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Prepaid Legal Services: More than an Open and Closed Case

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Prepaid Legal Services: More Than an Open and Closed Case

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THE AGE OF PREPAID LEGAL SERVICES is upon us. Bar associations throughout the country are planning and organizing bar-sponsored programs of legal insurance. Labor unions and other associations have formed, or are forming, various group legal service arrangements. In general, the organized bar favors the so-called "open panel" system for the delivery of prepaid legal services to the middle class. The open panel is essentially a fee-for-service program of legal insurance. Organized labor, as well as other influential spokesmen, support "closed panel" arrangements, whereby a group or association of any type retains either a private law firm or establishes its own law firm to serve its members' needs for particular legal services. The question of which system will best serve the needs of that broad mass of persons defined as "middle class," is a subject of sharp debate between attorneys and laymen alike. This article examines the recent history of the prepaid movement, focuses on the respective arguments favoring both the open and the closed panel, and concludes on a cautionary note as to the paucity of research substantiating and defining the specific legal needs of the diverse subgroupings constituting the middle class, while warning of the dangers inherent in viewing prepaid services as a singular solution for the fulfillment of these needs.

Background and History

In 1966 the American Bar Association retained Professor Preble Stolz of the University of California School of Law (Boult Hall) to conduct a study of the feasibility of legal insurance. Stolz, together with a group of consulting actuaries, published the results of their study, concluding:

> Legal insurance is a possible way of financing legal service for individuals of modest means. A plan can be constructed that would not be too costly to be sold. For the most part the services that would be purchased through insurance are low cost, preventive law services that the public is not now buying. The primary value of legal insurance would be as a way of encouraging people to use more legal services. For selected groups, legal insurance would be more attractive than group legal services, but in general, legal insurance can not achieve the economics of scale possible through group legal services. Legal insurance, accordingly, is far

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> from a complete answer to those concerned about the economic threat of a group legal services, nor it is likely to revolutionize the economics of law practice.[1]

The American Bar Association's Special Committee on Prepaid Legal Services, apparently undaunted by the limited utility of legal insurance programs as suggested by Professor Stolz, proceeded to conduct three major conferences on the subject of Prepaid Legal Services[2] (dealing mainly with the open panel) as well as instituting an open panel pilot project in Shreveport, Louisiana.[3] As of January 1, 1973, the A.B.A. reported that local and state bar association interest had grown so intense that at least twenty-two state bar associations had held discussions on the topic, or had introduced programs of bar-sponsored legal insurance; that the A.B.A.'s special committee on Prepaid Legal Services had given information and technical assistance to the planning efforts of state and local bar associations; that the California Lawyer's Service (a bar-sponsored program) had conducted four meetings and is already negotiating with its first group clients; that Washington and Colorado were about to form similar programs; that state bars in Illinois, Massachusetts, Michigan, Minnesota, New Jersey, Wisconsin, and Utah were past initial planning discussions; that New Jersey and Wisconsin were developing programs to be offered through existing Blue Cross Administrations; and that two major insurance companies, estimating that some twenty-three percent of the American public is willing to purchase legal insurance, have announced plans to begin experimental programs in 1973.[4]

This massive and almost frenzied movement of the bar toward group legal services is not without its historical antecedents or economic underpinnings. The organized bar, historically hostile toward any form of group legal services,[5] was ironically the protagonist in

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[1] Stolz, *Insurance For Legal Services,* 35 U.CHI.L.REV. 417, 476 (1968) [hereinafter cited as Stolz].

[2] At Los Angeles in Nov. 1971; at New Orleans in Feb. 1972; and at Washington, D.C. in April, 1972.

[3] The Shreveport program was instituted as a pilot project for members of Laborer's Local No. 229, in Shreveport, Louisiana. The project was jointly funded by the Ford Foundation, the American Bar Association, and the American Bar Endowment.

[4] 18 A.B.A. NEWS, Jan., 1973, at 4.

[5] The general view of the organized bar was that collective efforts of a group toward obtaining legal representation for its members was a violation of the A.B.A. CANONS OF PROFESSIONAL ETHICS NOS. 27 and 35 (prohibiting advertising and the interposition of lay intermediaries between lawyer and client). *See generally,* Elson, *The Canons of Ethics and the Providing of Legal Services,* 33 TENN.L.REV. 171 (1966); Markus, *Group Representation by Attorneys as Misconduct,* 14 CLEVE.MAR.L.REV. 1 (1963); Weihofen, *Practice of Law by Motor Clubs — Useful but Forbidden,* 3 U.CHI.L.REV. 296; *Legal Aid Programs of a Labor Union and the Unauthorized Practice of Law,* 20 U.PITT.L.REV. 85 (1958); *The Emergence of Lay Intermediaries Furnishing Legal Services to Individuals,* 1965 WASH. VOL. Q. 313 (1965); *Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys,* 72 HARV.L.REV. 1334 (1959).

a series of court decisions which were to guarantee the existence of such plans. In 1963 and 1964, the United States Supreme Court decided two cases, *NAACP v. Button*,[6] and *Brotherhood of Railway Trainmen v. Virginia State Bar*,[7] involving collective efforts of two groups to assist in obtaining limited legal representation for their members. In the *Brotherhood* case, Justice Black, delivering the opinion of the court, stated:

> Laymen cannot be expected to know how to protect their rights when dealing with practiced carefully counseled adversaries [citing *Gideon v. Wainwright*, 372 U.S. 335] and for them to associate together to help one another to preserve and enforce rights granted them under federal law cannot be condemned as a threat to legal ethics. The state can no more keep these workers from using their cooperative plan to advise one another than it would use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.[8]

Despite the comparatively clear language and intent of the *NAACP* and *Brotherhood* cases, the Court found it necessary to twice more grant certiorari in related matters over the next seven years. In both instances, the Court found as violative of the first amendment, bar association activities to curtail group legal efforts. In *United Mine Workers v. Illinois State Bar Association* (1967)[9] the Court, in a case involving the legality of a state court injunction barring a union local from providing or referring its members to an attorney for representation in workman's compensation cases, stated:

> We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.[10]

Four years later, the so-called "Burger Court" gave final notice that they would not distinguish away prior court holdings. In *United Transportation Union v. Michigan Bar Association*[11] a case wherein the union referred members to attorneys with whom the union had a fee ceiling arrangement, the court stated:

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[6] 371 U.S. 415 (1963).

[7] 377 U.S. 1 (1964).

[8] *Id.* at 7.

[9] 389 U.S. 217 (1967).

[10] *Id.* at 221-22.

[11] 401 U.S. 576 (1971).

> The common thread running throughout our decisions in *NAACP v. Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the court is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny an association of workers or others, the means of enabling their members to meet the cost of legal representation.[12]

The bar associations were not without their economic justification in seeking to suppress or limit union activities in legal services. It was suspected by many that a great number of formal or informal closed panel group arrangements existed. With the advent of the aforementioned court decisions, many of these group arrangements began to emerge from their cocoon of self-imposed obscurity. California was viewed as the hotbed of such arrangements, as later evidenced by the results of a registration requirement, wherein every lawyer involved in a group arrangement was obligated to make public record of his participation.[13] By November of 1971, it was reported that 83 lawyers or law firms had arrangements with 218 groups with a statewide membership estimated between 300,000 to 750,000 individuals, and that registrations were increasing at a rapid rate.[14] Given the difficulties of financing such plans in advance of Congressional legislation,[15] it is small wonder that such statistics alarmed many with a vested interest in the economics of private practice. Indeed, the American Bar Association, citing Stolz' study as establishing "that for the first time a serious student working with actuarial assistants has concluded that such a plan is feasible,[16] urged the interested, organized bar to foster and promote "plans based upon insurance principles and incorporating the concept of free choice of attorney . . . [and] . . . to move swiftly to cut through the myriad problems involved in setting up such programs."[17] As stated earlier, by 1973, state bar associations, with the aid of the American Bar Association, had moved strongly ahead with the structure and implementation of such programs.

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[12] *Id.* at 585-86.

[13] STATE BAR OF CALIFORNIA, RULES OF PROFESSIONAL ETHICS NO. 20 (1970).

[14] Address by Philip J. Murphy, Conference on the Development of Prepaid Legal Services, Nov. 12, 1971.

[15] *See* p. 430 *infra.*

[16] A.B.A. SPECIAL COMMITTEE ON AVAILABILITY OF LEGAL SERVICES, REPORT AND RECOMMENDATION, in REVISED HANDBOOK ON PREPAID LEGAL SERVICES 25 (April, 1972). This report was first adopted in Feb., 1968.

[17] A.B.A. SPECIAL COMMITTEE ON PREPAID LEGAL COST ISURANCE, REPORT, in REVISED HANDBOOK ON PREPAID LEGAL SERVICES 33 (April, 1972). This report was first adopted in Feb., 1971.

Meanwhile, another powerful interest group, organized labor, publically endorsed the closed panel. The AFL-CIO executive council released a statement on May 2, 1972 clarifying their long-standing position on legal services:

> Legal services for union members and their families can best be provided through union or community sponsored prepaid legal service plans. The alternative, open-ended fee for service arrangements, permits no effective cost controls and would lead to the same kind of runaway cost escalation many unions have suffered in fee-for-service medical programs.[18]

Within the general but still unproven assumption that local and state bar associations were now effectively out of the business of regulating and terminating collective efforts toward group legal services, several labor unions instituted comprehensive legal service plans.[19] Laborer's Local 423 in Columbus, Ohio, for example, began what is perhaps the most comprehensive plan in the nation.[20]

One does not have to look far to understand labor's especial concern with legal services, for the labor unions, with their massive group memberships and employer-pay benefit programs, are ideal spawning grounds for such plans. There exist, however, several remaining obstacles to the full implementation of both open and closed plans. If and when these obstacles are alleviated, the widespread utilization of legal service plans will be a reality.

The Obstacles

The major obstacle facing prepaid plans is Section 302 of the Taft Hartley Act. This section prohibits employer contributions to jointly administered trust funds for all but certain narrowly defined purposes.[21] Without such status as a fringe benefit, comprehensive prepaid plans face seemingly insurmountable difficulties. Few unions, for example, have the requisite monetary resources to finance programs from union dues. Still fewer unions now have memberships that are willing or able to finance prepaid plans out of their own pocket; even if they were so willing, the administrative, accounting, and collection problems inherent in such a scheme would provide difficult and expensive obstacles.

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[18] Statement of the AFL-CIO Executive Council on Prepaid Legal Services, Washington, D.C. (May 2, 1972).

[19] For an amusing view of a restrictive reading of the U.T.U. case, *see* Stolz, *Sesame Street for Lawyers: A Dramatic Rendition of U.T.U. v. State Bar of Michigan*, 36 UNAUTHORIZED PRACTICE NEWS 14 (Nov. 1971).

[20] This plan covers unlimited legal advice and consultation, 80 hours of legal services during each calendar year in connection with up to five matters per calendar year, and costs and expenses incurred in connection with rendition of legal services. Exempted are contingent fee matters, suits against the union or another member, collections, income tax preparation, and business ventures.

[21] 29 U.S.C. §186.

Although some commentators have proposed that Section 302(C)(6)[22] of the Taft Hartley Act (a 1959 amendment permitting trust contributions for the purpose of pooled vacations, holiday, severance, or other similar benefits) may be interpreted to embrace legal services under the guise of "similar benefits," the more reasonable view is that statutory modifications will be necessary in order to place legal services alongside medical services as a permissible fringe benefit. To accomplish this end, legislation has been introduced in both the House of Representatives and the Senate. Passage of the bill is expected, as both organized labor and the organized bar, mindful of the necessity for such legislation to both the open and closed panel, are lobbying strongly in its behalf.

Another stumbling block is Section 501(C)(9)[23] of the Internal Revenue Code, which provides tax-exempt status for voluntary employee beneficiary associations providing for the payment of life, sickness, accident, and *other benefits* to its members. Whether or not a legal service trust would be an exempt entity is dependent on the Internal Revenue Service's interpretation of this section. Additionally, it appears that benefits paid by group legal plans are taxable income to the recipient. Since medical benefits are tax exempt,[24] there would appear little reason not to provide similar treatment for legal services. One can imagine the incredulity of a worker receiving $5,000.00 in legal benefits only to find such an item includable in his gross income. Since such factors would unduly inhibit most types of legal service plans, many responsible commentators urge a more liberal reading of the term "other benefits" in §501(C)(9) and, if necessary, Congressional modifications of the relevant code provisions.[25] When in fact such modifications become reality, the age of prepaid legal services will be fully ushered in. It is perhaps not too bombastic to assert that in many respects the private practice of law will never again be the same.

The Need for Prepaid Legal Services

Both the open and closed panel approach begin with the underlying assumption of the failure of the present legal system to adequately represent the middle class. While there is little hard data to support a claim that the middle class is being deprived of legal services,[26] there appears to be a widespread acceptance of such a

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[22] 29 U.S.C. §186(c)(6).

[23] 26 U.S.C. §501(c)(9).

[24] 26 U.S.C. §105(b).

[25] *See* Bernstein, *Future Growth and Direction of Prepaid Legal Services, Collective Bargaining, and the Role of Labor*, in PREPAID LEGAL SERVICES 69 (Nov. 1971).

[26] Stolz, *supra* note 1, at 419; *see also* P. STOLZ, THE LEGAL NEEDS OF THE PUBLIC: A SURVEY ANALYSIS (Research Contribs. of Am. Bar Found. No. 4, 1968).

need. The A.B.A.'s Special Committee on Prepaid Legal Services asserts, "[T]he association has long been aware that the middle 70% of our population is not being reached or served adequately by the legal profession."[27] Other commentators more harshly suggest that the legal profession is adequately serving less than one-third of the people of the United States,[28] the great majority of these legally neglected being broadly classified as people of moderate means. Since the middle class has been variously defined to encompass approximately 128,000,000 persons with incomes between $5,000. and $15,000;[29] or sixty-three percent of the population with incomes between $6,000 and $18,000,[30] the scope of the defined problem of providing adequate legal services for this populace is indeed staggering, and will of necessity require the emergence of new institutions into the practice of law.

This asserted legal dilemma of the middle class, while generalized and largely unsubstantiated, is nevertheless easy to conceptualize. The poor, due to their classification as "indigents," have been afforded some semblance of access to legal representation by traditional legal aid societies, the O.E.O. Legal Service Program, and various decisions of the United States Supreme Court.[31] The wealthy, on the other hand, can abundantly afford to finance their own legal expenses. The middle class wage earner, however, does not qualify for government-assisted legal aid, and arguably can not afford the hourly fees of forty dollars and upward billed by most attorneys for legal services.[32]

The failure of the legal profession to provide for the "little man" is not surprising when one considers that the profession has never really been geared toward serving the working man, but rather has been fostered and subsidized to cater to business and property inter-

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[27] ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, INTRODUCTION, in REVISED HANDBOOK ON PREPAID LEGAL SERVICES 1, 2 (April, 1972).

[28] B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 5 (1970).

[29] 18 A.B.A. NEWS, *supra* note 4.

[30] Tolley, *Putting Group Legal Plans On Retainer For Middle America,* PENSION WELFARE NEWS, June, 1972 at 32.

[31] Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel for indigent accused of a misdemeanor for which a jail sentence may be imposed); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for an indigent accused of a felony); Bute v. Illinois, 333 U.S. 640 (1948) (right to counsel for an indigent accused of a capital offense).

[32] This figure of $40 per hour is gleaned from minimum fee schedules published by the Ohio Bar Assoc. in 1972. While one suspects that lawyer's fees will continue to rise, minimum fee schedules have recently come under attack as being violative of section one of the Sherman Act, 15 U.S.C. §1. Such a theory was recently adopted by a federal district court in *Goldfarb v. Virginia State Bar,* 1973 Trade Cas. 74.318 (E.D. Va. 1973). The position of the court was in accord with the attitude of the Justice Department. Since *Goldfarb,* many minimum fee schedules are being abandoned. See interview with Donald Baker, Chief of Antitrust Division's Policy Planning, 606 ATRR AA-4 (Mar. 27, 1973).

ests.[33] While such a focus may have been quite appropriate in the nineteenth century, it is particularly unfortunate today. With the increasing consumer power of the workingman, the expansion of past "New Deal" government into the lives of the populace, and the newly perceived involvement of Americans in the criminal justice system,[34] more and more persons are directly in need of legal assistance to aid them in navigating the sea of legal problems presented by contemporary existence.

As a natural consequence of this alleged failure on the part of the profession, contact between attorneys and the middle class has been comparatively slight, and when occasioned, is often fraught with distrust and fear. Many workers have little understanding of the functions of an attorney, and thus are unable to perceive when one is needed. Furthermore, there appears to be some evidence that much of the public distrusts the law in general, and attorneys in particular.[35] If such a general view of the middle class is correct, the problem of providing legal services for this group clearly transcends (but by no means excludes) prohibitive legal fees; and thus the solutions should also address themselves toward alleviating the barriers between the profession and a large segment of the public.

The Closed Panel

The closed panel is structured to provide legal services to any type of group or association. While plans differ as to extent of coverage, two general types are possible: (1) a house counsel arrangement, whereby the group retains attorneys on a full-time basis to represent its members, and (2) a private law firm retained by the group pursuant to a contractual arrangement. To a varying degree, it can be persuasively argued that such arrangements appear not only more economical than legal insurance, but also that they embody a preferred structure for the massive conditioning effort needed to educate a distrustful and legally naive middle America.

While the existence per se of a legal insurance policy may well in the long run encourage contact with an attorney, it is difficult to perceive an insurance company in the role of educating its policyholders to claim benefits. Such a role, of course, could be assumed by

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[33] Mayhew & Reiss, *The Social Organization of Legal Contracts*, 34 AM.SOC.REV. 309 (1969).

[34] I use the term "newly perceived" to reflect the fact that more accurate statistical systems have only recently disclosed the extent and percentage of the populace involved in the criminal justice. The Presidnt's Commission on Law Enforcment, for example, reported that as of 1965, one boy in six was sent to juvenile court; that forty per cent of all male children would be arrested for nontraffic offenses during their lives; that ninety-one per cent of a sampled group of 1,700 people admitted they had committed criminal acts. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

[35] *See* Stolz, *supra* note 1, at 420 n. 14.

bar associations and educators, but one suspects that the present lack of legal sophistication of the working class would attest to past shortcomings of the two in this regard. The insured group, on the other hand, could serve as a source of educational input for its members. Relying on brochures and lecturers, the group could conduct its own educational programs. While such an approach may be useful for highly-educated group memberships, its widespread utility is doubtful. It is the author's personal experience that all too many people ignore mail-outs and off-the-job lectures. In addition, many lack the necessary skills to comprehend and practically apply such material.

The closed panel, however, would tend to encourage frequent personal contact aimed at both education and "preventive legal care." To this end, an annual legal check-up[36] would be suggested. Such a device would serve a threefold purpose: first, it would tend to dispel fear and suspicion of attorneys by allowing the client to become familiar and presumably comfortable with the group attorney; second, it would enable the skilled attorney to review the legal picture of each client, and institute a program of preventive legal care; and finally, it would afford a suitable milieu for client education as to what situations and problems require consultation.

While legal insurance could conceivably provide for a legal check-up in its benefit schedule, no known system has yet to do so. The closest analogous benefit is an allowance for "advice and consultation." The A.B.A.'s pilot insurance project at Shreveport, for example, provides allowance for a maximum of four yearly visits to an attorney for purposes of advice and consultation. Although the administrators of the plan (Southwest Administrators, A Division of Jackson-Hardin, Inc., New Orleans, Louisiana), expected about one-half of all claims to be for advice and consultation,[37] statistics from the first two years indicate that such consultations accounted for only 1% of the fees paid by the plan. Significantly, in a two year period, only seven of approximately six hundred union members are recorded as having sought consultation. While such statistics may be somewhat misleading,[38] it is probable that few attorneys utilized the occasions for preventive legal care. While drawing concrete analogies from Shreveport may be dangerous, this statistic, in itself, is rather alarming.

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[36] The idea of a preventive "legal checkup" is discussed in an address prepared by Danny R. Jones for the Calif. Trial Lawyer's Ass'n Convention in San Francisco, Feb. 26, 1972 [hereinafter referred to as Jones]. Mr. Jones cites Brown, U. So. Cal. School of Law Preventive Law Newsletter, June, 1971.

[37] Preliminary report of Southwest Administrators, Inc. (Sept. 1969).

[38] *Id.* at 19.

The economic factor has been the most frequently-voiced criticism of the open panel. The argument is that the high administrative costs and abusive billing practices in union-sponsored, open panel medical plans suggest that similar legal insurance plans will be far more expensive than the closed panel.[39] Until there is more definitive statistical evidence, however, one can, at best, only make a rebuttable presumption in favor of this argument. Such a presumption would appear further justified in light of the economics of scale[40] available to an "enlightened" closed panel practice. Moreover, it is asserted that a "lawyer working on a retainer salary for a group has no motivation to inflate the amount of work that he does for a particular client."[41]

The ideal closed panel would copy, to some extent, the practice of the large corporation firms, of employing specialists in the areas most needed by their clients.[42] The specialists would serve much the same function as their corporate brethren, in that they would bring greater efficiency and effectiveness to their professional work by virtue of their expertise in one major area. Most attorneys in general practice would testify to the time saved and quality of work performed when working in their special areas. As time is indeed money in the legal profession, the costs saved by such an approach should be considerable.

Full implementation of the paraprofessional would be desirable to augment and complement the work of the specialist. Not only can the paraprofessional perform many of the time-consuming tasks hitherto handled by the higher-priced attorney, but a trained paraprofessional can also perform most legal tasks of an attorney with the exception of court appearances and client consultations.[43]

Other non-legal personnel would be of great use to such an office. An office administrator and efficiency expert, for example, may be desired to allocate and oversee workloads, dockets, office supplies, etc.,

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[39] SHREVEPORT BAR ASSOCIATION, PREPAID LEGAL SERVICE PLAN, A COMPILATION OF BASIC DOCUMENTS (1973).

[40] Stolz, *supra* note 1, at 472.

[41] *Id.*

[42] Jones, *supra* note 36.

[43] In fact, almost every legal task can be delegated to a paraprofessional (other than counseling clients and appearing in court or other formal proceedings) so long as "the lawyer maintains a direct relationship with his client, supervises the delegated and has capable professional responsibility for the work product." A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 3-6 (1960). Thus, a California appellate court found that it was permissible for a lay legal specialist to prepare complaints, demurrers, orders for and affidavit of publication of summons in divorce cases, bills of sale, and bankruptcy petitions, as this work was considered more preparatory than integral to a lawyer's work product. Johnson v. Davidson, 54 Cal. App. 251, 202 P. 159 (1921). However, in *Ferris v. Snively*, 172 Wash. 167, 19 P. 942 (1933), the Washington Supreme Court established definite limits to the legal activities which a layman could perform. There a specialist prepared wills, leases, mortgages, bills of sale, and contracts, and probated small estates, without the supervision of an attorney. The court held that the lay specialist was practicing law without a

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as well as to hopefully implement timesaving forms. A social worker or marriage counselor could be retained by the law firm in areas where legal help is often sought, perhaps inappropriately.[44] Once again, substantial cost savings would be expected, while quality should not suffer, and may well be enhanced. More importantly, it is difficult to imagine any legal insurance plan utilizing any of the aforementioned practices.

Economy and efficiency, while necessarily of great importance, should of course be secondary to quality of work performed. The continuance of a group retainer (or the extended existence of a house counsel arrangement) should, as in the corporate model, be dependent on an educated review of services performed in a given period. The closed panel conveniently lends itself to such a review. Records, files, and attorneys are in one place and easily accessible; lines of control and authority are readily apparent; complaints and grievances are centrally located and easily amenable to correction, thus making it easier to focus on weak spots in the operation. Central accessibility is another bonus, with the closed panel.

The Open Panel

Arguments favoring legal insurance emphasize that the open panel is the only plan providing for "free choice" of an attorney, and that legal insurance is not the "limited coverage-highly expensive" gargantuan that some might suppose. In addition, its proponents raise several serious questions and criticisims of the closed panel.

The argument for legal insurance is handicapped somewhat by a lack of statistical data in the area. The idea within the American legal framework can be traced back twenty years.[45] Actual implementation of open panel projects has been rare, and when occasioned, has involved pilot projects of uncertain general applicability. Consequently, any assertions of favorable or unfavorable cost comparisons are, at best, inconclusive.

With such limitations in mind, the Shreveport project provides a great deal of encouragement to open panel advocates. While Stolz' preliminary conclusions were based upon benefits for certain narrowly-

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license, as the layman's work represented the final product of the attorney with little or no change. It should be noted that *Snively* does not represent the modern viewpoint or the scope of activity of the legal specialist, and that it very likely would not be followed today due to the increasing support of the organized bar for the expanded use of paraprofessionals and the great shortages of legal services in many parts of the country. *See* Brickman, *Expansion of the Lawyering Process Through a New Delivery System: Emergence and State of Legal Professionalism*, 71 COLUM.L.REV. 1153 (1971); *see also Symposium on Legal Paraprofessionals*, 24 VAND.L.REV. 1077 (1971).

[44] While the "art" of marriage counseling is rather undeveloped, there are no indications that a lawyer is any more equipped for such counseling than is a social worker or psychologist. In fact, nothing in the standard curriculum of legal education would appear to qualify the attorney for such a role.

[45] *See* L. Brown, *Legal-Cost Insurance*, 354 INS.L.J. 475 (1952) (probably the first to publicly propose the ideas); *see generally* Stolz, *supra* note 1, at 417 n. 1.

defined categories, the architects of the Shreveport Plan almost entirely abandoned this categorical approach in favor of paying benefits in terms of genuine work tasks performed by attorneys. Thus, the program covers annual expenses up to one hundred dollars for advice and consultation; pays up to two hundred fifty dollars (after a ten dollar deductible) for office work; provides three hundred twenty-five dollars (after a twenty-five dollar deductible) for plaintiff's legal services in court cases, as well as an additional forty dollars for court costs; pays one hundred fifty dollars for "out of pocket expenses"; and also covers the insured for eight hundred dollars for defendant's representation (civil or criminal) along with a major legal benefit of eighty percent of the next one thousand dollars of incurred expenses. Aside from a list of exemptions comparing favorably with most closed panel plans, the Shreveport plan provides for broader protections than was hitherto considered feasible.

The open panel would also appear to avoid many of the ethical problems raised by the closed panel. Chief among these is the fear that the group entity itself will interfere with the attorney-client relationship. Such a worry is not without merit, as some group officials, for example, may well tend to view the closed panel as "their" law firm and thus seek special favors, or attempt to influence general policy — or worse yet, an individual case. Another ticklish situation arises if the group client decides to sue either the group entity itself, or the employer who finances the plan. While such suits are usually exempt from coverage, there is a very real concern that undue influence could be applied to the client or the closed panel attorneys.

Under the open panel plans, however, the attorneys utilized would be further removed from the group itself and, consequently, far less prone to be objects of undue influence.

The most acclaimed attribute of the open panel, however, is its preservation of the individual's option to choose the attorney of his choice. Such plans would leave undisturbed (or perhaps enhance) existing attorney-client relationships, and those who do not have an attorney would be free to enter the legal marketplace and voluntarily choose their own.

Conclusion

It is a matter of some speculation whether legal insurance will prove to be economically feasible. In abandoning Stolz' emphasis on a narrow categorical approach, the Shreveport designers have similarly abandoned the well-researched pronouncements of economic feasibility enunciated by the Stolz study. If feasible, however, the open panel would appear to be most attractive to groups possessing a fair degree of legal sophistication, and a high incidence of existing attorney-client relationships. For such individuals, the "preventive-

educational" features of the closed panel would be relatively unimportant, as all that may be desired is insurance to purchase legal services, should the need arise. The institution of a closed panel system for such groups may prove both divisive and unpopular.

Similarly, the closed panel is favorable for groups unwilling to gamble on the long-term economics of legal insurance and desiring to institute an effective program of preventive legal care. Closed panels are structured to encourage more frequent attorney-client relationships, and possess the requisite "economics of scale" made possible by, among other things, the intelligent utilization of the specialist and the paraprofessional. Groups gaining maximum benefits from such plans will probably have membership with limited legal acumen and a low incidence of existing attorney-client relationships.

For groups closest to the latter description, the entire freedom of choice issue may be little more than jingoistic fancy. One observer,[46] for example, argues that "[T]here is a vast difference between the abstraction of a free selection in the market place and the reality of how people really get to lawyers," reasoning that most people are referred to attorneys by third parties and that the Shreveport data indicates the group entity replaces the friend or neighbor as the source of referrals.

Leaving aside semantic distinctions and the causal factors underlying the dynamics of the legal marketplace, it is true that only the open panel allows an individual to choose his own lawyer. It also is true, however, that for too many of the legally disenfranchised (in the A.B.A.'s words) ". . . consulting a lawyer of their choice is not a part of their lifestyle."[47] Since most closed panel plans exclude traditional fee-generating cases (such as personal injury and workmen's compensation), the areas in which the middle class traditionally had some degree of freedom of choice are effectively preserved. Even in such areas, however, freedom to choose is meaningless if one does not recognize situations calling for the exercise of this freedom.

How free, then, is the choice of the individual? Can it not also be asserted that for many there is a certain freedom in not having to choose; in knowing that the firm which handles the legal work for your group is staffed by competent attorneys specializing in the area of your needs? To those who presently have little inclination or under-

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[46] Address by Ray Marks, Professor of Law U. of Chi. Legal Affairs Conference of the Louisiana branch of the American Civil Liberties Union, in New Orleans, Dec. 16, 1972. Reprinted in GROUP LEGAL SERVICES NEWS, Dec. 1972.

[47] A.B.A. SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, COMMENT, in REVISED HANDBOOK ON PREPAID LEGAL SERVICES 9 (April, 1972).

standing to consult with an attorney when needed, life can hold far more tragic consequences than those attendant to the loss of this largely illusory "freedom."

A word of caution must also be noted in regard to the seemingly geometric increase of activity in planning and implementing programs of legal services. The development of the area, in terms of studies corroborating the existence and identification of specific needs among different middle income groups for additional legal services, represents to no small degree a behavorial scientist's nightmare. As stated earlier, there is a notable absence of research defining and pinpointing the needs of the various socioeconomic groupings which represent the middle class. It is hoped that a well-designed program of prepaid legal services for a particular group would be prefaced by substantial socioscientific inquiries aimed at ascertaining the type of program best suited to the individual constitutents of the group.

Finally, it should also be noted that neither the open nor the closed panel represents a complete solution for the legal problems of the middle class. Legal insurance is essentially a system of distributing the expense of a future event among a broadly-based group. Since the insurable event (the legal problems of the middle class) are of a high frequency-low cost nature,[48] legal insurance will probably not reduce the long-term costs of legal services to the individual, but will merely provide a vehicle for one to lessen future expenses by prepaying such costs in small periodic amounts, to an insurance entity. The closed panel, on the other hand, while more economical and efficient, will only be available to members of defined groups,[49] and thus will not be of service to the great number of middle class persons who have no group identification. There is little reason, however, why such individuals could not be serviced by private law firms utilizing many of the same structural devices and economics of scale as would the envisioned closed-panel firms. Such firms would be able to provide high quality-low cost legal services to those persons who are not within the scope of closed panel coverage. Recently, such "legal clinics" have begun operations in parts of California, and reportedly are being harassed by local and state bar associations.[50] If the organized bar is truly concerned with providing the middle class with meaningful access to the legal system, it should encourage rather than suppress such efforts, in the realization that prepaid legal services represents only a partial answer to the legal dilemma of middle America.

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[48] Stolz, *supra* note 1, at 422.

[49] A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY §DR2-103 (D) (5) (1971).

[50] Disco & Meyers, *Legal Supermarkets*, 257 HARPER'S, July, 1973 at 30.