan itself.

Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002 (1) (1994), may preempt substantive state regulations; ERISA regulates disclosure, notice and fiduciary responsibility of money managers. See Moran v. Rush Prudential, 230 F.3d 959 (7th Cir. 2000), cert. granted, 121 S. Ct. 2589 (June 29, 2001); Julia Field Costich, Joint State-Federal Regulation of Lawyers: The Case of Group Legal Services Under ERISA, 82 Ky. L.J. 627, 630 (1993/1994); Heid & Misulovin, supra note 4; Bogan, ERISA, supra note 2, at 7 n.24. Indeed, broad preemption language was added to ERISA because of last-minute lobbying efforts by labor unions and employers, in part to avoid threatened state legislation prohibiting closed panel legal service plans. See Bogan, Protecting, supra note 2, at 983; see generally Roger D. Billings Jr., Prepaid Legal Services (1981) (offering a somewhat dated, but still valuable comprehensive treatment of regulations affecting prepaid legal service plans).

143. See, e.g., People v. Laden, 893 P.2d 771 (Colo. 1995) (agreeing to accept referrals from nonlawyer seller of living trusts violated rule against aiding unauthorized practice of law; public censure); People v. Cassidy, 884 P.2d 309 (Colo. 1994) (ordering suspension of lawyer for participating in sale of living trust packages to customers of nonlawyer preparers); see also Patricia Manson, Suspension of downstate lawyer sought, Chi. Daily L. Bull., June 11, 2001, at 3 (reporting recommendation of Illinois disciplinary panel to suspend William R. Pearcy for assisting nonlawyers in marketing of living trusts); Debra Cassens Moss, More 'American Legal' Woes: Company faces court action over its prepaid legal plan, A.B.A. J., July 1988, at 30 (relating investor’s complaint of paying $20,000 to Lawyer Access Network ("LAN") for rights as "sole master provider" in state, and that three others also claimed exclusive distributorship status; lawyer participants were unaware of price caps imposed by plan).

144. See, e.g., Case file in Pearcy (on file with author) (disciplining attorney for engaging in the unauthorized practice of law).

Innovative organizational structures seek ways to deliver high quality, individualized legal services meeting the common legal needs of middle-class clientele. Providers must anticipate high volume traffic flow, with sufficient numbers of staff attorneys who are knowledgeable about routine legal matters and supervisory mechanisms that monitor activities of subordinate personnel to ensure they meet expected standards of competent, timely delivery of services. Under the traditional paradigm, lawyers become involved only when the client regards a problem as serious enough to actively seek counsel, in spite of price fears and uncertainty about how to find a good lawyer. Prepaid legal insurance guarantees access to identified attorneys, who agree to perform some work for no additional fee, and who also agree to structured fee caps on noncovered tasks. Preventive legal advice is routinely offered at no additional cost to the insured. For example, even in the most limited "free" or "access" plans, the member may be entitled to free telephone consultations, some free office visits, document review and will preparation, with additional services available at a stipulated discount from the panel lawyer's usual fee. Comprehensive legal plans cover representation for a vast array of administrative, consumer, financial, family and estate law matters, as well as for nonfelony criminal charges. The striking emphasis on preventive lawyering encourages members to phone a participating lawyer early on, before a serious problem crystallizes. As part of the unlimited phone consultation covered by most plans, lawyers may follow up with calls or letters on a client's behalf in an effort to resolve the problem. While there is a risk of overutilization and unreasonable contentiousness by some members, these do not appear to be significant problems. As part of one's advisory function, sometimes the plan lawyer must counsel clients that not all problems in life are susceptible to legal resolution, and that alternative, nonlegal solutions may be more appropriate.

146. See, e.g., Seron, supra note 139, at 66-68 (describing one in-house union plan with specialist teams responsible for different practice areas; teams of lawyers and social workers stressed problem resolution).
147. See id. at 64.
148. API Technical Assistance Series, supra note 123, at 5-6.
149. Id. at 4-5, 11-16 (sample plan description).
150. Telephone Interview with Stephanie L Theban, Manager of Pre-Paid Legal Services Department, Riggs, Abney, Neal, Turpen, Orbison & Lewis, P.C. (June 20, 2001). The Riggs, Abney firm is the Oklahoma closed-panel provider for Pre-Paid Legal Services, Inc., based in Ada, Oklahoma. There are currently about 40,000 Oklahoma members; the firm receives a monthly payment per insured member as compensation for providing comprehensive legal services to plan members. A referral system is used for clients located too distant from the firm's offices. In matters presenting impermissible conflicts, the plan handles referral to an outside attorney. Id.
151. Id.
152. Id.
Quality control and customer satisfaction are high priorities for plan promoters. Financial success as a business enterprise requires that customers be satisfied with the value received for the monthly premiums so that they keep the policies in force and refer new members. The better programs carefully screen prospective providers, requiring detailed applications, personal interviews, local references and a minimum amount of experience in listed practice areas. Plan administration typically includes sophisticated reporting systems that gather computerized information on client usage, promptness in returning phone calls and performance of tasks. Periodic status reports allow the law firm and plan administrator to monitor performance and evaluate the need for changes to improve quality control. For example, Pre-Paid Legal Services, Inc., which operates nationwide, receives daily computer reports on client-initiated contacts, time lapse before calls returned and actions taken on client requests. Formalized evaluation of providers takes place monthly, with written performance evaluation and contract reviews done semi-annually. According to a plan administrator and a provider supervisor employed with Pre-Paid Legal Services, Inc., the plan respects client confidences and lawyers' independent professional judgment, with the sole focus of plan monitoring to gauge timely performance and customer satisfaction. Despite some critics' skepticism about the intrusiveness of "managed care," these monitoring mechanisms appear to be benign and staunchly client-centered. Unlike most middle income consumers, these plan members know whom to call when they have a legal problem, and how to handle a problem with their lawyer (through the 800 number hotline, and written complaint procedures). Thus, the plan's provisions give members greater recourse than is readily available to most middle income consumers, whose complaints about their lawyers' derelictions and incompetence generally fall on deaf ears until multiple complaints of egregious conduct compel official attention in the disciplinary arena.

C. Lessons from Health Care Service Plans

During his tenure as ABA President in 1965, Lewis Powell committed the organization to improving availability of legal services for ordinary citizens. He perceived that intransigence by the American medical profession caused a move towards socialized

153. See Seron, supra note 139, at 82 (stating that keeping pre-paid legal services customers satisfied is good business sense).
154. NRCCLS website, supra note 4.
155. API Technical Assistance Series, supra note 123, at 8-9 n.122; Telephone Interview with Leslie Fisher, Vice-President of Attorney Resources, Pre-Paid Legal Services, Inc. (May 22, 2001); see E. Allen Farnsworth, Contracts, § 8.4, 530-31 (3d ed. 1998) (discussing conditions of satisfaction).
medicine, and wanted to avert similar pressures for access to legal care.\textsuperscript{156} Skeptics of group legal services caution that similar problems to managed health care could arise when insurance carriers and business managers are involved with the delivery of legal services.\textsuperscript{157} Certainly, the managed care debates raise legitimate concerns about intrusions on independent professional judgment that could compromise quality of services. In-depth comparison of group health and legal service delivery systems must await another day. Nevertheless, some lessons can be drawn from the difficulties experienced in the health care industry as the legal profession experiments with new forms of delivering services to middle-class consumers.

The perceived need for health care insurance is a much higher priority than legal expense insurance.\textsuperscript{158} When medical needs go unmet, physical conditions may deteriorate further, resulting in death or disability. The adverse consequences of untended legal problems typically are less visible, immediate and dramatic. Public demand for solutions that increase access to health care and spread cost risks has risen steadily since the late nineteenth century.\textsuperscript{159} Physicians, like lawyers, have traditionally clung to individualized delivery of service, aggressively resisting innovative group delivery systems. Thus, traditional Blue Cross/Blue Shield health insurance was strongly preferred by the American Medical Association ("AMA"), and other powerful physician trade groups because it left participation open to all physician providers, with patients free to select the physicians of their choice.\textsuperscript{160}

Group medical care has been around in some form since the 1930s. Odd combinations of piecemeal regulation, legislative politics and judicial intervention have not served well the interests of patients or their physician providers. Starting in 1971, the Nixon administration actively promoted the concept of Health Maintenance Organizations ("HMOs"), which provide comprehensive services through their own staff of salaried professionals.\textsuperscript{161} Federal legislation encouraged widespread development of HMOs that provided comprehensive health care services to individuals who voluntarily enrolled and paid in advance a fixed price that ensured access to comprehensive health

\begin{footnotes}
\footnotetext[156]{See Powell Interview, \textit{supra} note 19, at 2; see also Werner Pfennigstorf & Spencer L. Kimball, Legal Service Plans: Approaches to Regulation 444, 447-51 (1977) (describing organized medical profession's vehement opposition to group delivery of health care).}
\footnotetext[157]{Cf. Sandy Theiss, \textit{Hyatt Hopes Voters Will Take His Word on it}, Dayton Daily News, Apr. 6, 1994.}
\footnotetext[158]{Pfennigstorf & Kimball, \textit{supra} note 156, at 442.}
\footnotetext[159]{Id. at 444.}
\footnotetext[160]{Id. at 448.}
\footnotetext[161]{Id. at 452-53.}
\end{footnotes}
Effectively nullifying the organized medical profession's opposition to such closed panel delivery systems, the HMOs were then able to capture a significant market share of prepaid health care. Increasingly, HMOs were able to shift to the physician providers the economic risks associated with delivering all medical care to enrolled members. This situation worsened after the Supreme Court construed ERISA's insurance clause very narrowly, effectively leaving the health care industry unregulated and immune to common law actions for malpractice or bad faith denial of coverage. Since that time, complaints about quality of care and unreasonable refusal to refer patients to necessary specialists have increased, although efforts are pending to enact a federal Patient's Bill of Rights to remedy these problems. In addition, when HMO's fail financially, or the physician provider groups that have accepted risk under capitated fee systems cut back on appropriate services, the patients are denied the medical care they paid for in advance.

To the extent that consumers have the financial resources and practical freedom to change their health care coverage, many have done so, returning to Blue Cross/Blue Shield or other private insurance systems. Here, too, however, providers have complained about managed care and unwarranted intrusions on their exercise of independent professional judgment about appropriate care, specialist referrals and medication. By contrast to what is happening in the HMO industry, these complaints about administrative bureaucracy and interference with professional judgment by nonmedical insurance claims adjusters are less disquieting. Private insurance carriers have moved away from complete "free choice" among physician providers, by offering more favorable premium rates to members who enroll in "preferred provider" systems. In-network preferred providers must undergo initial qualification screenings and must agree to payment under a predetermined formula and procedures, in which they agree to accept a flat fee, or a percentage of an allowed charge for specific services as full compensation, thus limiting what the providers can demand as payment from the individual insured. If an insured enrolls in the preferred provider plan, and thereafter uses a physician who is "out of network," the plan pays a lower percentage of the allowed charge, and the insured must pay any difference directly to the provider.

It would appear that this system is working fairly well, providing some quality assurance mechanisms, and limiting the amount of uninsured medical expenses falling on individual consumers. It also appears to be having an impact on the pricing activity of medical providers who are "out of network." Although they are not

162. Id. at 453.
163. Id.
164. Bogan, ERISA, supra note 2, at 19-25.
contractually limited to what they can charge the insured patient, some out of network providers voluntarily agree to charge the patient only the amount that the patient would have to pay an in-network provider. That is, some providers are adjusting their pricing in order to attract patients who would otherwise have a financial disincentive to go out of network. The end result: furthering free choice in the marketplace, with voluntary price controls by providers.

CONCLUSION

What are the lessons of prepaid health care for the future of prepaid group legal services? We might take heed that, if the pendulum swings too far in favor of closed panels, the plan promoters might flex their economic power, exacting too much from lawyer providers. At present, closed panels are preferred by the scholarly and empirical literature, and seem to be working well at affording access to quality legal services at reasonable prices. The dynamic tension between professionalism, entrepreneurship and managerial controls appears reasonably balanced. Right now, the developing group legal services industry may be well served by closed plans. As the industry develops, however, there may be danger that large closed plans will use their market power to unreasonably shift the financial risk of comprehensive legal service plans to providers, compromising the lawyer-providers' independent professional judgment and the resulting quality of services. Therefore, it behooves the legal profession to track these developments and make appropriate adjustments in the competitive legal marketplace so that clients do not become captives of an unresponsive system. If closed plans begin to act like monopolists, there may be a viable marketplace for open, or modified closed private insurance plans based on the Blue Cross/Blue Shield model. Accordingly, the bar should abandon its traditional resistance to group legal services, and willingly embrace innovative forms of practice that enhance middle-class access to affordable legal services.
Notes & Observations