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Joint State-Federal Regulation of Lawyers: The Case of Group Legal Services Under ERISA

INTRODUCTION

Shortcomings in the traditional mechanisms for regulating lawyer behavior have long been the subject of highly publicized debate.¹ Collegial self-regulation has given way to a system of binding legal rules enforced by state bar disciplinary bodies under the nominal supervision of state supreme courts.² United States Supreme Court opinions overturning traditional prohibitions against direct solicitation and minimum fee schedules have undermined this disciplinary self-governance.³ Less directly, judicial action under Rule 11,⁴ administrative direction of the behavior of lawyers practicing before federal agencies,⁵ and a growing number of statutory actions under state and federal law offer challenges to the existence of state-based regulation.⁶ In some

¹ See, e.g., President’s Council on Competitiveness, Agenda for Civil Justice Reform in America i, 1-6 (1991) (widely quoted statements by Vice President Quayle); Commission on Evaluation of Disciplinary Enforcement, American Bar Ass’n, Report to the House of Delegates iii (1991) [hereinafter McKay Report].
⁴ Fed. R. Civ. P. 11. See Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 Minn. L Rev. 793, 798 (1991) (“Rule 11 offers the federal courts an opportunity to enforce professional responsibility rules that state disciplinary bodies have been unable or unwilling to enforce.”).
⁶ See Stephen Gillers, Ethics That Bite: Lawyers’ Liability to Third Parties, Litigation, Winter 1987, at 8, 8-12. See generally Hazard, supra note 2, at 1255-57 (discussing the changes in the state bars’ authority as a result of Supreme Court decisions and federal regulations).
states, the hegemony of the state bar has been constrained or supplanted by regulatory agencies similar to those regulating health care providers.\(^7\)

The soundness of existing and proposed regulatory systems generally depends on their efficiency, effectiveness, and preservation of lawyer independence.\(^8\) As Deborah Rhode noted, "[T]he bar's distinctive and often appropriately adversarial relationship with the government calls for special sensitivity to the potential for regulatory retaliation,"\(^9\) but the insular quality of state-based disciplinary systems appears anomalous in the context of contemporary multistate legal practice and the broad sweep of federal regulatory schemes.\(^10\)

The policy makers' concerns with effective lawyer discipline implicate broader questions regarding legal practice. As in the case of health care, both the high cost of legal services and the lack of access to representation are widely acknowledged problems.\(^11\) The present underfunding of legal services for the indigent and the ever-present fear of catastrophic expense on the part of all but the wealthiest Americans tend to weaken the principle of equal access to justice.\(^12\) Although the United States Constitution mandates criminal representation,\(^13\) in civil actions and routine legal matters the average American may be underserved by the traditional fee-for-service system.\(^14\)

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\(^7\) See McKay Report, supra note 1, at 1-7; Cal. Bus. & Prof. Code § 6086.9 (West 1990) (creating the "State Bar Discipline Monitor").


\(^12\) For a discussion of these needs in the context of group legal services, see id. at 10.


\(^14\) The New Jersey Supreme Court noted:

There is reason to believe that the practice of law by staff-operated prepaid legal service plans is a useful innovation, serving the needs of many persons
For over four decades, organizations have sought to overcome these financial barriers by establishing group legal services, often using insurance-like, risk-spreading mechanisms such as prepayment. The imposition of an organizational intermediary between the client and the lawyer, while common in many areas of legal practice, violates the traditional model of direct representation underlying most rules of lawyer behavior. The intermediary group that pays for the legal services and the lawyer that provides the services may be subject to different state or federal regulations, as is the case when an employer sponsors group legal services.

Federal regulation of lawyers arises primarily when the legal practice intersects the domain of federal agencies such as the Securities and Exchange Commission ("SEC") or the Resolution Trust Corporation who may be neither poor enough to secure legal aid nor wealthy enough to have ready access to traditional law firm services. If groups of persons seek in conjunction with their mutual interests to provide legal services to their constituency, we see no supervening interest bearing on the regulation of the legal profession that should militate against such efforts.

In re 1115 Legal Service Care, 541 A.2d 673, 676 (N.J. 1988).

Alec M. Schwartz, A Lawyer's Guide to Prepaid Legal Services, 15 LEGAL ECON. 43, 44 (July/Aug. 1989). Prepaid legal services plans, whether employer-sponsored or individually contracted, are similar to prepaid health plans in providing a defined set of benefits in return for a fixed periodic payment. See id. The most basic type of prepaid legal services plan provides for "access services," such as the following: brief office consultations, simple document drafting (e.g., wills), short letters or phone calls, and discounted fee-for-service arrangements by referral to a participating lawyer who provides more extensive services. Id. In contrast, "comprehensive" plans cover a larger amount of services and are not limited to specified dollar or hour limits per year. Id. Some types of service are customarily excluded, such as complex matters (e.g., patents and class actions), tax preparation, contingent fee cases, and representation and reimbursement from the subscriber's liability insurance. See id. at 44, 49. Comprehensive plans, which may require copayments or deductibles, are sometimes referred to as insurance because they reflect risk-spreading and actuarial estimates. Id. at 44. Their coverage is often negotiated as part of an employee benefit package in the collective bargaining context.


18 See 17 C.F.R. § 201.2(e) (1992) (SEC's Rule 2(e) provides for the suspension and disbarment of attorneys who are found to lack the qualifications to represent clients, to have acted unethically, or to have willfully violated a federal securities law); see, e.g., In re William R. Carter, Fed. Sec. L. Rep. (CCH) ¶ 82,165 (Mar. 7, 1979) (suspending two
Unlike the practices governed by SEC or RTC standards, the representation of a client under a group legal services plan is not an obvious subject for federal action. In the case of SEC or RTC regulation, the client is usually a corporate entity or an individual whose alleged misdeeds took place in a corporate context. Conversely, the representation of a group legal services plan member is normally confined to the most mundane and personal of legal matters, and federal regulation appears only because of the existence of the organizational intermediary.

The ERISA plan administrator is held to a stringent standard of fiduciary responsibility. Similar standards apply to the lawyer serving the plan members when the lawyer is found to be a “party in interest.” At the same time, lawyers are subject to state disciplinary codes in their interaction with individual clients, regardless of group plan sponsorship.

The situation of lawyers in group legal services plans exemplifies the difficulty of applying traditional norms of professional regulation to contemporary legal practice. ERISA’s invasion of the jealously guarded state regulatory purview, while not as complete as the federal regulation of patent lawyers, undermines some of the premises that form the basis for state bar regulation. An examination of the peculiar status of group legal services plan lawyers may thus suggest ways of adapting the regulation of lawyers to the realities of the attorney-client relationship in the absence of privity. The combination of federal law with the traditional state disciplinary regulation for group legal services may provide a natural

lawyers from practice before the SEC because of their complicity in a company’s issuing of misleading financial information), rev’d, Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,170 (Feb. 28, 1981) (full commission finding that administrative law judge held lawyers to a standard exceeding ethical rules).


20 See 15 U.S.C. § 78(b), (c) (1988) (discussing the scope of the Securities and Exchange regulations and defining the relevant items); 12 U.S.C. § 1441(a), (b), (e), (f) (1989) (creating the RTC and defining its scope and purpose).


22 Id. §§ 1002(21), 1104(a)(1)(B); see infra notes 117-22 and accompanying text.

23 Id. § 1002(14)(B).

24 See infra notes 68-75 and accompanying text. To further complicate matters, lawyers employed by a legal services plan may join a union.

25 See supra notes 8-9 and accompanying text.
experiment in the accommodation of state bar and federal regulatory interests.

The next section of this Note discusses the history and current status of group legal services regulation by the organized bar and the judicial system. Part II describes the status of employer-sponsored group legal services plans under ERISA regulations and associated judicial decisions. This Note concludes with an analysis of the effect of joint state and federal regulation and its potential consequences in other areas of legal practice.

I. History of Group Legal Services Regulation

A. Early Cases and Supreme Court Decisions

Judicial enforcement of the organized bar's constraints marked the early regulation of group legal services. During the 1960s, the Supreme Court held most of these restrictions to be unconstitutional. Courts generally approved group legal services when they were offered under bar association auspices but prohibited attempts to provide such services without official bar sponsorship. Bar associations thus

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26 See infra notes 29-105 and accompanying text.

27 See infra notes 106-98 and accompanying text.

28 See infra notes 199-227 and accompanying text.


30 United Mine Workers, Dist. 12 v. Illinois St. Bar Ass'n, 389 U.S. 217, 221-22 (1967) (holding that the First Amendment protects the right of the United Mine workers to employ an attorney to help members with workmen compensation claims); Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia St. Bar Ass'n, 377 U.S. 1, 8 (1964) (holding that the First Amendment protects the right of union members to receive recommendation regarding attorney representation for injured workers); NAACP v. Button, 371 U.S. 415, 444 (1963) (holding that Virginia's regulation of those organizations dedicated to eliminating racial discrimination violates the First Amendment). For an extensive discussion of the influence of the organized bar on judicial acceptance of legal service plans and subsequent actions by the U.S. Supreme Court, see Riedmueller, supra note 29, at 231-54.

31 See, e.g., Jacksonville Bar Ass'n v. Wilson, 102 So. 2d 292, 295 (Fla. 1958) (approving bar association-sponsored lawyer referral services); Gumnels v. Atlanta Bar Ass'n, 12 S.E.2d 602, 610 (Ga. 1940) (approving bar association plan to aid victims of usury).

32 See People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., 244 P. 1089 (Cal. Ct. App. 1926) (stating that a corporation's providing legal services to its patrons for a fee constitutes the unauthorized practice of law); People ex rel. Lawyers' Inst. of San Diego v. Merchants' Protective Corp., 209 P. 363, 364 (Cal. 1922) (a
challenged automobile clubs seeking to provide prepaid legal services plans to their members. The bar associations based their arguments on professional standards such as those banning solicitation, fee-splitting, the unauthorized practice of law, and practice in the corporate form.\textsuperscript{33}

One pioneer of group legal services, the Brotherhood of Railroad Trainmen ("BRT"), encountered persistent opposition in several jurisdictions.\textsuperscript{34} The BRT established a legal aid plan in 1930, and its activity gave rise to a series of cases culminating in the landmark Supreme Court opinion of Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar.\textsuperscript{35} Union representatives advised injured union members of their need for legal counsel and referred the members to lawyers chosen by the union. The plan was challenged first in Illinois,\textsuperscript{36} and the Illinois court upheld the plan against claims of impropriety regarding loans,\textsuperscript{37} solicitation,\textsuperscript{38} and fee-splitting.\textsuperscript{39} In Ohio, the Cleveland Bar Association backed away from its initial approval of the BRT plan and sought to enjoin its members from participating.\textsuperscript{40} BRT lawyers also encountered opposition from the organized bar in California, New York, Tennessee, and Missouri.\textsuperscript{41}

In the 1960s, the civil rights movement gave rise to controversy with state bar authorities, and the eventual resolution of this controversy favored

\textsuperscript{33} See People ex rel. Chicago Bar Ass’n v. Chicago Motor Club, 199 N.E. 1, 2 (Ill. 1935) (court approval of an amendment to an ethical canon that withdrew the bar association’s initial approval of the Chicago Motor Club’s activities); People ex rel. Chicago Bar Ass’n v. Motorists’ Ass’n of Ill., 188 N.E. 827, 829 (Ill. 1933) (holding that the defendant’s sponsoring of a group constituted practicing law without a license); Seawell v. Carolina Motor Club, 184 S.E. 540, 544 (N.C. 1936) (relying on the prohibition against corporate practice); Rhode Island Bar Ass’n v. Automobile Serv. Ass’n, 179 A. 139, 142 (R.I. 1935) (finding a violation of the unauthorized practice rule). But see In re Thibodeau, 3 N.E.2d 749, 751 (Mass. 1936) (approving similar activity when the organization exercises minimal control; notably, state bar association involvement was absent).

\textsuperscript{34} See Riedmueller, supra note 29, at 239-45.

\textsuperscript{35} 377 U.S. 1 (1964).


\textsuperscript{37} Id. at 375-76.

\textsuperscript{38} Id. at 374.

\textsuperscript{39} Id. at 379.

\textsuperscript{40} In re Petition of the Committee on Rule 28 of the Cleveland Bar Ass’n, 15 Ohio L. Abs. 106, 108 (Ohio Ct. App. 1933).

\textsuperscript{41} See Riedmueller, supra note 29, at 241-45.
the development of group legal plans. In *NAACP v. Button*, the Supreme Court invalidated a state law banning solicitation of legal business. The Court construed the law as prohibiting the providing of services by NAACP staff lawyers to its members. Application of the Virginia statute violated the First and Fourteenth Amendments because the "vigorous advocacy" practiced by the NAACP was protected speech. Not only was the Virginia statute unconstitutionally vague, but its intended prohibition of unprofessional or malicious conduct did not extend to the NAACP's activities. While alluding to state actions against legal services plans based on ethical rather than statutory violations, the *Button* decision did not address the constitutionality of the ethical canons that formed the basis for the Virginia statute.

The implications of *NAACP v. Button* for unions' group plans were not lost on the Court. In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, the Supreme Court found that Virginia statutes prohibiting the legal services activities of the BRT violated First and Fourteenth Amendment rights. Following BRT, two cases further defined the individual's constitutional right to collectively sponsored legal representation. In *United Mine Workers v. Illinois Bar Association*, the Court extended constitutional protection to the services of a lawyer whose salary was paid by a union. The Court found that the First Amendment rights embodied in the legal services available through the union were more important than the mere possibility of harm arising from a violation of the state's interest in regulating lawyer behavior. Four years later, the Court held in *United Transportation Union v. State Bar of Michigan* that the First Amendment protected the union's right to act

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43 The Virginia statute prohibited the "solicitation of legal business in the form of 'running' or 'capping' . . . ." *Id.* at 423. After amendment, the statute "includ[ed], in the definition of 'runner' or 'capper,' an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party." *Id.*
44 *Id.* at 428-29.
45 *Id.* at 428-29.
46 *Id.* at 432.
47 *Id.* at 444.
48 See *Id.* at 442 n.25.
50 *Id.* at 8.
52 *Id.* at 221-22.
53 *Id.* at 223-25 (noting a complete absence of reported harm to members).
54 401 U.S. 576 (1971). United Transportation Union was the new organizational manifestation of the earlier BRT. The union controlled legal fees and informed its
collectively to obtain affordable and effective legal representation.\textsuperscript{55} Summarizing these holdings, Justice Brennan stated: "The common thread running through our decisions in \textit{NAACP v. Button}, \textit{Trainmen}, and \textit{United Mine Workers} is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."\textsuperscript{56}

\textbf{B. Amendments to the Model Code}

The organized bar's initial response to these judicial trends was to create an exception to Disciplinary Rule 2-103(D) of the Code of Professional Responsibility.\textsuperscript{57} This rule provides that a lawyer may cooperate in a dignified manner with the legal services activities of... [a] non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of rendition of the services requires the allowance of such legal activities.\textsuperscript{58}

members that recommended lawyers would waive charges. The state bar contended that this conduct violated statutory provisions forbidding fee-sharing. The complaint and records, however, failed to support the allegations. Id. at 584.

\textsuperscript{55} Id. at 585.

\textsuperscript{56} Id. Despite the conclusive nature of these Supreme Court holdings, some states banned "closed panel" groups as recently as 1988. See, e.g., \textit{In re 1115 Legal Service Care}, 541 A.2d 673, 678 (N.J. 1988) (recommending an amendment to state disciplinary rules to allow operation of "non-commercial, staff-operated prepaid legal service plans" such as the union-sponsored entity at issue). Florida's standards for prepaid legal services plans still require "an affirmative statement informing plan participants that they are free to use a nonplan panel attorney (at their own expense or with reimbursement by the group/plan sponsor as the case may be)." The Florida Bar re: Amendment to Rules Regulating the Florida Bar, 605 So. 2d 252, 425 (1992). This provision suggests an ongoing bias, though not an outright ban, concerning closed panels.

In addition to the dubious constitutionality of the discriminatory treatment of group legal services plans, the restraint of legal services plans by state bar associations may violate antitrust laws. See Meeks, \textit{supra} note 16, at 265-66. The Supreme Court, however, has noted that a state supreme court's disciplinary rules would come within the antitrust exemption that allows restraint of trade when a state acts in its sovereign capacity. Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977).

\textsuperscript{57} For a discussion of the organized bar's response to the Supreme Court's rulings, see J. Robert Kramer II, Comment, \textit{Group Legal Services: From Houston to Chicago}, 79 \textit{Dick. L. Rev.} 621 (1974-75).

\textsuperscript{58} \textsc{Model Code of Professional Responsibility} DR 2-103(D)(5) (1969) (amended 1980). Subsequent amendments deleted the overt reference to the bar's accommodation...
The Code still restricted group legal services practice to organizations whose primary purpose did not include "the rendition of legal services," and the performance of these services had to be "incidental and reasonably related to the primary purposes of such organization." The Code also prohibited the organization's receipt of any financial benefit resulting from the plan.

Subsequent developments in the Model Code loosened restrictions on participation in group legal services plans. For example, amendments passed in 1975 abolished discrimination between open and closed panel plans. The amended Code, however, still prohibited an organization from profiting from the rendition of legal services, thereby insulating the bar from insurance company sponsorship of legal services plans. Amended DR 2-103(D)(4)(b), by prohibiting the initiation or promotion

of constitutional mandates, labelled "embarrassing" by Wolfram. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.5.5, at 912 (1986).

DR 2-103(D)(5)(a).

DR 2-103(D)(5)(b). For an unsuccessful challenge to a similar restriction, see Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489, 496 (La. 1978) (upholding restrictions as constitutional).


See generally Kramer, supra note 57 (comparing the 1974 Houston Amendments to the Code with the adopted Chicago Amendments that addressed the ethical and constitutional issues created by regulating group legal services).

The organized bar itself entered into prepaid and other group legal services arrangements on a sporadic and limited basis during the period of general opposition to such plans. See Lillian Deitch & David Weinstein, PREPAID LEGAL SERVICES 25 (1976); Werner Pfennigstorf & Spencer L. Kimball, A Typology of Legal Services Plans, in LEGAL SERVICE PLANS: APPROACHES TO REGULATION, supra note 16, at 42-47; Riedmueller, supra note 29, at 255-59. Programs were also developed in the context of legal education, either directly as part of the curriculum, or indirectly by arrangement with the sponsoring groups. See ABA Proceedings, supra note 11, at 156-75.

Kramer, supra note 57, at 637-41; see also WOLFRAM, supra note 58, § 16.5, at 913 (noting removal of the requirement that closed plans reimburse the cost of non-participating attorney representation).

Legal services configurations fall into one of three patterns: "open panel," "closed panel," and "mixed plans." In an open panel plan, the consumer can choose his or her own lawyer, subject to minimum qualifications and contractual limits. A closed panel plan limits consumer choice to a predetermined group of lawyers. In mixed plans, advice and basic services are provided by a selected group of lawyers, while other lawyers are used for more extensive services, subscribers who reside in other states, and where a conflict of interest arises. See Schwartz, supra note 15, at 46.

DR 2-103(D)(4)(a); see WOLFRAM, supra note 58, § 16.5.5, at 914.
of a legal services organization "for the primary purpose of providing financial or other benefit" to a lawyer, appeared to prohibit plans that functioned as referral channels for closed panel groups. Furthermore, many reporting requirements, some well beyond those applied to conventional legal practices, continued to burden legal services plans.

C. Current State Law: Group Legal Services Under the Model Rules

Unlike the Model Code, the Model Rules of Professional Conduct have eliminated the special requirements for participation in group legal services plans. The Model Rules acknowledge that when a recipient of legal services does not bear costs directly, ethical and regulatory issues arise. The most familiar example is motor vehicle insurance defense, but similar concerns arise in liability insurance defense, class actions, corporate representation involving employees, and contingent fee suits. The Model Rules provide the following ground rules:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client consents after consultation;
2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. information relating to representation of a client is protected as required by [Model] Rule 1.6.

Two concerns of the drafters of the Model Rules were conflicts of interest between the represented party and the third party payor and interference with independent professional judgment. The official comment to Model Rule 1.7 resolves these issues by requiring the third party to arrange for independent counsel.

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65 DR 2-103(D)(4)(b).
66 WOLFRAM, supra note 58, § 16.5.5, at 914.
67 DR 2-103(D)(4)(f); see WOLFRAM, supra note 58, § 16.5.5, at 915. While the Model Rules have effectively abolished impediments to group legal practice other than those general ethical considerations applicable to all practices, the Code is still in effect in some states. Thus, courts must harmonize the Code with the Supreme Court's well-established protection of legal services plans.
68 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983) [hereinafter MODEL RULES].
69 MODEL RULES Rule 1.8(f).
70 Id. at cmt.
71 Id.

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise
The Model Rules express a broad concern in Rule 1.6 regarding the maintenance of client confidentiality against disclosure demands of third party payors. The official comment indicates the breadth of this prohibition: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Absent an explicit waiver, then, the subject matter of a client's interaction with a third-party-sponsored lawyer could not be disclosed to the payor. Confidentiality and conflict of interest concerns also dictate that when a plan covers two members who enter into a legal dispute with one another, arrangements must be made for independent representation of one of the parties.

In addition to the overarching ethical concerns, there are other problems common to situations involving third party payment for legal services. The extent to which the third party payor bears costs for which it is liable under contract is often at issue and is extensively regulated by state law. Prohibitions against the unauthorized practice of law by nonlawyer third parties are complemented by restrictions on the corporate form of legal practice when a nonlawyer is a part owner, director, or officer, or otherwise "has the right to direct or control the professional judgment of a lawyer." The regulation concerning advertising of legal services, while less stringent than in the past, still speaks to third party payors in its general prohibition against compensating a person or entity who recommends a lawyer's services, since the promotional efforts of the third party may include such a recommendation.

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72 "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." MODEL RULES Rule 1.6(a).

73 Id. at cmt.

74 MODEL RULES Rule 1.6(a).


77 MODEL RULES Rule 5.4(d).

78 MODEL RULES Rule 5.4(d)(3).

79 MODEL RULES Rule 7.2(c).
The Model Rules and many analogous state guidelines have eliminated the prohibition contained in DR 2-103(D)(4)(a) of the Model Code against participation in for-profit plans. Model Rule 5.4, which prohibits fee-sharing with nonlawyers, does not ban participation in a legal services plan, even when the plan is for profit. Likewise, while Model Rule 7.2(c) prohibits a lawyer from giving "anything of value to a person for recommending the lawyer's services," it excepts "the usual charges of a . . . legal service organization." An official comment notes that "[t]his restriction does not prevent . . . a prepaid legal services plan [from paying] to advertise legal services provided under its auspices."

Model Rule 7.3, which limits an attorney's direct contact with prospective clients, underwent major revision in light of Shapero v. Kentucky Bar Association, in which the Supreme Court held that a total state ban on direct mail solicitation by attorneys violated the First Amendment. The Official Comments to the Model Rules carefully distinguish the restrictions on individual solicitation of legal business from the dissemination of information about legal services plans:

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan . . . . This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer.

This standard would permit even face-to-face solicitation of legal business when a lawyer interacts with the representative of an employer-sponsored legal plan.

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80 See, e.g., The Florida Bar re: Amendment to Rules Regulating the Florida Bar, 605 So. 2d 252, 424 (1992) (setting specific requirements for plan and participant approval by the bar association's Board of Governors).
81 ABA Comm. on Professional Ethics and Grievances, Formal Op. 355, at 17 (1987) ("Participation of a lawyer in a for-profit prepaid legal service plan is permissible under the Model Rules, provided the plan is in compliance with the guidelines in this opinion.").
82 MODEL RULES Rule 7.2(c).
83 Id. at cmt.
84 486 U.S. 466 (1988).
85 Id. at 476.
86 MODEL RULES Rule 7.3 cmt.
The comment correctly distinguishes the situation in which a firm negotiates with a contracting group from the Model Rule 7.3 situation involving intrusive and overbearing solicitation of clients. Negotiations or presentations regarding the contractual relationship between an ERISA legal services plan and an employer or other fiduciary lack the elements of client vulnerability and unequal access to information that make direct solicitation potentially abusive. If the plan solicits members by describing its lawyer-providers in laudatory terms, however, the participating lawyer may run afoul of restrictions on advertising or payment for referrals and recommendations.

Model Rule 5.4(a) states that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." As Wolfram notes, a literal reading of this provision would suggest a prohibition of any employment that entails payment from a group legal services plan to a lawyer (or vice versa). However, Model Rule 6.3 and its comments encourage lawyers "to support and participate in legal service organizations," thus indicating that a proper interpretation of Model Rule 5.4(a) would limit its application to payment for impermissible solicitation of clients.

In general, the Model Rules should be read broadly so as to permit group legal services, including participation in plans administered by for-profit insurance companies, direct hiring of lawyers for employee legal services plans, and consultation and referral systems. Closed and open panels, in-house and contract services, and even direct promotion of a legal services organization appear to be permitted, provided that the plans observe the general rules regarding confidentiality and solicitation.

D. Current Trends in Group Legal Services

While the position of prepaid and other group legal services in the contemporary legal marketplace originated with union-negotiated plans, other parties to these plans have included credit unions, credit card

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87 Id.
88 See id.
89 MODEL RULES Rule 5.4(a).
90 WOLFRAM, supra note 58, § 16.5.5, at 916.
91 MODEL RULES Rule 6.3 cmt.
92 WOLFRAM, supra note 58, § 16.5.5, at 917.
93 Id.
94 Id.
95 Pfennigstorf & Kimball, supra note 16, at 199.
96 See Charles Harris, Utah Prepaid Legal Services Plan Transcript of Proceedings,
holders, bank depositors, association members (as in Button), and other group purchasers. Participation in prepaid legal services plans is increasingly a function of individual enrollment rather than employee fringe benefits. For example, in 1987, only 2.3 million of an estimated 13.5 million prepaid plan enrollees were in plans funded by associations or unions.

Insurance companies market legal services plans much as they do other forms of insurance, although their efforts are not currently widespread. Storefront chains such as Hyatt Legal Services have also entered the prepaid-plan market, offering a variety of options tailored to individual corporate clients' needs. While centralized off-site management is necessary for the functioning of these legal groups, the

in NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES AND BEYOND 32-39 (1974); ABA Comm. on Professional Ethics and Grievances, Informal Op. 1313 (1975) ("appropriate and dignified notice" of services to members of credit union appear not to violate Disciplinary Rules); Connors v. Katz, 393 N.Y.S.2d 579 (N.Y. App. Div. 1977) (finding that agreement was between individual members and the law firm rather than constituting legal services plan). Where a credit union limits its membership to employees of identified groups and employees control its organization, a voluntary enrollment prepaid legal services program sponsored by the credit union may be classified as an ERISA plan. See BILLING, supra note 75, § 6.18.

97 See Cuyahoga County Bar Ass'n v. Gold Shield, Inc., 369 N.E.2d 1232, 1237 (Ohio 1975) (enjoining lawyers from participation in an enterprise that was under corporate direction and financed through major credit card companies). Signature Group, a subsidiary of Montgomery Ward, has developed legal plans using marketing strategies common for other types of insurance, apparently without interference by either disciplinary bodies or other regulatory entities. See Carroll Seron, Managing Entrepreneurial Legal Services, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 75-77 (Robert L. Nelson et al. eds., 1992).

98 See supra notes 42-48 and accompanying text.

99 See, e.g., Pfennigstorf & Kimball, A Typology of Legal Services Plans, in LEGAL SERVICE PLANS: APPROACHES TO REGULATION, supra note 16, at 26-27 (quoting Army Regulation No. 608-50, Feb. 22, 1974, No. 3, which provides: "[p]ersonal legal difficulties may contribute to a state of low morale and inefficiency, and may result in problems requiring disciplinary action. Prompt assistance in resolving these difficulties is an effective preventive measure.").

100 See LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 81:2505 (1988) (citing Aggregate Legal Services Plan Statistics, National Resource Center for Consumers of Legal Services, Legal Plan Letter, No. 147 (March 8, 1988)).

101 Id. The number of individuals actually covered by these plans is somewhat greater, since many include family members. See Schwartz, supra note 15, at 43.

102 See Seron, supra note 97, at 77-79 (noting that Nationwide Insurance markets legal plans in thirty-seven states).

103 Id. at 74-75.
personal nature of the services provided makes the day-to-day experience of participating lawyers comparable to that of the "traditional small-firm or solo practice." Despite these links with the familiar experience of consumer and lawyer, however, legal services plans have not followed third-party health care coverage in becoming a dominant mode of professional compensation.

II. FEDERAL REGULATION AND CASES UNDER ERISA

A. ERISA and Employer-Sponsored Group Legal Services

The purpose of ERISA is to "protect ... the interest of participants in employee benefit plans and their beneficiaries ... by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts." ERISA regulates prepaid group legal services plans provided as an employee benefit unless the plans fit one or more narrow exceptions.

Congress intended for ERISA to remedy the conflicts and inadequacies of state employee benefit regulation. The Taft-Hartley Act, ERISA's predecessor in the movement toward unitary regulation.

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104 Id. at 64.
105 See infra note 214 and accompanying text.
106 For a comprehensive review of ERISA regulations and case law, see BILLINGS, supra note 75, § 6.
108 Id. § 1002(1).
109 A 1985 Department of Labor regulation excludes from ERISA regulation those plans that meet the following criteria:
   (1) No contributions are made by an employer or employee organization;
   (2) Participation [in] the program is completely voluntary for employees or members;
   (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs, and to remit them to the insurer; and
   (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.
29 C.F.R. § 2510.3-1(f) (1985).
110 See BILLINGS, supra note 75, § 6.1.
of legal services plans, contained a provision for legal services plans among the collectively bargained benefits subject to federal regulation. The Taft-Hartley Act laid the foundation for ERISA's structural standards for employee legal services plans by requiring payment of plan finances into a trust fund for the exclusive benefit of employees and their dependents, joint administration by equal numbers of employer and employee trustees, and annual audits.

The broad scope of ERISA and its federalization of employee benefits law have fundamentally restructured benefits litigation. ERISA's definition of an "employee welfare benefit plan" encompasses most funds or programs that are maintained by employers or employee organizations and that provide for medical, disability, death, unemployment, prepaid legal services, or other non-pension benefits. State regulation of most employee benefit plans is preempted by section 514(a) of ERISA. This federal preemption serves ERISA's goals of uniformity and regulation of multistate corporations, but deprives plaintiffs of common law remedies and forces them into federal courts.

The regulatory core of ERISA imposes explicit fiduciary duties on a wide range of individuals involved with employee benefit plans, including plan administrators and other defined parties in interest. ERISA

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112 Id. § 186(e)(8).
113 Id. § 186(e)(5)(B), (e)(8).
114 29 U.S.C. § 1002(1). ERISA does not apply to plans sponsored by governmental entities or churches, or those run by U.S. employers in foreign countries for nonresident aliens. Id. § 1003(b).
117 29 U.S.C. § 1104 (1988). ERISA defines the parties subject to these standards in § 1002(21) (plan trustees) and § 1002(14) (other parties in interest). See, for example, Whitfield v. Lindemann, 853 F.2d 1298, 1307 (5th Cir. 1988), in which the court found an attorney liable for the plan trustee's reliance on the attorney's valuation of assets acquired by an ERISA plan. Without finding that the attorney held fiduciary status, the court held the attorney jointly liable with the trustee for the plan's losses attributable to his misleading valuation. See also McLaughlin v. Biasucci, 688 F. Supp. 965, 968
describes this duty, which is based on the common law of trusts, as acting “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

Transactions between statutory fiduciaries and defined parties in interest are a particular concern because the fiduciary may attempt to avoid her obligations by delegating duties to another party. ERISA generally prohibits such delegation, but offers several narrow exemptions. The fiduciary who breaches his duty to an ERISA plan shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the Court may deem appropriate, including removal of such fiduciary.

Nonfiduciaries, including lawyers, who participate in a breach have generally been found liable as well.

One goal of ERISA is to foster the growth of prepaid group legal services plans by preempting the regulatory efforts of state bar associations and other state disciplinary authorities. The legislative history of ERISA reflects congressional disapproval of the efforts of state bar associations to impede the formation of “closed panel” legal plans through disciplinary regulations forbidding lawyer participation in plans that restrict client access to specified attorneys. As one of ERISA’s primary sponsors stated, “[T]he State,
directly or indirectly through the bar, is preempted from regulating the form and content of a legal service plan, for example, open versus closed panels, in the guise of disciplinary or ethical rules or proceedings.\textsuperscript{126}

While ERISA preempts any state regulation restricting participation in legal services plans, it does not preempt all state regulation of the plan lawyers' conduct. The legislative history makes this distinction clear by stating that ERISA does not preempt "bar association ethical rules, guidelines or disciplinary actions."\textsuperscript{127} That is, "[a] general ethical rule or normal disciplinary action . . . is not preempted by ERISA, even though the law "relates to" the plan in the sense that the plan is not shielded from its generally applicable effects (e.g., the attorneys it refers to must be admitted to the bar)."\textsuperscript{128}

The New York Court of Appeals clarified this distinction in 1975 when it noted in dicta that although ERISA may "pre-empt the regulation of union prepaid legal services plans, qua plans, . . . [i]t does not reach the professional licensure and regulation of lawyers, qua lawyers, who would render legal services under the plans."\textsuperscript{129} The court defined the state regulatory functions as the following:

\begin{quote}
to assess the authenticity of the plan, to assure its freedom from any taint of improper professional conduct, to preserve the attorney-client relation, to require full disclosure to prevent fraud or other wrong upon the public, and, above all, to make sure that future professional conduct on behalf of [prepaid legal services plans] . . . remains subject to disciplinary control by the Appellate Division.\textsuperscript{130}
\end{quote}

While it may be argued that the authenticity of an ERISA legal services plan is a federal rather than a state matter, the court otherwise appears to be in harmony with ERISA's legislative history.

\textsuperscript{127} Id.
\textsuperscript{128} Id. at 291; see also In re UAW Legal Services Plan, 416 N.Y.S.2d 133, 134 (N.Y. App. Div. 1979) (holding that ERISA does not preempt this level of regulation of state lawyers in a prepaid legal services plan).
The legal services employee benefit trust provides the structure for an ERISA plan, and is regulated by the National Labor Relations Act as well as ERISA. These trusts act as both the administrator and the underwriter in the case of collectively bargained agreements. Equal numbers of employer and employee representatives must act as trustees, and each is held to a high level of fiduciary responsibility. Detailed regulations specify the structure of ERISA benefit plans and reporting requirements.

In light of the current concern over the financial burden legal services impose upon individual and corporate payors, pressure to minimize the cost of legal services may detract from the lawyer’s ability to meet client needs. This risk parallels the general concern over interference with professional judgment and the duty of loyalty to the client. In the classic scenario, disagreement between client and insurer may exist regarding the decision to settle or defend under a liability insurance policy. The lawyer may feel pressure to settle regardless of the client’s desires. Obviously, under-representation would be an infraction in the context of group legal services as well. Moreover, the plan’s financial arrangements may motivate the lawyer to provide more or less representation than he would to a similarly situated fee-for-service client. The client may thus complain that the administrator denied him plan benefits.

The question of what services are covered under a given plan has been litigated extensively in the area of employee welfare and health plan benefits (the category to which legal services plans belong). Until 1989, courts generally deferred to the plan administrator’s determination of entitlement to benefits unless it was “arbitrary and capricious.” In 1989, the Supreme Court announced a de novo standard of review, which has been applied in many subsequent employee welfare benefit cases. The application of this standard to legal services benefit claims,
however, has not yet been litigated. The Sixth Circuit’s 1990 decision in *Perry v. Simplicity Engineering*\(^{141}\) may provide a small measure of reassurance in its holding that true de novo review, including information not considered by the plan administrator, amounts to “federal district courts . . . function[ing] as substitute plan administrators,” a role not intended by Congress.\(^{142}\)

B. Cases on ERISA Regulation of Employer-Sponsored Legal Services Plans

1. Fiduciary Duty Cases

Reported cases involving ERISA’s provisions regulating prepaid legal services providers are sparse but dramatic. In *Benvenuto v. Schneider*,\(^ {143}\) trustees of a union legal services benefit trust and the law firm that provided contract services were held jointly and severally liable for overpayment of $292,800 plus interest and costs.\(^ {144}\) The trustees had interviewed and taken bids from only one firm and had failed to monitor utilization, analyze services in light of payments, or insure appropriate use of plan assets.\(^ {145}\) Some evidence suggested that the plan trustees, acting under the complete domination of an imprisoned union president, colluded with the law firm.\(^ {146}\) The law firm did minimal work, used unqualified personnel, kept no time records, and “received excessive amounts of money in relationship to the services rendered and benefits received.”\(^ {147}\)

The plan trustees received sanctions for their breach of fiduciary duties as defined in sections 404(a)(1)(A) and (B) of ERISA.\(^ {148}\) The court, apparently believing that the unusual nature of the action against the law firm required an additional explanation, stated that the firm members “knew by their actions that they were receiving money in violation of ERISA and participated with the Trustees in breaching

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\(^{141}\) 900 F.2d 963 (6th Cir. 1990).
\(^{142}\) Id. at 966.
\(^{143}\) 678 F. Supp. 51 (E.D.N.Y. 1988).
\(^{144}\) Id. at 55.
\(^{145}\) Id. at 52.
\(^{146}\) Id.
\(^{147}\) Id. at 54.
\(^{148}\) Id. (citing 29 U.S.C. § 1004(a)(1)(A), (B)).
fiduciary responsibilities.”\textsuperscript{149} Therefore, the members “must be treated as participating under the common law of trusts.”\textsuperscript{150}

The Department of Labor filed an action similar to that in Benvenuto against the trustees of a 5,000-member New York union’s legal services plan.\textsuperscript{151} According to the complaint, “the trustees acted imprudently when they caused the plan to enter into agreements for legal services without considering alternative service providers or methods of delivery, and . . . failed to implement a system to monitor and control the quality and cost-effectiveness of services rendered.”\textsuperscript{152} In another case, United States v. Fisher,\textsuperscript{153} the court presented a union’s prepaid legal services plan in a rather sinister light. The defendant lawyers were charged with having given “illegal kickbacks to the union officials from the first day of the prepaid legal services contract.”\textsuperscript{154}

Disputes between contractual providers and legal services benefit funds can also be ugly, as evidenced by Mirkin, Barre, Saltzstein, Gordon, Hermann & Kreisberg, P.C. v. Noto.\textsuperscript{155} A legislative committee discharged the Mirkin firm following a finding by the committee that the firm overcharged and otherwise acted unprofessionally in providing services to a civil service employees’ union.\textsuperscript{156} The firm sued the committee members, at least one of whom also served as a plan trustee, alleging that they had conspired to induce the plan to breach its contract. The defendant trustees counterclaimed, alleging that other plan trustees had conspired with the firm “to enable it to obtain lavish retainer agreements whereby it would be the sole provider of prepaid legal services”\textsuperscript{157} to plan members.

These cases illustrate the general principle that proof of a breach of duty by a plan trustee must exist in order for an ERISA legal services plan attorney to be found liable for damages to the plan.\textsuperscript{158} While the

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} BILLINGS, supra note 75, § 6.91 (Supp. 1985) (citing Civ. No. 85-1713 (S.D.N.Y., Mar. 5, 1985) (unreported)).
\textsuperscript{152} Id.
\textsuperscript{153} 692 F. Supp. 495 (E.D. Pa. 1988). The reported case arose from the defendants’ motions to dismiss certain indictments against them on the grounds of prosecutorial misconduct. The court denied their motions but failed to report the eventual outcome of the case against the lawyers.
\textsuperscript{154} Id. at 499.
\textsuperscript{155} 94 F.R.D. 184 (E.D.N.Y. 1982).
\textsuperscript{156} Id. at 185.
\textsuperscript{157} Id. at 186.
\textsuperscript{158} Julianne Joy Knox, Nieto v. Ecker: Incorporation of Nonfiduciary Liability Under
plan's legal services providers may, as in Fisher, be guilty of other infractions, they are unlikely to be held independently accountable for breaching their fiduciary duty unless their actions in regard to plan assets endow the lawyers with fiduciary status. However, by virtue of "providing services ... to the [ERISA] plan," plan lawyers are "parties in interest" and are thus prohibited from engaging in the furnishing of services to the plan for more than "reasonable compensation." The party in interest is also vulnerable to an excise tax of 5% of the amount involved in a prohibited transaction, even if the party in interest was unaware that ERISA prohibited her actions.

In order to avoid liability from their conduct in administering the plan, plan trustees should do the following: identify the type of delivery system best suited to the needs of the group served, establish reasonable compensation levels, establish an actuarially sound schedule of benefits, and document the basis for each of these decisions. Once the plan is in place, the trustees' duties include employing qualified lawyers, making timely payments to eligible beneficiaries, avoiding excessive payments, and


On the other hand, a fiduciary such as a plan administrator or trustee who participates in a decision to hire himself as a provider of legal services would violate both the prohibition against self-dealing, ERISA, 29 U.S.C. § 1106(b)(1), and the so-called multiple services rule. See HOUSE CONF. REP. No. 1280, 93d Cong., 1st Sess. 295, 314 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5095.

See ERISA, 29 U.S.C. § 1002(14)(B) (defining "parties in interest").

Id. § 1106(a)(1)(C).

The only prepaid legal services case involving a party in interest cited in BILLINGS, supra note 75, § 6.105, is Marshall v. Sackman, No. 79 Civ. 0838 (S.D.N.Y. Feb. 14, 1979). Mr. Sackman and his father were charged with a number of ERISA infractions, and the party in interest status does not appear to have been a decisive factor.

See I.R.C. § 4975(a) (1988). Only the Secretary of Labor may bring this action.


I.R.C. § 4975(a), (b), (e)(2).

See BILLINGS, supra note 75, § 6.63.

See id. § 6.96 (discussing Marshall v. Sackman, No. 79 Civ. 0838 (S.D.N.Y., Feb. 14, 1979) (invoking a consent decree that reimbursed $150,000 the plan had paid to the son of plan trustee, who worked as a legal services plan director in a series of positions)).


While cases that involve excessive payment to parties in interest or fiduciaries are more common, excessive payment to any party is an infraction of ERISA's standards. 29
GROUP LEGAL SERVICES

scrupulously observing the rules concerning provision of services to themselves and other fiduciaries.169

Two recent cases170 address the issue of the lawyer's status as a fiduciary of ERISA trust assets when holding the proceeds of a settlement and disposing of them in contravention of a subrogation agreement. The lawyers in these cases were not part of any group legal services agreement with the employee benefit trust fund. Rather, private parties hired them for specific cases in accordance with subrogation agreements requiring that the client reimburse the plan out of settlement funds for amounts expended by the plan to defray medical expenses.171 Even though the subrogation agreements embodied the attorneys' sole connection with the ERISA plan,172 these cases still have significant implications for those lawyers providing prepaid or other group legal services under an ERISA plan agreement.

In Chapman v. Klemick,173 the lawyer advised his client to violate a subrogation agreement that the client had signed in order to obtain payment of medical expenses by his union trust fund.174 The trust fund based its case on the application of ERISA's definition of a fiduciary175 to an attorney who exercises discretionary control over money held as an asset of the trust fund under the subrogation agreement.176 The key inquiry was whether Klemick met the definition of "fiduciary" by exercising "discretionary control or authority over any Trust Fund assets."177 The district court held that in deciding how to allocate funds (i.e., taking his own fee before advising the client to spend the rest as soon as possible), the attorney met the "discretionary control" test.178 The Eleventh Circuit Court of Appeals reversed,179 distinguishing the fiduciary position of an attorney rendering services to an ERISA plan from the non-fiduciary role of the attorney who


169 See, e.g., BILLING, supra note 75, § 6.100 (citing ERISA Opinion Letter No. 78-29 (1978) (finding trust indenture provision authorizing reimbursement of trustee legal fees incurred in defending charges of violation of fiduciary duties unenforceable)).


171 Gentner, 815 F. Supp. at 1355; Chapman, 750 F. Supp. at 521.

172 Gentner, 815 F. Supp. at 1356; Chapman, 750 F. Supp. at 521.


174 Id. at 521.


176 Chapman, 750 F. Supp. at 522.

177 Id.

178 Id. at 523.

179 3 F.3d 1508 (11th Cir. 1993).
represents a plan beneficiary. The court noted consistent case law and regulations stating that "an attorney who renders legal services to an employee benefit ordinarily will not become a plan fiduciary, where those services amount to no more than an attorney's 'usual professional functions.'"

In Hotel Employees & Restaurant Employees International Union Welfare Fund v. Gentner, the Nevada District Court recently held that a lawyer who fails to make the disposition of settlement proceeds specified by a subrogation agreement is not a fiduciary under ERISA. The case is distinguishable from Chapman for several reasons. First, the Nevada client, unlike Klemick's client, had significant assets remaining from which the trust fund could be reimbursed. Moreover, Gentner, the Nevada attorney, may have had a good faith reason for contesting the subrogation agreement, which was signed under protest. Because of these distinctions, the Nevada court explicitly "decline[d] to go as far as Chapman."

While no reported case has addressed this fact pattern in the context of an employer-sponsored legal services plan, such a case could arise if a legal services plan lawyer, either under a full-coverage benefit plan or by separate agreement, took on an employee's case. As a "party in interest" to the contested subrogated funds, the plan lawyer holding discretion over plan funds would be especially vulnerable to imputation of fiduciary status.

2. Administrative Issues

A number of Department of Labor opinions address the status of a legal services plan in regard to ERISA. For example, a 1982 ERISA opinion letter held that the Michigan Dental Association's coverage of professional liability of its members was not an ERISA plan because the Association did not employ the beneficiaries of the plan. Because having ERISA status

180 Id. at 1511.
181 "We are aware of no case in which a lawyer for an ERISA plan beneficiary, as opposed to a lawyer for an ERISA plan, has been alleged to be an ERISA fiduciary." Id. at 1510.
182 Id. (citing 29 C.F.R. § 2509.75-5).
184 Newell, a fund participant, recovered almost $590,000 from Travelers Insurance, while the subrogation agreement only required that he reimburse the trust fund $90,544.16. Id. at 1356.
185 Id. at 1355.
186 Id. at 1360.
188 BILLINGS, supra note 75, § 6.14 (Supp. 1985) (citing ERISA Opinion Letter No. 81-6A (1982)).
can provide federal jurisdiction and generally limit recovery, the status of a proprietary employee benefit plan in relation to ERISA is an important issue and requires cautious choice of terminology. In United States v. Blood, for instance, a Maryland federal district court convicted a marketer of prepaid legal services plans of embezzlement from an ERISA plan and failure to file required ERISA reports. The defendant, relying in part on the prosecution’s allusion to the plans as insurance, appealed on the ground that the plans were “insurance” and thus exempt from ERISA regulation. The Fourth Circuit held that ERISA governed the plans and noted that the government’s use of the word “insurance” in its argument was inadvertent rather than an admission of plan characterization.

Other recent cases help to define the relationship between a plan and its sponsors and providers. The court in Sullivan v. Salem Plumbing, Inc. noted that “ERISA provides that a trustee of a benefit plan may bring a civil action against an employer to recover delinquent fund contributions.” On the other hand, as Milonas v. Santa Clara County Hotel, Motel, Restaurant Employees and Bartenders Legal Fund states, a suit for amounts owed by a plan to a contract provider of legal services does not fall within the statute. ERISA does not give federal courts jurisdiction over an action brought by an independent contractor, as its language limits private rights of action to participants, beneficiaries, and fiduciaries.

III. SYNERGY AND CONFLICT UNDER JOINT REGULATION

Conflicts may arise between the lawyer’s status as provider under an ERISA plan and her ethical duty to her client. For example, the Illinois

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189 See cases cited supra note 115.
190 806 F.2d 1218 (4th Cir. 1986); see also In re Fortement Ass’n, 403 N.Y.S.2d 290 (App. Div. 1977) (involving the court’s approval of the corporation’s application to form a prepaid legal services plan).
191 Blood, 806 F.2d at 1220.
192 Id.
193 Id. at 1221.
196 123 Lab. Cas. (CCH) ¶ 10,430, at 23,069 (N.D. Cal. 1991).
197 Id. at 23,071.
198 Id. (citing 29 U.S.C. § 1132).
State Bar Ethics Committee found that since any member of an employer-sponsored legal services plan could become a client in the future, a lawyer who represents a party adverse to a plan beneficiary and receives capitation or other fees from the plan has a conflict of interest.\textsuperscript{199} While other states do not appear to have followed this opinion, it raises a general concern over client identity similar to that faced by an attorney representing a corporate client with wide-ranging interests and subsidiaries. The lawyer whose practice encompasses both individual and group clients would be well advised to ascertain the identity of her client's opponents at the earliest opportunity and investigate any possibility of membership in a client group. This duty is akin to a corporate legal representative's duty of ensuring that his clients' affiliations do not conflict.\textsuperscript{200}

A more specific conflict between ERISA standards and state ethics rules arose in the Chapman \textit{v. Klemick}\textsuperscript{201} and \textit{Hotel Employees & Restaurant Employees International Union Welfare Fund v. Gentner}\textsuperscript{202} cases. In \textit{Klemick}, the defendant attorney argued that if the court were to find that he held an ERISA fiduciary status, he would have "a conflict of interest between his duty to the Trust Fund and his duty as an attorney to his client."\textsuperscript{203} The court dismissed this contention, noting the presence of similar conflicts in other areas, such as "the requirement that an attorney file an 8300 form\textsuperscript{204} upon receipt of $10,000 in cash from

\textsuperscript{199} Ill. St. Bar Ass'n Comm. on Professional Ethics Op. 732 (1981), \textit{reprinted in Professional Ethics Opinions}, Ill. B.J. 586, 590 (May 1991). The Committee found the existence of an impermissible conflict of interest where a member of the plan had asserted a claim against a non-plan client of an attorney who was under contract with the plan. The lawyer's acceptance of a portion of the annual fee paid to plan lawyers created a lawyer-client relationship with all potential clients who were members of the plan. Because the identity of a client's adversary as a member of the plan may be impossible to determine, the burden of this rule, if literally applied, could be overwhelming.

Fortunately, this seems to be an isolated opinion. A more recent Oregon opinion states that a client who is a beneficiary of a corporation's plan is "not an actual client of the providing firm" until the standard attorney-client relationship is established. Legal Ethics Comm. of the Oregon State Bar Op. 1991-46 (1991), \textit{summarized in Laws. Man. of Prof. Ethics} (ABA/BNA) 1001:7106 (1992).

\textsuperscript{200} \textit{See}, e.g., Picker Int'l, Inc. \textit{v. Varian Assocs. Inc.}, 869 F.2d 578, 584 (Fed. Cir. 1989) (disqualifying a law firm after a merger with another firm resulted in the simultaneous representation of adverse parties).

\textsuperscript{201} 750 F. Supp. 520 (S.D. Fla. 1990), \textit{rev'd}, 3 F.3d 1508 (11th Cir. 1993).


\textsuperscript{203} \textit{Klemick}, 750 F. Supp. at 523.

\textsuperscript{204} An 8300 form is a tax reporting form for transactions of $10,000 or more. 26 CFR 1.60501-1.
a client."²⁰⁵ Both situations reflect compelling policies "to protect the interests of the many as opposed to the greed of the one."²⁰⁶

The Gentner court, which rejected the characterization of the plan attorney as a fiduciary,²⁰⁷ was more sensitive to the conflict between state and federal regulation. Nevertheless, it cautioned that its holding should not be interpreted to countenance "the unfettered right or discretion of attorneys to dispose of assets as they see fit when they are aware of a third party's rights under a Subrogation Agreement."²⁰⁸ The Klemick and Gentner cases offer the same solution to the lawyer's conflict: place the contested funds in an escrow account and bring a declaratory judgment action regarding the funds' appropriate disposition.²⁰⁹

These examples of contradictory burdens placed on ERISA legal services plan lawyers by state and federal regulations logically lead to three conclusions. First, lawyers providing services to plan members rather than to the plan itself are unlikely to be characterized as fiduciaries.²¹⁰ Secondly, apparent conflicts can be resolved by strategies (e.g., conflicts screening or declaratory actions) that are commonplace in legal practice. Third, the tension between ERISA regulations and state ethical mandates reflects the same concerns that arise when a lawyer represents either a party comprising multiple entities²¹¹ or a client whose fees are paid by a third party.²¹²

The concerns that arise in more conventional types of legal practice govern ethical requirements and administrative regulations for group legal services.²¹³ For example, when a lawyer under contract with a sponsoring group provides services to a client member and documents these services to the payor, she will inevitably disclose the fact and extent of representation. If the matter in issue involves a dispute with the sponsoring group, the lawyer has a conflict of interest. If the plan does

²⁰⁵ Klemick, 750 F. Supp. at 523 n.7.
²⁰⁶ Id. at 523.
²⁰⁷ Gentner, 815 F. Supp. at 1359. The Eleventh Circuit Court of Appeals likewise rejected this characterization. Chapman v. Klemick, 3 F.3d 1508, 1510 (11th Cir. 1993).
²⁰⁸ Id. at 1360.
²⁰⁹ Klemick, 750 F. Supp. at 523; Gentner, 815 F. Supp. at 1360.
²¹⁰ See supra notes 170-86 and accompanying text.
²¹¹ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt.
²¹² See id.
not cover the nature or extent of the services requested, professional judgment may be implicated.

CONCLUSION

National regulatory standards for lawyers have been the subject of scholarly speculation for many years. The states regulate the legal practice with a number of ethical rules, generally through bar association actions. The federal government regulates lawyers who work under contract with employer-sponsored legal services plans via ERISA. Not only have these lawyers survived the experience, but group legal services seem to be undergoing a resurgence. The model of joint state-federal standards has implications for many forms of legal practice when third parties pay legal fees or several states are involved. Federal regulation, far from chilling legal independence, has protected group services from the organized bar’s efforts to stifle their growth.

While group legal services plans currently cover less than ten percent of the U.S. population, the popularity of insurance in our risk-averse society suggests that consumer interest in membership will increase. Increasing competition for clients is likely to make participation in such plans more attractive to lawyers. Insurance vendors, constantly in search of new products, will further stimulate the market. The decline of unions in recent years and the general concern with the cost of employee benefits may curb growth in the use of collectively bargained plans subject to ERISA regulation. Regardless of enrollment trends and the mix of plan types, group legal services plans have attained the status of a permanent feature on the legal landscape.

Although ERISA authorizes plan beneficiaries to bring actions against plan lawyers, there are no reported cases involving actions by individual participants. This absence of “consumer” lawsuits appears

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214 The American Prepaid Legal Services Institute cites a 1987 figure of 13 million enrollees. AMERICAN PREPAID LEGAL SERVICE INSTITUTE, OPENING THE DOOR TO AFFORDABLE LEGAL SERVICES 2 (1988). See also Laws. Man. on Prof. Conduct (ABA/BNA) 81:2505 (1988). This figure should be increased by any dependents covered under these plans.

215 A list distributed by the American Prepaid Legal Services Institute includes twenty-three “organizations offering personal legal service plans to consumers and groups” in all fifty states. American Prepaid Legal Services Institute, Organizations Offering Personal Legal Service Plans to Consumers and Groups (August 10, 1993) (unpublished).

216 29 U.S.C. § 1132(a)(2); see BILLINGS, supra note 75, § 6.115.

217 However, individuals have brought state bar disciplinary actions. See III. St. Bar
in striking contrast to their predominance in ERISA health benefit plan case law.\textsuperscript{218} It may reflect the historical dominance of union sponsorship of group legal services benefit plans, but union actions are also scarce. Another explanation may be the routine nature of most services covered under the plans. Regardless of the reason, the paucity of ERISA cases on legal services plans suggests that ERISA regulation at its current level would be inadequate to meet the challenge of expanded group legal services plan activity.

The Model Rules have eliminated most distinctions between practice under group legal services plans and other types of legal practice.\textsuperscript{219} The Model Rules, however, provide little positive guidance in dealing with the very real differences between employer-sponsored plan practice and the individual or corporate representation that underlies most of the Rules' paradigms. State regulation of group legal services plans can be better structured to complement ERISA regulations by including provisions similar to those in the Model Rules that address insurance defense and other third party payor circumstances. For example, these provisions could explicitly address the conflict that arises when a plan and its beneficiary disagree on subrogation rights against a settlement.\textsuperscript{220} Likewise, the Model Rules' comments regarding permissible and impermissible client conflicts should allude to legal services plan clients.

Most, if not all, apparent disparities between ERISA and state ethics rules could be resolved in this manner. ERISA would continue to pre-empt state law but would not place the ERISA plan attorney in an ethical dilemma. It is important to remember that Congress intended ERISA's preemption of state benefit plan regulation to facilitate the development of employer-sponsored group legal services plans.\textsuperscript{221} Furthermore, this preemption has the effect of freeing benefit plans, if not the lawyers who participate in them,\textsuperscript{222} from state regulation.

Group legal service is a concept worth defending. Given this conclusion, the state or national bar should undertake the effort of

\textsuperscript{218} See generally Costich, \textit{supra} note 137 (discussing the applicable de novo review for courts' examination of ERISA health benefit plan decisions).

\textsuperscript{219} See \textit{supra} notes 69-94 and accompanying text.

\textsuperscript{220} See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt.

\textsuperscript{221} See \textit{supra} notes 123-25 and accompanying text.

\textsuperscript{222} See \textit{supra} note 126 and accompanying text.
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harmonizing state and federal rules. If lawyers are concerned with equalizing access to representation, they must consider strategies other than the traditional fee-for-service or contingency fee arrangements. By assuring access to a "safety net" of basic legal services and removing the specter of unanticipated financial burdens, legal services plans offer consumers the same type of security as health benefit plans. In addition, group legal services plans present an opportunity to improve the caliber of legal services since they often provide a mechanism for assessing quality, outcomes, and cost-effectiveness.223

Unlike the individual client, the employer-sponsored plan wields considerable economic clout, especially when negotiating for "repeat" business. As one commentator notes,

most individuals are "one shot" users of legal services. These plans effectively make the sponsoring organization . . . a "repeat player" who can act as a sophisticated intermediary between the individual and the lawyer. Thus, the plan can standardize terms of engagement (including fees), monitor client complaints, collect information about outcomes, perform random audits, and generally engage in the kind of detailed evaluation and review that corporations use to protect themselves against agency problems.224

Trustees of an ERISA legal services plan have a duty to perform these quality assurance functions as part of their fiduciary role, while enrollees in non-ERISA legal insurance plans similarly benefit from state regulation of the insurance industry.225

The cases that have arisen under ERISA regulation of lawyers do not indicate the existence of an unresolvable conflict between state and federal standards.226 ERISA regulations, complementing those of the states, provide an additional assurance for the client and the other employees served by the ERISA plan by requiring meticulous attention to the disposition of plan funds.227 These regulations address the fact

223 It was precisely the lack of such monitoring that the court criticized severely in Benvenuto v. Schneider, 678 F. Supp. 51, 52 (E.D.N.Y. 1988). See supra notes 143-50 and accompanying text. ERISA regulation reinforces the economic benefits gained by close attention to quality control. See Russel G. Pearce et al., Project: An Assessment of Alternative Strategies for Increasing Access to Legal Services, 90 YALE L.J. 122, 129 (1980).
224 Wilkins, supra note 8, at 880.
225 See BILLINGS, supra note 75, §§ 8.30-.34.
226 See supra notes 143-98 and accompanying text.
227 See supra notes 170-86 and accompanying text.
that the ERISA plan beneficiary has a legitimate interest in the integrity of his plan in addition to his interest in the legal representation for which he has bargained with his employer. Apparent dilemmas concerning conflicts of client interest or disputes over the disposition of funds are readily resolved with reference to strategies familiar to lawyers who represent corporate or insured clients. The ERISA legal services plan would thus appear to be an appropriate framework for experimentation with new models of professional regulation wherever pooled funding, third-party sponsorship, or multistate activity arises.

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