Prepaid Legal Services: Obstacles Hampering Its Growth and Development

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INTRODUCTION

A recent survey of the American Bar Association (ABA) confirms the longstanding belief that a large sector of the American population does not receive adequate legal counseling. One of the methods devised to alleviate this problem is the use of prepaid legal service plans. These plans allow individuals to receive specified legal services at a fixed price for a certain period of time. The coverage available generally includes advice and consultation for estate, domestic, and real estate matters, and representation in litigation.

Early attempts to initiate prepaid legal service plans were frustrated by ethical restrictions imposed upon attorneys. Within the last ten years, however, the judiciary, the legal profession, and Congress have implemented changes that have encouraged the development of prepaid legal services. The United States Supreme Court has held that collective activity undertaken to obtain meaningful access to the courts is protected by the first amendment's right of association, and cannot be denied by the states.

1. See Green, The High Cost of Lawyers, N.Y. Times, Aug. 10, 1975, § 6 (Magazine), at 26-27; Spreading Fast—"Insurance" To Pay Lawyers Bills, U.S. News & World Report, Nov. 11, 1974, at 61 [hereinafter cited as Spreading Fast]. The survey shows that 70% of the adult population of the United States is without sufficient legal care. The upper 10% of the population is able to afford proper legal care. The lower 20% of the economic scale is eligible for government aid. Id.; see 45 C.F.R. § 1611 app. A (1978) (eligibility requirements for publicly funded legal services).

2. A list of publications in this area is available from the National Resource Center for Consumers of Legal Services, 1302 18th Street, N.W., Washington, D.C., 20036, hereinafter referred to as the National Resource Center. Prepaid legal services should be distinguished from legal clinics which offer legal services for routine matters at reduced rates and do not require prepayment of fees. See Maron, Consumers Challenge Legal Monopoly, Intellect, Apr. 1977, at 334; Lawyers Take Aim at Their Soaring Fees, U.S. News & World Report, Aug. 21, 1978, at 73 [hereinafter cited as Soaring Fees].

3. The average price per person generally ranges between $50 to $100 per year. See DeMent, Pre-Paid Legal Service Plans, Pension World, July 1978, at 17.


5. See, e.g., Amalgamated Meat Cutters, Butcher Workmen and Affiliated Crafts of North America, Legal Counsel, A New Benefit from Local 1, at 7-14 (n.d.) (on file with the Fordham Law Review) [hereinafter cited as Local 1] (areas covered include domestic relations, criminal matters, traffic violations, real estate transactions, landlord-tenant disputes, consumer transactions, financial counseling and assistance, estate planning, will drafting, and representation in probate proceedings and personal injury actions).

6. See Ohman, Prepaid and Other Group Legal Services for Trade Unionists, 2 Lab. Stud. J. 3, 4 (1977). Early prepaid legal service plans were formed by doctors seeking to alleviate the burdens of malpractice claims and by automobile clubs attempting to assist members involved in personal injury suits. Id.

Court's decisions, the ABA abandoned its antagonism towards these plans and actively endorsed prepaid legal services. In 1970, it established a committee to study the area and, together with other organizations, it developed the first large scale plan which is still in existence today. Moreover, in 1975, the ABA removed almost all the ethical restrictions discouraging attorneys from participating in these plans by amending its Code of Professional Responsibility. Finally, Congress passed legislation that qualifies prepaid legal services as a subject of collective bargaining and that treats contributions to these plans favorably under the federal income tax laws.

retain workmen's compensation attorneys for their members); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (first amendment guarantees labor unions the right to retain attorneys to represent their members in enforcing personal injury claims against their employers); NAACP v. Button, 371 U.S. 415 (1963) (Virginia statute prohibiting an organization from retaining an attorney to represent one of its members held unconstitutional). In United Transportation, the Court stated: "The common thread running through our decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." 401 U.S. at 585-86. For a discussion of these cases, see Gilmore, The Organized Bar and Prepaid Legal Services, 21 Wayne L. Rev. 213 (1975).

8. See A Primer of Prepaid Legal Services 5 (P. Murphy ed. 1974) [hereinafter cited as Primer].

9. Id. Laborers Local No. 229 Legal Service Plan, commonly known as the Shreveport Plan, was originally designed as a pilot project sponsored by the ABA, the Ford Foundation, and the Shreveport and Louisiana Bar Associations. The plan was developed and partially funded by these organizations. Id.

10. See ABA Code of Professional Responsibility, DR 2-103(D)(4) (1976). This rule permits an attorney, under several conditions, to furnish legal services to "[a]ny bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries." Id.; see Note, Prepaid Legal Services, Ethical Codes, and the Snares of Antitrust, 26 Syracuse L. Rev. 754 (1975). It should be noted that the ABA Code of Professional Responsibility is only advisory and it is up to the various state bar associations to develop and enforce their own ethical codes. See ABA, Professional Responsibility: A Guide for Attorneys 4 (1978). Several state bar associations have yet to grant attorneys permission to participate in prepaid legal service plans. See Gilmore, supra note 7, at 221; cf. Letter from Richard Levin, Chairman of the Delaware State Bar Association Committee on Prepaid Legal Services (Oct. 18, 1978) (on file with the Fordham Law Review) (Delaware Supreme Court has not yet ruled on the ethicacy of these plans). The Federal Trade Commission is currently conducting an investigation "to determine whether the rules of states and of bar associations unfairly restrain trade in the delivery and availability of legal services." Nat'l L.J., Jan. 29, 1979, at 3, col. 1.


12. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2134(b), (e), 90 Stat. 1520 (codified at I.R.C. §§ 120, 501(c)(20)). These sections apply to plans offered by an employer as a fringe benefit. Under the Code's provisions, an employer may deduct contributions made to a prepaid legal service plan. I.R.C. § 501(c)(20). In addition, neither the amount of the employer's
These developments have stimulated the growth of prepaid legal services, and at present there are approximately 5,000 plans operating throughout the nation.\textsuperscript{13} Expansion of prepaid legal services, however, has not been as rapid and widespread as was expected.\textsuperscript{14} Many commentators predicted that these plans would have a major impact on the manner in which the American population obtained legal advice and representation.\textsuperscript{15} A survey conducted by the author, however, shows that various plans are experiencing difficulty in sustaining operation.\textsuperscript{16} This Comment will examine why the success of prepaid legal services has not met expectations and what can be done to remedy the problems. Part I will discuss the possible ways to structure a plan and the desirability of selecting one form over another. Part II will deal with the obstacles that prepaid legal service plans face and will suggest methods by which they can be overcome.

I. STRUCTURING A PREPAID LEGAL SERVICE PLAN

The manner in which a plan is structured has a significant effect upon its initial and long term success. In considering whether to establish a prepaid legal service plan, one must decide: who should sponsor the plan; who should supervise its day-to-day operations; how members will be enrolled and released; whether members can choose their own attorney or only attorneys specified by the plan; and what coverage will be available under the plan.

A. The Plan Sponsor

The sponsor is the individual or organization that establishes the plan, but not necessarily the one that develops its structure or supervises its daily contributions nor the employees' eventual use of the plan will be considered income for the purposes of federal income tax. \textit{Id.} \S 120(a)(1), (2). To qualify for this favorable treatment, the plan must come within the Code's definition of a group legal service, that is, "a separate written plan of an employer for the exclusive benefit of his employees or their spouses or dependents to provide such employees, spouses, or dependents with specified benefits consisting of personal legal services through prepayment of, or provision in advance for, legal fees in whole or in part by the employer." \textit{Id.} \S 120(b). In addition, the plan must fulfill a notification requirement, \textit{Id.} \S 120(c)(4), which will entail filing an application with the Secretary of Treasury, using Package 1024 available from the Internal Revenue Service. Letter from Jeanne S. Gessay, Rulings Section 1, Exempt Organizations, Technical Branch, Internal Revenue Service (Feb. 7, 1979) (on file with the \textit{Fordham Law Review}). For an exhaustive treatment of these sections, see Lazarus, \textit{The Impact of the Tax Reform Act on Group Legal Service Plans}, \textit{Pension & Profitsharing Tax J.}, Mar. 1977, at 118.

\textsuperscript{13} Antoine, \textit{Growth Patterns in Legal Services}, AFL-CIO American Federationist, Mar. 1976, at 1. A study is currently being conducted by the National Resource Center to determine a more recent and accurate figure. Nat'l L.J., Sept. 25, 1978, at 4, cols. 2, 4.


\textsuperscript{15} \textit{See} Primer, \textit{supra} note 8, at 18 (1974 report predicts that within the next few years 70\% of the public and 50\% of the lawyers in the United States will be involved in prepaid legal services); Maron, \textit{supra} note 2, at 335 (citing Philip Murphy of the American Prepaid Legal Services Institute).

\textsuperscript{16} The author surveyed approximately 300 prepaid legal service plans, bar associations, and insurance companies. Over 200 responses, which are the basis of this Comment, were received.
operation. Although there is confusion as to the precise definition of a plan sponsor, it appears that its function is either to fund the plan for the benefit of the members, such as an employer offering it as an employee fringe benefit, or to arrange for payment to be made by the members themselves. Although any group of people can establish a prepaid legal service plan, employers and unions dominate the field. Bar associations and insurance companies have also begun to sponsor plans, offering membership both to groups and occasionally to individuals.

1. Employer as Sponsor

Employer-sponsored plans are generally the product of a collective bargaining agreement in which the employer offers the plan to employees as a fringe benefit. This type of plan is attractive to employees because the employer generally funds the legal services, either in whole or in part. The employer also benefits from its sponsorship because its contributions to the plan are deductible for federal income tax purposes and the cost of providing legal services for employees will be less than other programs generally offered as fringe benefits. In addition, there is some evidence that these plans tend to lower employee absenteeism and improve morale.

There are, however, several disadvantages to employer-sponsored prepaid legal service plans. Initially, the party seeking its establishment must

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17. See W. Pfennigstorf & S. Kimball, supra note 11, at 27-28; notes 50-54 infra and accompanying text.
19. Prepaid legal services are generally initiated by preexisting groups. See generally Spreading Fast, supra note 1, at 61. Several individuals, however, who are not members of a preexisting group, can agree to share the risk of the need for legal services and group together solely for the purpose of establishing a prepaid legal service plan. For example, farmer Jones may see that each year, an average of two of the twenty farmers in his own town spend approximately $2,000 for legal services. Farmer Jones could contact each of his fellow farmers and they could agree to pay $100 a year into Jones' plan. The Jones plan would fund whatever legal services the farmers need in that year, thereby protecting them from the financial setback that could result from a serious legal problem. See Another Option: The Group Legal Service Plan, Consumer Reports, May 1977, at 288 [hereinafter cited as Another Option].
20. See Maron, supra note 2, at 334; Ohman, supra note 6, at 3.
21. See Kirby, supra note 4, at 325. In addition to these four, other groups have sponsored plans. See DeMent, supra note 3, at 19 (consumer cooperatives, credit unions, tenant organizations, religious groups, social groups and student associations).
22. See Ohman, supra note 6, at 12. Plans that are funded by the employer are often referred to as union-sponsored plans funded by the employer. This Comment will refer to employer-funded plans as employer-sponsored and union-funded plans as union-sponsored.
25. The yearly cost of prepaid legal service averages between $50 and $100 per person, see note 3 supra, whereas the average annual amount that employers spend for employee benefits is over $4,500 per employee, a large share of which funds health insurance. See Will Guidelines Slow Fringe-Benefit Boom?, U.S. News & World Report, Jan. 22, 1979, at 75.
successful in the labor negotiations. In addition, employees will have to forgo some other fringe benefit that they would have obtained in place of the prepaid legal service plan. Moreover, the employer may retain control over the structure and administration of the plan, resulting in its being less responsive to the needs of the employees. Finally, employer-sponsored plans will be adversely affected by government-imposed wage and price controls, which tend to make fringe benefits less attractive than wage increases.

The drawbacks associated with employer-sponsored plans are not significant, and, as a result, such plans have been well received. Employees gain a tax advantage by choosing a prepaid legal service plan because the employer's contributions and the employee's eventual use of the plan are not reported as income for federal income tax purposes. The disadvantage of excessive employer control can be resolved by the employees bargaining for some voice in structuring and administering the plan. This can be accomplished by placing the plan's operation under the control of a board chosen by the employees, with some input from the sponsoring employer. The effect of wage and price controls, however, threatens the future growth of employer-sponsored plans, and demonstrates the need to encourage other groups to sponsor prepaid legal service plans.

2. Labor Union as Sponsor

Unions have been quite successful as sponsors of plans for their membership. A major cause of this success is the ease with which unions can contact potential members of the plan. A union can take advantage of its established lines of communication to inform its members of the benefits of prepaid legal services. In addition, employees are accustomed to having the union provide various services for them, and may prefer to be represented by attorneys whose qualifications have been scrutinized by the union. Finally, because an estimated sixteen to seventeen million Americans are members of labor unions, this type of plan has a broad market from which it can recruit members.

The only disadvantage of union-sponsored plans is that the individual members must fund them, generally in the form of a union dues deduction.

27. DC 37 Municipal Employees' Legal Services Plan, MELS After Ten Months: A Progress Report (n.d.) (on file with the Fordham Law Review) [hereinafter cited as Progress Report] (employees agreed to a $26 a year reduction in their cost of living allowance).
28. See Maron, supra note 2, at 334.
30. See Insurance To Cover the Lawyer's Bill, Business Week, Apr. 18, 1977, at 46, 47 [hereinafter cited as The Lawyer's Bill].
31. I.R.C. § 120(a)(1), (2), discussed at note 12 supra.
32. See notes 226-27 infra and accompanying text.
34. Another reason for this success is the mandatory enrollment policy that most union-sponsored plans use. See note 69 infra and accompanying text.
37. An example of a member-funded union plan is the Laborers' Local 423 Legal Services
This should not be a significant problem for most unions because the cost will be spread over the entire membership and therefore should not burden the individual members. Thus, the number of union-sponsored plans should continue to increase as their popularity spreads throughout labor organizations.

3. Bar Association as Sponsor

Although not yet as successful as the employer or union plans, state and county bar associations have begun to sponsor prepaid legal service plans.38 The major advantage of bar association plans is that, unlike most others, they have the ability to offer prepaid legal services to individuals who are not members of a particular organization.39 This characteristic enables bar plans to reach the sector of the population that does not receive adequate legal counseling40 and does not belong to any group that might sponsor a plan, such as a labor union. Unfortunately, however, bar plans have higher operating costs than employer or union plans and, therefore, membership fees tend to be high.41 These increased costs result from the efforts bar associations must make in order to solicit potential group or individual members. Indeed, the inability to attract a sufficient number of members has caused several bar plans to fail,42 and has prevented them from having any substantial impact on the growth of prepaid legal services.43

Finally, bar-sponsored plans have come under attack as possible violations of federal antitrust laws.44 The Justice Department has suggested that plans

38. See Another Option, supra note 19, at 288.
39. Currently most bar-sponsored plans are offered only to individuals who are members of a preexisting group. See, e.g., California Lawyers' Service, Sample Benefit Plan Description 1 (n.d.) (on file with the Fordham Law Review) (plan open to members of a group on whose behalf contributions are paid); Letter from Barbara Moon, Administrator, Indiana Legal Services Plan (Dec. 5, 1978) (on file with the Fordham Law Review) (plan available to employers with 50 or more employees); Letter from Jill Breymer, Administrative Vice President, Alliance Administrators (Nov. 13, 1978) (on file with the Fordham Law Review) (plan sponsored by Kansas State Bar Association offered to groups); Letter from Howard H. Braverman, Associate Executive Director, Illinois State Bar Association (1978) (on file with the Fordham Law Review) (plan sponsored by Illinois State Bar Association is offered only to groups, each group being a self-sustaining program). They may, however, also be offered to individuals. See Kirby, supra note 4, at 326; see, e.g., New York County Lawyers Ass'n Press Release (June 8, 1978).
40. It should be noted that when a plan is offered to a group, the offeror of the plan, such as the four bar associations cited above, is technically not the sponsor even though it is often referred to as such. The group that the plan is offered to becomes the sponsor as it initiates the plan for its members and arranges for funding. See note 17 supra and accompanying text. The offeror becomes the plan administrator. See notes 56-58 infra and accompanying text. If the group simply allows the offeror to solicit its members, and the group does not initiate the plan or arrange for funding, the offeror, not the group, will be the sponsor and often the administrator.
41. See Maron, supra note 2, at 335.
43. See Maron, supra note 2, at 335.
44. See pt. II(A)(1) infra.
in which fee schedules are set by attorneys may be forms of illegal price fixing. In addition, several commentators believe that bar-sponsored plans seek to maintain high fees for legal services. Although these problems could have serious consequences, they can be avoided in ways that will be discussed below, and should not discourage future efforts to increase the role of local bar associations in the development of prepaid legal services.

4. Insurance Company as Sponsor

The involvement of both nonprofit and commercial insurance companies as sponsors of prepaid legal service plans is a relatively recent occurrence. In the past, these companies have avoided sponsorship because of restrictive insurance laws that exist in many states. In addition, the lack of available information concerning the public demand for legal services and the financial commitment that sponsorship will require, has made insurance companies reluctant to establish a large scale prepaid legal service plan. As prepaid legal services continue to develop, however, statutory barriers will be removed, information will become more widespread, and involvement of insurance companies is likely to increase significantly.

Insurance company plans, like those sponsored by local bar associations, have the ability to offer membership to individuals who are not affiliated with a particular group or organization. Unlike bar association plans, however, insurance companies will be able to minimize the financial drawbacks associated with them.

45. See note 136 infra and accompanying text.
46. See Maron, supra note 2, at 335.
47. See DeMent, supra note 3, at 23-24; Kirby, supra note 4, at 326; Comment, Commercial Insurance Plans on Prepaid Services, 27 Baylor L. Rev. 511, 523 (1975) [hereinafter cited as Commercial Insurance].
49. See Kirby, supra note 4, at 327.
50. One example of insurance companies' involvement is the plan of Blue Cross of Western Pennsylvania. The plan, which is still in the development stage, will be administered by Consumer Service Casualty Insurance Company, a wholly owned subsidiary of Blue Cross of Western Pennsylvania. It will provide a prepaid legal insurance program to interested industry and employee groups throughout Pennsylvania. Letter from John H. Shenefield, Assistant Attorney General, Antitrust Division, Department of Justice, to John W. Wishart, Consumer Service Casualty Insurance Company (Sept. 7, 1978) (copy on file with the Fordham Law Review). At least fifteen other Blue Cross affiliates are researching the possibility of entry into this legal service field. DeMent, supra note 23, at 9. Blue Cross, however, cannot begin large scale involvement in prepaid legal services until state statutes which permit it to offer only hospital and medical insurance plans are amended. Id. at 9-10; see, e.g., Conn. Gen. Stat. Ann. § 33-157 (West Supp. 1978); Mich. Comp. Laws Ann. § 550.501 (1967); W. Va. Code § 33-24-2(b) (1975). See generally S. Law, Blue Cross: What Went Wrong? 13 (1974). Prudential Insurance Company is also about to begin marketing prepaid legal services to employers who will offer it as a fringe benefit. Nat'l L.J., March 26, 1979, at 8, col. 2.
51. See Primer, supra note 8, at 4; see, e.g., H. Stonecipher, Pre-Paid Legal Services, Inc., Story 2 (n.d.). As with bar association plans, see note 39 supra, at the present time, most insurance company plans are offered to groups. See, e.g., Kirby, supra note 4, at 326-27 (Stonewall Insurance Company and Midwest Mutual offer plans solely to groups); Letter from John H. Shenefield, Assistant Attorney General, Antitrust Division, Department of Justice, to John W. Wishart, Consumer Service Casualty Insurance Company (Sept. 7, 1978) (on file with the Fordham Law Review) (Blue Cross of Western Pennsylvania Plan to be offered to industry and employee groups).
associated with individual membership because they already possess the facilities and expertise necessary to solicit subscribers. On the other hand, because commercial insurance companies must realize some profit from their involvement in prepaid legal services, the cost per member will be higher than in plans offered by other sponsors. In addition, those who believe that the availability of health insurance has increased the costs of providing health care have suggested that insurance company plans will have a similar effect on the cost of legal services.

B. The Plan's Administrator

Far too often, literature discussing prepaid legal services does not clearly distinguish between the sponsor and the administrator of a plan. Although the same person or association often performs both roles, it is important to realize that the two are separate functions. The sponsor initiates and finances the plan, either by bearing the cost itself or by arranging for payment to be made by the members. The administrator, however, supervises the day-to-day operations of the plan and often develops the plan's structure. In addition, a sponsor need not possess any specific qualifications. An administrator, however, must have some degree of expertise in order to ensure the plan's solvency. The decision of who should oversee the daily operation of a plan depends on its size, the expertise of the sponsor, and the cost of hiring an administrator. In employer, union, and insurance company plans, the sponsor will be able to perform the administrative function itself if it has developed the necessary expertise from offering other programs, such as health insurance, to its members. On the other hand, if the sponsor does not have

52. See Practising Law Institute, Pre-paid Legal Plans 163-65 (2d ed. 1974).
53. Maron, supra note 2, at 335 (citing James Lorenz, California Rural Legal Assistance, a federally funded legal services program).
54. See, e.g., Kirby, supra note 4.
56. See notes 18-19 supra and accompanying text.
57. See W. Pfennigstorf & S. Kimball, supra note 11, at 28.
59. See Institute of Industrial Relations, University of California, Prepaid Legal Services, Proceedings of a Conference on the Development of Prepaid Legal Services 51 (Nov. 12-13, 1971) [hereinafter cited as Conference].
60. The cost of hiring an administrator varies tremendously. The Shreveport Plan is administered by Southwest Administrators, Inc., see Shreveport Bar Association, Laborers Local Union 229 Prepaid Legal Service Plan: A Compilation of the Basic Documents 11 (n.d.) [hereinafter cited as Compilation] (on file with the Fordham Law Review), at a cost of $400 per month. Alaska Laborers—Construction Industry Legal Services Fund, Legal Consultant's Report 2 (1976) (on file with the Fordham Law Review). In addition, in 1976, the cost of an administrator for one plan of 12,000 members was $60,000 a year, and for another of 2,600 members the cost was $12,000. Id. It has been suggested that the hiring of a professional administrator may produce lower plan costs than if the administration was performed by an inexperienced sponsor. See Randolph, What Bars Should Consider in Prepaid Legal Services Plans, 60 A.B.A. J. 797, 801 (1974).
61. See Bernstein, supra note 35, at 474.
the requisite experience and knowledge, a professional administrator should be hired.62

If the sponsor decides to hire an administrator, several types are available. Independent organizations are available to administer prepaid legal service plans.63 For example, the Fortement Association will design and operate a plan for any group of five or more persons.64 In addition, local bar associations and insurance companies are becoming administrators of plans because of the difficulties they have encountered in sponsoring plans.65 They will often establish and make available a model plan which they will administer for any interested sponsor.66 There is also a limited number of individuals who have the qualifications needed to oversee the operations of a plan.67

C. Methods of Enrollment and Release

One of the most important aspects of a plan's structure concerns the manner in which it chooses to enroll members and the ease with which they may discontinue coverage. At present, there are two alternatives, the voluntary and the mandatory plan. In a voluntary plan, such as one sponsored by a bar association, individuals seek out membership on their own, and may discontinue coverage at any time.68 In a mandatory plan, however, individuals are automatically enrolled simply because they are members of a preexisting group and they must continue coverage as long as they are affiliated with the group. An example is a union-sponsored plan that automatically enrolls all union members and deducts payment from their wages.69 Therefore, under a voluntary format, the sponsor faces the difficult task of enrolling members, whereas in a mandatory plan, the sponsor can enroll an entire group without making an appeal to the individual members.

If a voluntary plan fails to enroll a sufficient number of members, it will be unable to begin operation.70 To compound this problem, many of the individ-

63. See, e.g., Union Law Center, Group Legal Service Program (n.d.) (on file with the Fordham Law Review) (provides and administers plans for employer and union sponsored plans).
64. Letter from George W. Blood, Chairman of the Board, Fortement Association, to Employer and Employee Organization Officials 3 (n.d.) (on file with the Fordham Law Review) [hereinafter cited as Fortement Letter].
65. See, e.g., Letter from N. Samuel Clifton, Executive Director, Virginia State Bar (Oct. 12, 1978) (on file with the Fordham Law Review) (Midwest Mutual Insurance Company administers a plan sponsored by the Virginia Bar Association); notes 42-43, 47-49 supra and accompanying text.
68. See generally DeMent, supra note 3, at 23.
69. See Maron, supra note 2, at 334.
70. See Novak, supra note 62, at 1083.
71. See Maron, supra note 2, at 334; Note, Prepaid Legal Services and Their Feasibility in
uals that enroll in voluntary plans have an immediate need for legal services. This tendency, which is known as adverse selection, places a severe financial strain on the plan during its first year of operation, and often causes insolvency and dissolution. In addition, the problem is perpetual because once the legal needs of the adversely selected group are fulfilled, they often discontinue coverage and are replaced by others with immediate legal needs. For example, one voluntary plan in California, Consumer's Group Legal Services, reports that an estimated seventy-five percent of the persons joining have an immediate legal problem, and only sixty percent of its members renew each month. This should be compared with a typical mandatory plan such as that of the Amalgamated Meat Cutters, in which only twelve percent of new members made use of their coverage during the first year of operation.

Several measures can be taken to at least ease the problem of adverse selection. The most obvious solution is to make enrollment mandatory and restrict discontinuance of coverage. Mandatory enrollment will only be successful when the plan members comprise a cohesive group, such as a labor union. It is impossible to create a mandatory plan if there is no preexisting group or if membership in the group is not important to the individuals, because many will simply discontinue group membership rather than join the prepaid legal service plan. A second way to reduce the impact of adverse selection is to charge a higher rate for those who represent a higher risk, as is done with automobile insurance. This will offset at least part of the heavy financial burden imposed on the plan by the immediate use of the high risk members. A drawback to this suggestion, however, is the unavailability of the data necessary to make the determination as to who are high risk members and how much they should be charged. Another possible solution is to limit or deny coverage for services connected with causes of action that arise before the individual joins the plan.

Ohio, 41 U. Cin. L. Rev. 841, 864 (1972) [hereinafter cited as Ohio Prepaid]; Letter from Sandy DeMent, Executive Director of the National Resource Center (Oct. 19, 1978) (on file with the Fordham Law Review) [hereinafter cited as DeMent Letter].

72. DeMent Letter, supra note 71; see Maron, supra note 2, at 334.
73. See generally DeMent Letter, supra note 71.
74. See Maron, supra note 2, at 334.
77. See Ohio Prepaid, supra note 71, at 865.
78. See, e.g., Novak, supra note 62, at 1082 (Utah Bar Association plan does not cover preexisting matters); Alliance Administrators, Inc., Prepaid Legal Services of Kansas, Inc., (n.d.) (on file with the Fordham Law Review) (Kansas Bar Association plan excludes prior matters); State Bar of Wisconsin, Attorney's Checklist for Drafting a Group Legal Services Plan 3 (1975) (on file with the Fordham Law Review) [hereinafter cited as Checklist] (Wisconsin Bar Model Plan excludes prior matters). Other plans, though not excluding preexisting matters, put some restrictions on coverage of them. See, e.g., Local 1, supra note 5, at 5 (preexisting matters covered at the discretion of the administrator and only if the member did not consult an attorney concerning this matter prior to membership and did not reasonably foresee that the problem was subject to coverage under the plan).
selection problem as the high risk individuals would not be attracted to the plan, it would also make it difficult for voluntary plans to obtain enough members in order to begin operation.\textsuperscript{79}

A more desirable solution is to discourage members from discontinuing coverage once their legal needs are met. This could be accomplished by requiring them to join for an extended period of time.\textsuperscript{80} Ideally, payment for the entire term should be required at the beginning of each period so as to assure a member's enrollment for the duration of the period. Installment payments would be less burdensome on the member, and would increase the plan's attractiveness, but they would not prevent the member from discontinuing coverage after the period in which his legal problems were resolved. A schedule of installment payments that decrease in amount over the coverage period, however, may encourage members to fulfill their financial obligation to the plan even after it has satisfied their legal needs.

D. The Members' Choice of Attorneys

Another decision that must be made in structuring a prepaid legal service plan is whether to permit members to choose their own attorney or to restrict coverage to attorneys designated by the plan. There are three alternatives that may be employed: the open panel, the closed panel, and the modified open panel.\textsuperscript{81} An open panel allows a member to retain any attorney in the community who then will be paid directly by the plan.\textsuperscript{82} This approach is similar to the procedure used by insurance companies that offer health insurance.\textsuperscript{83} A closed panel, generally favored by union sponsors,\textsuperscript{84} is serviced by a predetermined group of attorneys who have been retained or employed in advance by the plan.\textsuperscript{85} A plan utilizing this method will only provide

\textsuperscript{79} See note 71 supra and accompanying text.

\textsuperscript{80} See, e.g., Consumers' Group Legal Services Membership Booklet 109 (n.d.) (on file with the Fordham Law Review) (offered an optional two year application at a reduced rate to encourage extended membership). Currently, however, the typical enrollment period does not extend beyond one year. See, e.g., Letter from Martha Cramer, Legal Assistant, Consumers' Group Legal Services (Nov. 15, 1978) (on file with the Fordham Law Review) (yearly enrollment); Fortement Association, Enrollment Form (n.d.) (on file with the Fordham Law Review) (monthly enrollment).

\textsuperscript{81} For a more detailed discussion of these three possible panel options, see Bartosic & Bernstein, Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients Through Collective Bargaining, 59 Va. L. Rev. 410, 427-33 (1973); Bernstein, supra note 35, at 474-75; Ohman, supra note 6, at 8-11.

\textsuperscript{82} See Fortement Letter, supra note 64, at 1.

\textsuperscript{83} See Spreading Fast, supra note 1, at 61.

\textsuperscript{84} Not all employer- and union-sponsored plans utilize a closed panel. See, e.g., Michigan Education Association Legal Service Corporation, Summary Plan Description 1 (n.d.) (on file with the Fordham Law Review) (employer-sponsored plan using an open panel).

\textsuperscript{85} See Fortement Letter, supra note 64, at 1. Pure open or closed panel plans are rare. DeMent, supra note 3, at 20. A relatively small number of attorneys service open panels because of word-of-mouth advertising within the group and the natural limitations of location and compatibility. Thus, they develop some characteristics of a closed panel. \textit{Id.} Conversely, closed panel plans will generally have open panel options. For example, if a plan member is in immediate need of an attorney while in a foreign jurisdiction in which there are no attorneys from
coverage for legal matters that members bring to one of the attorneys retained or employed by the plan. The modified open panel, which has elements of both the open and closed panels, permits members to make use of any attorney who has expressed an interest in offering his services by submitting his name to the plan. The member receives a list of these names and may choose any one with whom he wishes to consult.

1. The Open Panel

The open panel is preferred by some plans, particularly those sponsored or administered by bar associations, for several reasons. The right to choose one's own attorney is highly valued and a member will have more confidence in an attorney that he freely chooses. Secondly, open panels do not alter the traditional method of providing legal services, and, therefore, they are promoted by those who do not wish to deviate substantially from this method. Finally, the open panel can provide legal services to members for whom traveling to a central location would be inconvenient.

One of the drawbacks of the open panel is that they tend to be more costly than the closed and modified open panels. Administrative costs are greater in an open panel plan because they are serviced by an indefinite number of attorneys. Moreover, the plan will generally have little control over the efficiency and pricing policies of these attorneys. Several commentators suggest that this lack of control will encourage open panel attorneys to charge plan members higher fees because they are guaranteed payment by the plan.

One possible way to lower the cost of open panels is to have the members present their attorney with a list of hourly rates up to which the plan will provide coverage. If the attorney's fees are more than these rates, the plan member must either pay the difference or go to another attorney. It is reasonable to assume, however, that attorneys seeking to broaden their
clientele will make an effort not to discourage prepaid legal service plan members.

A further disadvantage of the open panel is that it does not solve the problem that many people are reluctant or unable to seek out attorneys on their own. In addition, in an open panel, a large number of the members may take advantage of their coverage at the same time, thereby financially overburdening the plan. Finally, it has been alleged that open panel attorneys treat prepaid legal service members as second class clients. This assertion, however, is difficult to understand because attorneys owe plan members the same duty as any other client and will be adequately compensated for their services.

2. The Closed Panel

The closed panel, which is the most popular of the three alternatives, can be structured in either of two ways. The plan can establish a closed-panel staff arrangement, in which it will hire a number of attorneys to serve as in-house counsel. These attorneys are salaried by the plan and work exclusively for its members. Alternatively, the plan can establish a closed-panel retained arrangement, in which it will provide legal service by contracting with a law firm. The retained firm will agree to advise and represent members, and the plan will pay a fixed hourly fee. If the members are dispersed over a large geographic area, such as in a plan sponsored by a nationwide union, the plan may contract with more than one law firm, each servicing a different region. As the number of retained firms becomes greater, however, the arrangement will lose the characteristics of a closed panel, in that the plan will have less control over the attorneys, and will be less centrally located.

Closed panels have the advantage of eliminating the problem of relying upon the individual to seek out an attorney. In addition, if the plan is sponsored by a group, members may be more comfortable going to attorneys chosen by their group. A closed panel also lowers the cost of providing members with legal services. When a plan contracts with a law firm, the

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95. See Dunne, Prepaid Legal Services Have Arrived, 4 Hofstra L. Rev. 1, 24 (1975). A survey of the DC 37 Municipal Employees Union in New York revealed that the major reasons why members failed to obtain adequate legal counseling were the expected cost and because they did not know how to find or choose a competent attorney. Progress Report, supra note 27, at 4. Other reasons given by the members were that they lacked the time necessary to find a competent attorney, and that they did not trust attorneys. Id.

96. To reduce the impact of this problem, the Utah State Bar Association seeks an agreement from billing attorneys to accept a prorated portion of the available funds, the remainder to be forwarded at a later date. See Novak, supra note 62, at 1082-83.


98. ABA Code of Professional Responsibility, DR 2-103(D) (1976).

99. Ohman, supra note 6, at 7. The closed panel staff arrangement is feasible only if the plan is large enough to justify hiring a staff of attorneys. Id. at 8.

100. Id. at 7.

101. See, e.g., Local 1, supra note 5, Insert (plan has retained eleven law firms, several in New York and several in Pennsylvania).


103. See id. But see Politz, supra note 88, at 437.
plan should be able to obtain a favorable schedule of fees because of the large
number of clients it will bring to the firm. Moreover, when the plan hires a
panel of attorneys, it will be able to supervise their activities and maximize
their efficiency. Finally, administration costs will be lower in the closed
panel retained arrangement because the plan will generally be dealing with a
single law firm rather than an indefinite number of attorneys.

A significant advantage of closed panels is that they possess a built-in
ability to reduce the effect of financially overburdening utilization in a short
period of time. In the in-house staff arrangement, the panel is usually salaried
and, therefore, a sudden increase in utilization will not increase the cost of
providing services. In addition, in the closed-panel retained arrangement, a
single law firm is able to handle only a certain number of legal matters at one
time, thereby creating a natural barrier to levels of utilization that could
threaten the solvency of the plan.

There are several disadvantages to choosing a closed panel arrangement.
The ABA Code of Professional Responsibility prohibits attorneys from being
employed or retained by closed panel plans if the plan is organized for
profit. As a result, attorneys may not be associated with a commercial
insurance company plan if it intends to use a closed panel. In addition, plans
choosing the closed-panel staff arrangement will require a large capital
investment to establish and maintain a number of salaried attorneys.

Moreover, several commentators have suggested that because of the efforts
these plans will make to minimize costs, a mass production attitude will
develop and a lower quality of services will be provided. Finally, attorneys
may resist expansion of closed panel plans because they will alter the manner
in which attorneys have offered their services to the public. Initial hostility,
however, should subside as soon as attorneys recognize that prepaid legal
services will make their services available to a much larger sector of the
nation’s population.

3. The Modified Open Panel

Despite its limited use, the modified open plan possesses many of the
advantages of both the open and closed plans. By providing a list of
participating attorneys, the plan relieves members of the task of finding an
attorney. The modified open plan also permits members to choose their own
attorney and, therefore, is not a substantial deviation from the traditional

104. See generally Bernstein, supra note 35, at 474.
105. See generally Fortement Letter, supra note 64, at 1.
106. ABA Code of Professional Responsibility, DR 2-103(D)(4)(a) (1976). It should be noted
that although other provisions in the Code pertain to closed panel plans, see, e.g., id. DR
2-103(D)(4), they are not relevant to the present discussion.
107. See Primer, supra note 7, at 17.
108. Telephone Interview with Mary Tarcher, Administrator, New York County Legal
Services Corporation Prepaid Legal Services Plan (Mar. 13, 1979) (closed-panel attorneys are
generally less thorough and do not follow through on matters as often as other attorneys).
109. See Primer, supra note 7, at 17.
110. See Fortement Letter, supra note 64, at 2 (modified open panel “provides for total
quality and cost controls . . . , but at the same time it eliminates the prohibited transactions,
conflicts of interest and etc.”).
method of providing services. Moreover, these plans will be able to accommodate geographically dispersed groups. They will also have lower administrative costs because they will deal with a definite number of attorneys, and do not require any large investments of capital. In addition, modified open panels are not restricted by the Code of Professional Responsibility. Finally, they provide a sponsor with flexibility in that it can maximize any of the above qualities by increasing or decreasing the number of panel attorneys.

E. Coverage

1. Coverage Options

The final decision that must be made in structuring a prepaid legal service plan is to define the amount and type of coverage available to the members. One way in which the plan may accomplish this is by placing a dollar or hour maximum on the coverage it will provide in specific areas of the law. These areas generally include legal matters that the middle class most often encounters, such as home purchases, landlord-tenant problems, adoptions, traffic violations, consumer-oriented problems, domestic matters, as well as civil and criminal defense work. The number and type of legal matters for which the plan will provide coverage should be designed to satisfy the needs of the members. For example, members of an upper-middle income group may insist upon coverage for personal financial matters, while a lower-middle income group may prefer coverage for landlord-tenant problems.

The second way in which a plan may define its coverage is by placing hour or dollar maximums on the categories of legal services it will provide, rather than on specific areas of law. The types of legal services generally provided include: (1) advice and consultation—office visits or telephone conversations; (2) office work—conferences, negotiations, investigations, research, letter writing, and document drafting or review; (3) out-of-pocket expenses associated with judicial and administrative proceedings—preparation and filing of pleadings, court costs, and witness fees; and (4) major legal expenses—representation in a civil or criminal proceeding, to the extent that expenses exceed coverage in the other categories. This method of defining

111. For example, the Illinois State Bar Association Plan limits its coverage as follows: advice and consultation, 4 hours; wills and estate planning, 3 hours; change of name, 3 hours; adoptions, 6 hours; conservator or guardian estates, 6 hours; real estate transactions, 6 hours; landlord-tenant problems, 7 hours; traffic offenses, 5 hours; administrative proceedings, 4 hours; consumer transactions, 6 hours; warranty enforcement, 4 hours; bankruptcy, 7 hours; domestic relations, 10 hours; probate, 10 hours. Illinois State Bar Ass'n, Prototype Plan of Prepaid Legal Services 6-10 (n.d.) (on file with the Fordham Law Review). Some plans place maximum limits on time or dollar amounts without any distribution among legal matters. See, e.g., Checklist, supra note 78, at 3 (limits coverage to a total of twenty hours of an attorney's time per year).

112. See DeMent, supra note 3, at 20.


114. See Compilation, supra note 60, at 3-4. Although it imposes limits on the categories of legal services, the Utah Bar Association Plan permits members to carry over to the following year any unused hours in several of the categories. See Novak, supra note 62, at 1082. The financial effect of such a provision should be accurately determined before it is included.

115. See Compilation, supra note 60, at 3-4. Plans without sufficient financial resources
coverage may be more flexible than the first because it would enable members to use all of their coverage in the specific areas of law in which they have the greatest need for legal services.

Finally, in conjunction with either of these two methods, prepaid legal service plans may exclude specific matters from coverage. For example, plans usually exclude cases that can be handled by a nonpanel attorney on a contingent fee basis because the member will not be financially burdened by such an exclusion. Suits against the sponsor are excluded in employer and union plans in compliance with federal law. Legal matters connected with a member's business are also typically excluded because they extend beyond the personal legal needs of the member.

2. Specific Coverage Problems

All prepaid legal service plans should formulate rules defining the coverage available when both parties to a dispute seek to use attorneys retained by the plan. This situation often arises in divorce proceedings in which both spouses belong to the plan, or one spouse is a member and the other is covered as one of his dependents. If the plan uses an open panel, no coverage problem exists because each party can retain independent attorneys. In a closed panel, however, there may be a conflict of interest if the same closed panel seeks to represent both parties. Plans can avoid this problem in several ways. They may simply exclude from coverage disputes between members so that neither party can take advantage of the plan. Another common solution is to permit one of the parties to retain an attorney outside the closed panel who will be paid by the plan. The plan could also provide coverage only to the first member to see one of its attorneys or, in a domestic dispute, make coverage available only to the member and not to his dependent.
A second problem arises when a member's coverage expires while a plan attorney is representing him. This usually occurs when an individual leaves the group that sponsors the plan, such as a labor union. Formulating rules to define coverage in this situation is necessary because the local bar association code of ethics or the nature of the matter may make it impossible for the attorney to withdraw. The prevailing view is that representation should continue without charge. In addition, legislation in some states requires that the group offer the individual a conversion privilege, whereby he can continue plan membership after leaving the group.

II. PROBLEMS COMMON TO ALL PLANS

A. Statutory Barriers to Certain Prepaid Legal Service Plans

1. Federal Antitrust Laws

In *Goldfarb v. Virginia State Bar*, the Supreme Court held that published fee schedules enforced by bar associations “constitute a classic illustration of price fixing” and therefore violate section one of the Sherman Act. Thus, a bar-sponsored plan that is serviced by a substantial number of independent attorneys who will follow a fee schedule set by the plan may produce the same anticompetitive and price fixing effects as those condemned in *Goldfarb*. For example, in an advisory letter, the Justice Department expressed concern that the prepaid legal service plan sponsored by the New York County Lawyers Association would “stabilize legal fees to the disadvantage of consumers of legal services.” The bar association established the fees that the plan would pay to the attorneys servicing the plan for the first year. At the end of the first year, a member-dominated committee supervised the schedule of fees. The Justice Department refused to approve the plan's

member's spouse or dependent when their interests are opposed to that of the member without that member's written authorization and consent.

125. See DeMent, supra note 3, at 20.
126. Id.
127. Id.
128. See, e.g., Ind. Code Ann. § 27-7-8-5 (Burns Supp. 1978). The converted plan, however, will generally be more expensive than group membership and may offer less coverage. See, e.g., Letter from Barbara Moon, Administrator, Indiana Legal Services Plan (Dec. 5, 1978) (on file with the *Fordham Law Review*). The Indiana State Bar Association pilot plan charges members a group monthly premium of $5.90 for coverage of the member, his spouse, and all of his dependents under the age of 18. The conversion policy, however, costs $12.00 per month for family coverage and the benefits offered under the converted policy are approximately 50% of those offered by the group policy. Id.
130. Id. at 783.
132. Dunne, supra note 95, at 33; see ABA Compilation of Reference Materials on Prepaid Legal Services, Antitrust Section, at i (1973) [hereinafter cited as ABA Antitrust Reference Materials]. For a more detailed discussion of this problem, see W. Pfennigstorf & S. Kimball, supra note 11, at 253-98.
format and, as a result, the bar association relinquished its control over the fixing of fees to be paid to participating attorneys.\textsuperscript{135}

The potential for violating the antitrust laws exists when attorneys promulgate a fee schedule that may have anticompetitive effects.\textsuperscript{136} If someone other than the sponsoring attorneys establish the fee schedule, the plan might not violate the Sherman Act because the setting of fees would not be a result of concerted action among attorneys.\textsuperscript{137} In addition, if the plan contracts with a single law firm, there should be no violation because the transaction is a routine sale of services. If the plan maintains a staff of salaried attorneys, the result should be the same because concerted action among employees of the same employer would not violate the Sherman Act.\textsuperscript{138} Therefore, plans using a closed panel should not run afoul of the antitrust laws.\textsuperscript{139}

To avoid potential antitrust violations, it has been suggested that bar-sponsored plans delegate the fee-setting function to someone other than attorneys.\textsuperscript{140} For example, in the California Lawyers Service, sponsored by the California State Bar Association, a board of directors composed of nine members determined the fees paid by the plan.\textsuperscript{141} Participating attorneys and plan members each elected four members of the board, and these eight appointed the remaining director. Because it was stipulated that this ninth member would not be an attorney, the Justice Department stated that it would not institute civil action against the plan.\textsuperscript{142}

State bar associations may also violate the antitrust laws by promulgating rules of professional ethics that discriminate against closed panels.\textsuperscript{143} Several states impose greater restrictions upon the ability of closed panel plans to advertise and solicit than they impose upon open panel plans.\textsuperscript{144} Because closed panel plans may be at a competitive disadvantage, the Justice Department has not approved bar plans in these states.\textsuperscript{145}

Because exact guidelines are unavailable,\textsuperscript{146} it is advisable that all sponsors

\textsuperscript{134} Id. at 1.
\textsuperscript{136} See Dunne, supra note 95, at 33; Kirby, supra note 4, at 328; ABA Antitrust Reference Materials, supra note 132, at i.
\textsuperscript{137} Dunne, supra note 95, at 33; ABA Antitrust Reference Materials, supra note 132, at l.
\textsuperscript{138} See Dunne, supra note 95, at 33; ABA Antitrust Reference Materials, supra note 132, at i.
\textsuperscript{139} See ABA Antitrust Materials, supra note 132, at i. See generally Dunne, supra note 95, at 33.
\textsuperscript{140} See Randolph, supra note 60, at 788-89.
\textsuperscript{141} Letter from Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice to Carl B. Metoyer, Vice President, California Lawyers Service at 2 (Jan. 17, 1975) (on file with the Fordham Law Review) [hereinafter cited as Metoyer Letter].
\textsuperscript{142} See id.
\textsuperscript{143} See Kirby, supra note 4, at 328.
\textsuperscript{144} See, e.g., Department of Justice Press Release at 2 (Feb. 19, 1975).
\textsuperscript{145} See Metoyer Letter, supra note 141, at 4-5.
\textsuperscript{146} The Justice Department's position on prepaid legal services is made known only through press releases issued under its Business Review Procedure. See generally, Telephone Interview with Mr. Richman, Antitrust Division, Department of Justice (Mar. 7, 1979).
submit the proposed plan to the Antitrust Division of the Justice Department pursuant to its Business Review Procedure.\textsuperscript{147} The division will inform the plan as to whether the Justice Department would challenge it as a violation of the federal antitrust laws.\textsuperscript{148} Although this will not insulate the plan from antitrust liability in the future,\textsuperscript{149} it will afford it the opportunity to take whatever corrective measures are necessary to avoid possible violations.

2. State Insurance Statutes

Not all prepaid legal service plans are subject to state insurance regulations. Those that are the product of collective bargaining and employer- and union-sponsored plans are exempt from state regulation under provisions of the Employee Retirement Income Security Act (ERISA).\textsuperscript{150} In addition, because few states list prepaid legal service plans as a recognized form of insurance,\textsuperscript{151} it is possible that plans not offered by insurance companies\textsuperscript{152} will not have to comply with state insurance laws. If prepaid legal service is found to be insurance, however, plans not exempted by ERISA will have to satisfy requirements that will make it difficult or impossible to begin operation.\textsuperscript{153}

\textsuperscript{147} 28 C.F.R. § 50.6 (1978); see Randolph, supra note 60, at 798; Department of Justice Press Release at 3 (Apr. 7, 1977).

\textsuperscript{148} See Department of Justice Press Release at 3 (Apr. 7, 1977).

\textsuperscript{149} See Randolph, supra note 60, at 798; Department of Justice Press Release at 2 (Sept. 8, 1978).

\textsuperscript{150} 29 U.S.C. §§ 1003, 1144(a) (1976); see Gilmore, supra note 7, at 226-27. At least one court has extended ERISA's exemption because of overwhelming public policy reasons to plans that do not technically meet the statute's requirements. See People v. Blue Crest Plans, Inc., N.Y.L.J., Feb. 27, 1979, at 11, col. 2 (N.Y. Sup. Ct. Feb. 23, 1979) (oral agreement to provide a plan to a union was sufficient to bring plan within the exemption). In addition, it appears that plans not covered by ERISA may also gain exemption through certain structuring techniques. A plan sponsored by the Berks County (Pa.) Bar Association was to be offered to employers for the benefit of their employees. The Pennsylvania Insurance Department issued a letter stating that it considered the plan to be a form of insurance. The bar association, to avoid insurance law restrictions, turned over the sponsorship to the individual employers, and became the administrator of the plans. As a result, these employer-sponsored plans, covered by ERISA, were no longer governed by the state's insurance laws. The Berks County Bar Ass'n. Prepaid Legal Plan 1-2 (n.d.) (on file with the Fordham Law Review).


\textsuperscript{153} See generally DeMent, supra note 3, at 24; Kirby, supra note 4, at 328; Novak, supra note 62, at 1081. Prepaid Legal Services, 47 U.S.L.W. 2293, 2296 (Nov. 7, 1978); ABA Compilation of Reference Materials on Prepaid Legal Services, Insurance Section (1973) [hereinafter cited as ABA Insurance Reference Materials].
Because many states make no specific mention of prepaid legal services in their insurance laws, an examination of how they define insurance is necessary. Most statutes appear to fall into either of two groups.\(^{154}\) One group defines insurance as an agreement to pay a sum on the happening of destruction, loss, or injury.\(^{155}\) Under this definition, prepaid legal services can arguably be interpreted as being outside the definition of insurance because destruction, loss, or injury is not always the basis for the need of legal services. The second group of statutes qualifies the first definition by requiring that the event be “fortuitous” or “contingent.”\(^{156}\) A stronger argument can be made that prepaid legal services do not fit this definition. Although some of the coverage offered is conditioned on the happening of a fortuitous or contingent event such as litigation, most matters, such as will drafting, tax advice, and home purchases, are within the control of the individual member.\(^{157}\)

Regulation under state insurance laws will retard the future development of prepaid legal services. The insurance commissioners of nine states do not permit the marketing of any plans not exempted by ERISA.\(^{158}\) The commissioners of seven other states have not yet ruled on the status of prepaid legal services.\(^{159}\) Among these sixteen states are several of the largest potential markets for prepaid legal service plans.\(^{160}\) In addition, even in states that permit marketing of prepaid legal services, the insurance laws will make establishment of a plan very difficult. For example, requirements for the reserve capital that each plan must maintain may range from $500,000 to $2,000,000.\(^{161}\) As one commentator has noted, this is “an amount well beyond

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157. See In re Feinstein, 36 N.Y.2d 199, 208, 326 N.E.2d 288, 293, 366 N.Y.S.2d 613, 620 (1975) (two plans held not to be insurance); Prepaid Legal Services, 47 U.S.L.W. 2293, 2296 (Nov. 7, 1978) (“[T]he insurance principle, which depends on many people making small payments to cover a few claims, is at odds with one of the main goals of prepaid legal services, which is to encourage use, such as yearly legal check-ups.”).
158. DeMent, supra note 3, at 24; see, e.g., Telephone Interview with Mr. Goldstein, N.Y. Department of Insurance (Mar. 7, 1979) (New York Insurance Commissioner considers prepaid legal service to be insurance and will challenge these plans as an unauthorized sale of insurance).
159. DeMent, supra note 3, at 24.
160. Id.
the means of small consumer-sponsored or bar-sponsored plans.” In addition, state regulations applicable to certain insurance companies will substantially influence their interest in sponsoring prepaid legal service plans. Therefore, a decision that prepaid legal service is a form of insurance will make it difficult to offer these plans to individuals in need of adequate legal counseling.

Steps should be taken to reduce the impact of state insurance laws on prepaid legal services. Several state legislatures have already enacted legislation placing prepaid legal services under the supervision of the state bar rather than the insurance department. If a state chooses to define prepaid legal services as insurance, it should amend existing statutes to recognize it as a permissible form of insurance, and to alter specific restrictions that will have an unnecessarily harsh effect on these plans. Finally, if no action is taken, the federal government should consider preempting state law by amending federal legislation.

B. Administrative Problems

1. Lack of Actuarial Data

Actuarial data is needed to determine the amount of funds required to operate a plan. Because of the relative scarcity and diversity of the plans in existence, there is presently a shortage of the actuarial data needed to structure a financially sound plan. As a result, many are unable to determine accurately the amount of money necessary to provide prepaid legal services. In addition, many potential sponsors are reluctant to initiate a plan without some indication of the financial commitment they will be making. Until adequate actuarial information is available, it is advisable for all plans to maintain substantial cash reserves so that they can absorb any initial miscalculations in the amount of funds needed to operate the plan. It is also advisable that sponsors seriously consider hiring an expert to perform the actuarial computations. As large plans such as that of the United Auto


165. This may not be required if the state’s insurance law has a provision permitting the sale of other similar types of insurance. See, e.g., Mont. Rev. Codes Ann. § 40-2905(n) (Supp. 1977); N.Y. Ins. Law § 46(24) (McKinney Supp. 1978); W. Va. Code § 33-1-10(11) (1975); Wyo. Stat. § 26.1-88(xv) (1967).

166. See Bartosic & Bernstein, supra note 81, at 460. This can be done by amending the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1976).


168. See Greene, supra note 97, at 593.


170. See Conference, supra note 59, at 49-50. A professional actuary will not only assist in developing a plan that is financially sound, but will also continually evaluate the plan’s solvency. See id. at 50.
Workers (UAW)\textsuperscript{171} and of Blue Cross\textsuperscript{172} begin operation, actuarial information will become more accurate and widespread.

Initially, plans must determine the number of persons expected to join.\textsuperscript{173} This is difficult only in a voluntary plan because mandatory plan sponsors know the number of the group members that will be automatically enrolled. One way in which voluntary plans may deal with the problem is to begin operation only when membership reaches a certain level.\textsuperscript{174} Although this would prevent some plans from beginning operation,\textsuperscript{175} it would ensure that those that do are financially sound.

Another figure that a plan must know in order to estimate the cost of providing legal services is the average cost of solving specific legal problems.\textsuperscript{176} To arrive at this figure, the plan must determine the average hourly rate charged by the attorneys providing the specific service and the average amount of time required to resolve the problem. In closed panel plans, the average hourly rate is either specified in a contract or determined by the salaries paid a staff of attorneys.\textsuperscript{177} In modified open panel plans, the average hourly rate can be obtained by conducting a survey of the attorneys that will provide services to the members. In open panel plans, however, because the plan will not know the attorneys members will seek out, average hourly rates may be determined by examination of rates charged by similar plans. Such information may be available at one of the several organizations that monitor the development of prepaid legal services.\textsuperscript{178}

An estimation of the average time needed to resolve a particular legal problem is a more difficult figure to determine. The average time is dependent on the efficiency of the attorneys and the nature of the legal problem. The best method of making this determination, as suggested above, is by looking at the average time to resolve the particular legal problem in similar plans and making adjustments to compensate for any differences between the plans.

\textsuperscript{171} See Nat'l L.J., Sept. 18, 1978, at 4, col. 2. This plan, which began operation in November 1978, is limited to the 140,000 members of the UAW Chrysler Division. ABA Press Release at 2 (Sept. 6, 1978). If successful, the UAW plan may encourage other automotive unions, which have a total of 2.5 million members, to offer prepaid legal service plans. \textit{A New Fringe Benefit: Prepaid Legal Help}, U.S. News & World Report, Aug. 29, 1977, at 70 [hereinafter cited as \textit{A New Fringe Benefit}].

\textsuperscript{172} See note 80 supra.

\textsuperscript{173} A plan must determine the predicted number of persons who will join to estimate the funds it will receive during its first year of operation, as evidenced by the following formula:

\[
\text{Working Capital} = \left( \frac{\text{Predicted Number of Persons Who Will Join}}{\text{Price per Person}} \right)
\]

\textsuperscript{174} See, e.g., Letter from Sheldon N. Sandler, Bader Dorsey & Kreshtool, Attorneys at Law (Nov. 10, 1978) (on file with the \textit{Fordham Law Review}) (Delaware State Education Association Plan imposed a minimum level of 500).

\textsuperscript{175} See, e.g., id. (plan failed to enroll the necessary 500 members).

\textsuperscript{176} See generally ABA, Lawyers for Laborers 16 (1975) (on file with the \textit{Fordham Law Review}) (average claim of $225 for the years 1971-1974).

\textsuperscript{177} See \textit{A New Fringe Benefit}, supra note 171, at 70.

\textsuperscript{178} See note 212 infra and accompanying text.
Plans must also determine the percentage of members who will use the plan during a specified period. Different types of plans will have different utilization rates. Therefore, a plan should look only to one with similar characteristics for guidance concerning this computation. Some generalizations can be made of typical utilization rates in specific plans. For example, in mandatory plans, there is some evidence that utilization is approximately ten percent during the first year of operation, twelve percent to fifteen percent during the second year, and eighteen percent to twenty-five percent during the third and subsequent years.\(^1\) A few mandatory plans have reached a thirty percent utilization rate, but this appears to be the uppermost limit.\(^2\) Utilization in most voluntary plans, however, will certainly be higher,\(^3\) primarily because of adverse selection. An estimated range of utilization in voluntary plans is almost impossible to determine because of the many variables that will affect the frequency with which members use their coverage. For this reason, it is particularly important for a voluntary plan to maintain a sufficient cash reserve to absorb the financial burden that may result from a miscalculation of the utilization figure.

Once these three figures are determined, the price that individual members will have to pay can be ascertained through use of the following formula:

\[
\text{Price per Person} = \left( \text{Utilization} \times \frac{\text{Average Price of a Legal Problem}}{} \right) + \frac{\text{A Proportionate Share of Administrative Costs}}{}\]

At present, yearly rates generally range from twelve dollars to three hundred dollars per member.\(^4\) If the sponsor believes that the price per person is so high that it will have an adverse effect on the plan's potential success, it may lower the price by adjusting any of the other variables, such as decreasing the utilization rate.

2. Control of Utilization

The ability to control the number of members making use of their coverage during a specific period of time is important to a plan's stability. Overutilization by the members may result in the plan's inability to meet current expenses and may ultimately cause its failure. Underutilization will result in the plan's not achieving the goal of providing adequate legal services to the public at a reasonable cost. Therefore, prepaid legal service plans should be aware of ways in which they may influence the rate of utilization.

\(^1\) DeMent, supra note 3, at 22.
\(^2\) Id.
\(^3\) Compare Letter from George Blood, Chairman of the Board, Fortement Association (Oct. 30, 1978) (on file with the Fordham Law Review) (voluntary plan has 115% utilization rate) with note 179 supra and accompanying text.
\(^4\) An open panel sponsored by the Utah Bar Association estimates that 15% of its gross receipts are expended for administrative costs. Novak, supra note 62, at 1081.
One of the most effective ways to decrease utilization\textsuperscript{184} is by limiting the coverage available under the plan. As noted above, this may be accomplished by reducing either the types of services offered or the time and dollar maximums provided for in the plan.\textsuperscript{185} Limiting coverage for preventive matters such as will drafting would have the most dramatic effect on utilization because they are brought to the plan more often than matters covered under “major legal expenses” such as litigation.\textsuperscript{186} Another method of decreasing utilization is to discourage members from bringing frivolous matters to the plan. Plans may prevent this by providing for an initial amount that will be deducted from coverage, similar to deduction provisions included in auto insurance policies.\textsuperscript{187} The plan may also charge members an office visit fee. For example, the Northern California Teamsters Plan charges members a two dollar fee for each office visit.\textsuperscript{188} A slightly higher fee may persuade members to refrain from seeking an attorney’s advice only because he would incur no further expense. Finally, plans funded by employers and unions are able to decrease utilization by requiring employees to work a certain number of hours during a preceding period before they are eligible for coverage.\textsuperscript{189} This method is most often used in seasonal or sporadic industries such as construction to allow the employer to exclude employees who maintain union membership but work infrequently and only for short periods.\textsuperscript{190}

Whenever a voluntary plan seeks to reduce plan usage, care must be taken to avoid substantially decreasing its appeal to the public.\textsuperscript{191} For example, if the plan drastically reduces coverage, it may not be able to enroll the number of new members necessary for it to maintain its solvency. Therefore, volun-

\textsuperscript{184} Before attempting to decrease utilization, the plan should consider raising the price of coverage. If utilization is high, it may be assumed that the members are satisfied with the plan and, therefore, may be willing to pay a higher premium.
\textsuperscript{185} See notes 111, 114 supra and accompanying text.
\textsuperscript{186} See, e.g., Colvin & Kramer, supra note 113, at 52.
\textsuperscript{187} See, e.g., DeMent, supra note 23, at 9. (Lumberman's Mutual Casualty Company, an insurance company sponsored plan, incorporates a schedule of deductibles which are applicable to different benefits); Minnesota Education Ass'n Legal Services Benefit Plan, 1977 Annual Report 1 (on file with the Fordham Law Review) (applies a $50.00 deductible to litigation in which the plan member initiated the action).
\textsuperscript{188} Northern California Teamster Group Legal Plan (n.d.) (on file with the Fordham Law Review).
\textsuperscript{189} See, e.g., Connecticut Laborers' Legal Services Plan 9 (n.d.) (on file with the Fordham Law Review) (member is eligible if he has worked at least 240 recorded hours in the 12 consecutive calendar months preceding the month in which he seeks legal services); Northern California Teamster Group Legal Plan (n.d.) (on file with the Fordham Law Review). The Construction, Production, and Maintenance Laborers' Prepaid Legal Service Plan has a complicated system in which an employee must work 300 hours in three consecutive months before he is eligible for coverage. When the employee becomes eligible, 300 hours are credited to his "Revenue Account." Each month thereafter, any hours above 100 hours that the employee has worked are added to the account, and any hours less than 100 are deducted from his account. To remain eligible, the employee must maintain a minimum of 100 hours in his account at the end of each month. Construction, Production and Maintenance Laborers' Prepaid Legal Services Trust Fund Financing Statement n.1 (1977) (on file with the Fordham Law Review).
\textsuperscript{190} See note 189 supra.
\textsuperscript{191} See note 71 supra and accompanying text.
tary plans should decrease utilization in ways that have the least effect on particularly attractive services included in their coverage.

To increase its usage, a plan should avoid inclusion of any restrictions similar to those mentioned above. In addition, a plan may take some affirmative steps to promote its usage. For example, the location and visibility of the plan may affect utilization. The Laborers' Local 423 Plan, which located its office in the same building as its hiring hall and union office, has maintained a high utilization rate. Although location alone is not responsible for this high usage, plan officials believe that it has been a major factor. Another way to increase utilization is by educating and informing members of all the benefits available under the plan. A lack of information will usually result in an abnormally low rate of utilization.

C. Increasing Public Interest

1. Nature of the Problem

The major barrier to the future development of prepaid legal services is an unreceptive public attitude. The general public does not recognize many legal problems and, as a result, is unaware of the benefits that prepaid legal services can offer, particularly in the area of preventive law. In addition, there is a sizable negative attitude in this country toward attorneys and the legal system. These conditions have made it impossible for many voluntary plans to attract an adequate membership and have retarded the growth of collectively bargained plans because employees believe that other fringe benefits, such as increased health insurance, are more important.

192. Letter from Nora E. Jones, Legal Intern, Laborers' Local 423 Legal Service (Oct. 9, 1978) (on file with the Fordham Law Review). This plan has sufficient resources to enable it to maximize utilization because the average member's contribution is between $150 and $225 annually. Id. This is an unusually high figure. See note 3 supra.


195. See, e.g., Colvin & Kramer, supra note 113, at 53; Letter from Edward P. Smith, Executive Director, Rhode Island Bar Association (Dec. 15, 1978) (on file with the Fordham Law Review) (lack of realization of a need rather than lack of actual need, is the reason for their difficulty in subscribing members). Preventive law describes the steps that can be taken to deal with a legal matter before it becomes a legal problem. See Consumers' Group Legal Services, Membership Booklet 108 (n.d.) (on file with the Fordham Law Review) (plan members should see a plan lawyer "before" they sign a purchase agreement, lease or mortgage; "before" they make a statement to an insurance adjustor; and "before" they make any decision that has legal implications.

196. See Meserve, Our Forgotten Client: The Average American, 57 A.B.A. J. 1092, 1093 (1971); Address by Joe Sims, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, The Legal Profession and the Future File: After Lawyers Advertising, What?, Oklahoma City University School of Law's Program on Changing Times for the Legal Profession 1-3 (Apr. 21, 1978) [hereinafter cited as Sims Address]. But see Wall St. J., Oct. 18, 1978, at 1, col. 1. (hostility towards the legal profession is causing people to seek out alternative methods of receiving legal services, such as prepaid legal services).

An examination of the plans that have failed or have experienced serious difficulty demonstrates that public unawareness of the need for an attorney and the benefits of prepaid legal services is the most significant problem. The Florida Bar reports that seventy percent of the voluntary plans initiated in that state are experiencing enrollment difficulties because "the general public is unaware of the benefits of preventative law." In addition, the Pennsylvania Bar Association decided not to pursue actively establishment of a prepaid legal service plan because of a lack of consumer demand. Indeed, almost all voluntary plans will confront this unawareness barrier because a large percentage of present members had never retained an attorney before their joining a plan.

The widespread negative feelings toward the legal profession have been caused by a combination of events. First, there exists a traditional belief that attorneys are an elite group of wealthy individuals. Second, because a large number of attorneys are active in politics and employed by government, the public has associated them with scandals such as Watergate. Third, the bar's opposition to no-fault insurance and advertising has been interpreted by some as an attempt to protect a profitable source of business. Finally, Chief Justice Burger's continuing attack on the competency of the profession has reinforced the public's negative attitude.

The experience of the Texas Classroom Teachers Association Plan illustrates the effect of the public's unawareness and its negative attitude on prepaid legal services. The plan was cancelled because it was not well received by its members. They stated that they were accustomed to discussing their legal problems with relatives and friends and did not see the need to obtain legal counsel. In addition, they believed that most attorneys were inaccessible and their services were too expensive, and that the plan was a scheme to obtain clients. Many other plans will encounter a similar

198. Letter from Michael A. Tartaglia, Staff Counsel, Prepaid Legal Services, Florida Bar Association (Oct. 17, 1978) (on file with the Fordham Law Review). The Florida Bar has established operating rules for prepaid legal service plans and has formed a corporation, the Florida Lawyers' Prepaid Legal Services Corporation, to develop an open panel plan, scheduled to begin operation in 1979, for state residents. See id.

199. Letter from Michael Tartaglia, Staff Counsel, Prepaid Legal Services, Florida Bar Association (Nov. 9, 1978) (on file with the Fordham Law Review).


201. See, e.g., Ohio Prepaid, supra note 71, at 842-43 (Shreveport Plan survey shows 46% of the members had never been to a lawyer before); DC 37 Municipal Employees Legal Services Plan, Client Questionnaire 3 (n.d.) (35 out of the 45 members questioned had never before used an attorney).

202. Sims Address, supra note 196, at 1.

203. Id. at 1-2.

204. Id.

205. See id. at 1.


208. See id.
attitude and, therefore, public unawareness and hostility must be overcome before prepaid legal services can substantially expand.

2. Overcoming Public Unawareness and Hostility

The public's lack of knowledge concerning the benefits of legal counsel can be overcome by a large scale marketing and education process. Although these will raise a plan's operating costs, the possible increase in membership may justify the expense. This process must occur on two levels. First, potential sponsors must be educated as to the advantages of initiating prepaid legal service plans. Second, plans must demonstrate to the general public that it may benefit from obtaining adequate legal counseling, and how prepaid legal services will make attorneys available at a reasonable cost.

Prepaid legal services may be marketed in several ways. If the potential members are dispersed over a reasonably large area, mass media advertising, together with a direct sales program, may be necessary.209 If the potential market is more centrally located, however, such as a labor union or a consumer group, distribution of literature at group meetings may be sufficient. In addition, plans can conduct seminars and publish articles explaining the services they offer. For example, Consumers' Group Legal Services attempts to educate the public in California by using both of these methods.210 The AFL-CIO and the UAW conduct programs at their conventions discussing the potential uses of prepaid legal services.211 Several national organizations also employ these methods in attempting to market prepaid legal services.212

One of the most effective ways to educate the public as to the benefits of prepaid legal services is to make coverage available to potential members for an initial period at a reduced fee or free of charge. Once the individual realizes how much the plan has to offer, he will seriously consider permanent enrollment and may also inform others of the advantages of joining the plan. This method of "education by use" was employed by the Michigan Education Association Plan, which offered two years of free coverage.213 After this period, the union membership decided that prepaid legal services was a worthwhile topic for collective bargaining, and was willing to request it over

209. Although the Supreme Court has held that the first amendment guarantees attorneys the right to advertise, Bates v. State Bar, 433 U.S. 350 (1977), state bar associations may prohibit direct solicitation of potential plan members by attorneys. Allison v. Louisiana State Bar Ass'n, 362 So.2d 489 (La. 1978). Some believe that all that is necessary to promote prepaid legal services is more aggressive salesmanship. See Kirby, supra note 4, at 327-28 (salesman for prepaid legal services covering auto accidents earns a 50% commission rate and has sold 32,000 individual policies).


211. See Kirby, supra note 4, at 325.

212. These include the National Resource Center for Consumers of Legal Services, the American Prepaid Legal Services Institute, and the ABA Special Committee on Prepaid Legal Services.

The beneficial effects of potential members' contact with a plan is also supported by statistics that show that most plans experience increased utilization after several years of operation. Therefore, plans with sufficient funds should strongly consider "education by use" as a way to inform the public of the advantages of legal counseling and prepaid legal services.

After a plan has successfully marketed its services, it should institute a program of continuing education. This process will enable members to make effective use of their coverage and, in voluntary plans, may aid in the prevention of members discontinuing their coverage. The most common form of continuing education is the distribution of newsletters by the sponsor or the administrator. These newsletters should explain to members how to use the plan and may even inform them of their legal rights in situations they routinely encounter. For example, the newsletters distributed by Laborers' Local 423 inform members of the services it offers and often discuss subjects such as a debtor's rights against his creditor. Other plans offer seminars and workshops to the membership dealing with areas of the law which might be of particular interest.

Although the public can be made aware of the benefits of prepaid legal services, its negative attitude toward the legal profession cannot be as easily overcome. It is possible that by reducing public unawareness, its negative attitude will also decrease. Prepaid legal services will educate the public as to the benefits of preventive legal counseling and, therefore, may have an ameliorative effect on public hostility toward the bar.

214. See id.
215. See Politz, supra note 88, at 435; Spreading Fast, supra note 1, at 62; note 171 supra and accompanying text.
216. See note 71 supra and accompanying text.
217. Instead of distributing newsletters, some plan sponsors or administrators publish articles in periodicals received by the group. See, e.g., Trenton State College Legal Service Plan, First Yearly Report of SGA Legal Service 1977-78, at 3 (1978) (on file with the Fordham Law Review) (administrator writes a weekly column for the school newspaper).
218. In addition, these newsletters could also remind members of the existence of the plan which is apparently necessary in some mandatory plans. Members are automatically enrolled and may not be aware of their membership because payment may be made by the employer or included in the employee's union dues deduction. See, e.g., National Broadcasting Company (NBC), News Report, (Sept. 27, 1978) (video cassette available from NBC News, 30 Rockefeller Plaza, New York, N.Y.) (several members of Local 1115 of the New York Nursing Home Employees Union Prepaid Legal Service Plan were unaware of its existence).
219. Letter from Nora E. Jones, Legal Intern, Laborers' Local 423 Legal Service 1 (Oct. 9, 1978) (on file with the Fordham Law Review); see, e.g., Laborers' Local 423 Legal Service Newsletter (June 1978) (on file with the Fordham Law Review) (articles dealing with criminal law, will drafting, and the plan's income tax service); Laborers' Local 423 Legal Service Newsletter (July 1976) (on file with the Fordham Law Review) (articles discussing how to use the plan and how to deal with traffic violation arrests); Laborers' Local 423 Legal Service Newsletter (Special Edition) (n.d.) (on file with the Fordham Law Review) (warning members to beware of the credit practices of a local jewelry store).
220. See, e.g., Maron, supra note 2, at 334 (Berkley Consumer Co-op holds seminars for members on various topics, such as the effect of California laws on unmarried persons who live together); CGLS, supra note 55, at 3 (plan has an evening seminar program for the general public).
D. Policy Considerations

1. Court Burden

Development of prepaid legal services may decrease the number of cases reaching the courts if the services offered prevent rather than initiate legal disputes. On the other hand, it is quite possible that by educating people of their rights and by making adequate legal counseling readily available to a large sector of the population, the caseload in many courts will significantly increase. If the expansion of prepaid legal services does increase litigation, elected representatives and the judiciary may oppose its further development. Although conserving judicial resources is an important policy consideration, it must be balanced against the right of access to the courts and adequate legal services. Because of the acute need to make legal representation available to a greater part of the nation's population, the possibility that prepaid legal services may increase caseloads should not be used to restrict development of the plans.

2. Inflationary Effect

Some observers predict that the development of prepaid legal services will increase inflation. These individuals believe that health insurance has been a major cause of escalating medical care costs because doctors, being guaranteed payment, have freely raised their fees. If prepaid legal services follow this same course of development, their widespread acceptance may result in inflating legal costs. At present, it is too early to test the veracity of these assertions. If they are accurate, however, proper regulation of plans may help to curtail the inflationary effect of prepaid legal services.

Regardless of whether prepaid legal services increase inflation, they are clearly vulnerable to the effects of inflation. For example, President Carter's program of voluntary wage and price controls will adversely affect prepaid legal services because the administration intends to include fringe benefits within the proposed seven percent limit on wage increases. This will curtail

221. See Jones, Group Legal Practice: The Client's Right, the Lawyer's Duty, 8 Trial 31, 32 (May-June 1972).
224. See Bowler, supra note 222, at 61.
225. The Lawyer's Bill, supra note 30, at 47.
226. But see Nat'l L.J., Nov. 13, 1978, at 3, col. 3 (arguing that wage and price controls will stimulate the growth of prepaid legal services because union leaders will be looking for an inexpensive benefit to offer to the membership).
227. See Will Guidelines Slow Fringe-Benefit Boom?, U.S. News & World Report, Jan. 22, 1979, at 75; Nat'l L.J., Nov. 13, 1978, at 3, col. 3. It should be noted that President Carter has voiced his support for the concept of prepaid legal services. Address by President Carter, Los
the growth of collectively bargained plans because employees are likely to choose salary increases rather than fringe benefits such as prepaid legal service plans. Plans that do not arise out of collective bargaining are also vulnerable because during inflationary periods buying power decreases and it is unlikely that the public will be willing to expend money for prepaid legal service plans.

3. Government Support

The federal and state governments, by becoming active supporters of prepaid legal services, can accelerate its development. For example, because it is the largest employer in the country, government sponsorship of plans for its employees will almost ensure the widespread success of prepaid legal services.\(^\text{228}\) In addition, exempting prepaid legal services from present and future wage and price controls would also stimulate its growth by making it more attractive than other fringe benefits. Congress may also advance the development of prepaid legal services by allowing a tax deduction to individuals for premiums paid to a plan. Finally, a less direct form of government support will result from the passage of national health insurance. Such legislation will free a large amount of individual and employee benefit money, thereby making it available for investment in prepaid legal service plans.\(^\text{229}\)

4. Attitude of the Bar

Some commentators believe that the bar may oppose expansion of prepaid legal services.\(^\text{230}\) Attorneys may not be receptive to the scrutiny of their services by plan sponsors and administrators. Moreover, widespread acceptance of prepaid legal services may substantially alter the present structure of competition among attorneys, especially if the closed panel or modified open panel becomes the dominant service mechanism.\(^\text{231}\) Nonpanel attorneys will be at a competitive disadvantage with those servicing plans, particularly in small communities.\(^\text{232}\) For example, when the UAW was developing its plan, many local attorneys expressed concern that the plan would have a detrimental effect upon their practice. Ultimately, the plan limited its coverage to document drafting and legal advice, allowing all other forms of legal services to be provided in the traditional way.\(^\text{233}\)

Attorneys should not oppose the future development of prepaid legal services. Initially, plans employing the open panel will not alter traditional methods of competition. The entrance into the market for legal services of a large number of people not presently able to obtain adequate counseling will

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\(^\text{228}\) In 1971, four unions representing approximately 650,000 postal workers proposed prepaid legal services as an employee benefit. No agreement was reached partly because of the absence of any functioning national legal service delivery system. Bernstein, \textit{supra} note 35, at 473.


\(^\text{230}\) \textit{See} Primer, \textit{supra} note 7, at 17-18.

\(^\text{231}\) \textit{See} id.

\(^\text{232}\) \textit{See} Colvin & Kramer, \textit{supra} note 113, at 53-54.

increase opportunities for attorneys. Finally, well-funded plans will allow for greater use of innovative techniques, such as computers, thereby improving the efficiency of the legal profession.

**CONCLUSION**

"Justice is not free. It's a luxury you have to pay for." Prepaid legal service is a means by which reasonably priced legal counseling can be made more available to a great number of people. Steps must be taken to encourage the development of these plans. Emphasis should be given to devising ways to make voluntary plans more successful. In addition, ethical restrictions and statutory barriers to all plans should be removed. Finally, the legal profession must initiate whatever programs are necessary to inform the public of the benefits of preventive law and to diminish hostility toward attorneys. Through these measures, prepaid legal service plans may attain their goals and a much larger segment of the population may be able to afford the price of justice.

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235. See, e.g., Maron, *supra* note 2, at 334 (Berkley Co-op plan makes extensive use of paralegals).