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Group and Prepaid Legal Services Plans: Kentucky Rules Provide Ethical Standards

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GROUP AND PREPAID LEGAL SERVICES PLANS:
KENTUCKY RULES PROVIDE ETHICAL STANDARDS

I.

On May 16, 1972, through two rules adopted by the Court of Appeals, Kentucky became the first state to establish formalized ethical standards for furnishing legal services pursuant to a prepaid legal services plan and the second state to adopt standards for group legal services. A third rule provides simply that no actively practicing member of the Kentucky Bar Association may have any financial interest in any such plan. The rules were adopted at the urging of the Kentucky Bar Association, and they evidence a recognition on the part of both the Court and the practicing bar of a need to improve the delivery of legal services to the average citizen of the Commonwealth.

From the outset, it is important to distinguish group legal services from prepaid legal services. Group legal services have been defined as those rendered:

(1) to individual members of a group identifiable in some substantial common interest,
(2) by a lawyer provided, secured, recommended or otherwise selected by:
   (a) the group, its organization or its officers; or
   (b) some other agency having an interest in obtaining legal services for members of the group.

The most common form of group legal services plan involves a labor union, professional group, or similar non-profit organization's providing an attorney for its members, or the group's suggesting that members consult a particular attorney. Such plans have traditionally involved a group with some primary purpose other than the render-

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1 Rule of the Court of Appeals 3.476 (1972) [hereinafter cited as RCA].
3 RCA 3.477.
4 RCA 3.477 precludes any member of the Kentucky Bar Association [hereinafter cited as KBA] "who is actively engaged in the practice of law" from having any such financial interest. Presumably an attorney who completely retired from the practice of law in this state could maintain such financial interest in a group or prepaid plan.
5 The KBA and the Court are proceeding cautiously. These are temporary rules, effective until June 1, 1973, in their present form. The rules may be extended as drafted, but the KBA has solicited comments and suggestions on the temporary rules, and it may be expected that there will be some changes.
The labor union which secures an attorney to handle workmen's compensation cases for its members is a paradigm of such plans. The identifying characteristics of such plans—and the mark of Cain as far as many attorneys are concerned—is that the group selects the attorney who will serve the members, or provides at most a limited choice. This is seen by many as violative of the attorney-client relationship and of the traditional methods by which individuals have selected the attorneys who will represent them.

Prepaid legal services refers to a "system in which the cost of possible legal services needed in the future is prepaid in advance by, or on behalf of, a client who receives such services." The concept has also been termed "legal services insurance" and is perhaps easier to understand when considered in this manner. Legal services insurance has been defined as:

a group insurance arrangement under which the individual members of a group . . . either directly or indirectly, pay insurance premiums upon a policy of insurance which would provide payments for certain scheduled legal services expenses incurred by the insureds. The insureds would be free to select the lawyer of their choice who would be compensated by benefits paid by the insurer. . . .

Prepaid legal plans differ from group legal services in two very important respects: they are not restricted to group-related legal problems and they provide for freedom of choice by the group member-client in his selection of an attorney.

II.

Prepaid legal services is a relatively recent development and may be seen as a compromise solution to the controversy over group legal services—a controversy which emerged slowly but has in recent years erupted into a full-scale conflict. The recent history of group

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8 Whitmer, supra note 2, at 22, quoting ABA SPECIAL REPORT TO NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES 1 (1971).
9 Barlow, Legal Services Insurance: Will It Work?, 16 LA. B.J. 349 (1969). The terms "prepaid legal services" and "legal services insurance" will be used largely interchangeably in reference to a plan which provides for the payment of some sort of benefit in response to a member's need for legal services and his selection of his own attorney.
10 There have been a number of articles written on the controversy—many taking violent exception to one or more of the others. Consider, for example: Cady, The Future of Group Legal Services, 55 A.B.A.J. 420 (1969); Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 COLUM. L. REV. 973 (1963); Christensen, Regulating Group Legal Services: Who Is Being
legal services has been written largely by the United States Supreme Court.\textsuperscript{11} A decision which raised little controversy among members of the bar at the time it was rendered but which in retrospect is seen as a first step in the advent of group legal services is \textit{National Association for the Advancement of Colored People v. Button}.\textsuperscript{12} The NAACP came into conflict with the laws of Virginia\textsuperscript{13} by providing the services of staff attorneys, paid by the organization on a per diem basis, to litigants in suits involving school desegregation and other racial discrimination cases. There was evidence that blacks were unable to get local attorneys to represent them in their suits. Apparently motivated by a desire to halt the NAACP's legal services activities, the Virginia Legislature in 1956 expanded an 1849 law which prohibited the solicitation of legal business by a "runner" or "capper" to include in the law's definition of such persons "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."\textsuperscript{14} The Supreme Court of Appeals of Virginia held, when the matter was presented to it, that the activities of the NAACP were properly proscribed by the law and also were in violation of Canons 35 and 47 of the \textit{ABA Canons of Ethics}.\textsuperscript{15}

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\textsuperscript{12} 371 U.S. 415 (1963).


\textit{A "runner" or "capper" is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability. . . .

This portion of the statute was later removed. \textit{Id.}, \textit{as amended}, ch. 622 (1964).

The NAACP challenged the decision on a number of grounds, but the United States Supreme Court focused upon one central issue in its decision—that the law "as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth."\(^\text{16}\) In reversing the Virginia court, the Supreme Court said "that the activities of the NAACP, its affiliates and legal staff . . . are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business. . . ."\(^\text{17}\) Many lawyers limited \textit{Button} to its "civil rights" locus of facts at the time the decision was rendered, and there is language in the opinion to that effect.\(^\text{18}\) But as subsequent decisions by the Court have indicated, in cases involving group legal action on behalf of individual members, the necessity to balance individual freedoms and the power of the state to regulate activities harmful to its citizens is not limited to the area of civil rights.\(^\text{19}\) The Court articulated the balancing test to be applied and indicated that the burden rests with the state to justify its regulatory interest: "[T]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities which can justify the broad prohibitions which it has imposed."\(^\text{20}\)

The second of the landmark decisions in the area of group legal services is \textit{Brotherhood of Railroad Trainmen v. Virginia}.\(^\text{21}\) Because it arose in the same state and thus under the same law as \textit{Button}, \textit{Trainmen} provides an accurate measure of the Court's expansion of its rationale in the earlier case. The Brotherhood had advised injured workers or the survivors of members killed on the job of their rights under the Federal Employer's Liability Act and the Safety

\(^{17}\) Id. at 428-29.
\(^{18}\) See, e.g., the following language:
The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association. Id. at 491.
\(^{19}\) In support of this inference note the following language of the Court: That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. Id. at 444.
\(^{20}\) Id.
Appliance Act. It then recommended attorneys to handle claims for members or their survivors. “The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families.” There was no “political” issue involved and no assertion that the members could not obtain adequate counsel without group assistance, as in Button. The union’s national organization wanted the best possible representation for its members; therefore it divided the United States into sixteen regions and selected a practitioner or firm in each region “with a reputation for honesty and skill in representing plaintiffs in railroad personal injury litigation.” The Supreme Court again reversed the Virginia court’s decision to ban group legal activity:

In the present case the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers. The Brotherhood’s activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP.

Justices Clark and Harlan dissented: “By its decision today the Court overthrows state regulation of the legal profession and relegates the practices of law to the level of a commercial enterprise.” The dissenters expressed their belief that Button should be limited to cases involving “political expression,” and they feared the decision in Trainmen was one which “will encourage further departures from the high standards set by canons of ethics as well as by state regulatory procedures. . . .” For many that fear was realized the following year with the Court’s decision in United Mine Workers of America, District 12 v. Illinois State Bar Association.

Unlike the Brotherhood, the U.M.W. was actually engaged in what has come to be more strictly defined as true group legal services. It did not merely channel members to attorneys; rather it retained salaried counsel to represent its members in workmen’s

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22 Id. at 5.
23 Id. at 4.
24 By order entered June 12, 1962, the Supreme Court of Virginia refused the Brotherhood’s petition for an appeal and thereby affirmed the injunction decree of the Chancery Court of the City of Richmond. For the action of the Virginia court following the Supreme Court’s decision, Brotherhood of Railroad Trainmen v. Commonwealth, 149 S.E.2d 265 (Va. 1966).
26 Id. at 9.
27 Id. at 12.
compensation proceedings. The Illinois Bar sought to enjoin this activity as the unauthorized practice of law, and the Illinois Supreme Court agreed. The Illinois court distinguished *Trainmen* as applicable only to referral of members to selected lawyers and *Button* as limited to the areas of civil rights and political expression. The United States Supreme Court did not agree that its earlier decisions should be construed so narrowly: "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."

The last chapter written by the Supreme Court in the recent history of group legal services is *United Transportation Union v. State Bar.* The Supreme Court of Michigan had enjoined activities of the United Transportation Union substantially the same as those involved in *Trainmen.* The complaint by the Michigan Bar set forth as relevant factors: "that the Union recommended selected attorneys to its members and their families, that it secured a commitment... that the maximum fee charged would not exceed 25% of the recovery, and that it recommended Chicago lawyers to represent Michigan claimants." Reduced to basic terms, the complaints were that the union engaged in setting fees in contravention of local standards, and employed out-of-state attorneys who could not be disciplined by the State Bar except for withdrawal of the right to appear *pro hac vice.* In reversing the Michigan court, the Supreme Court, perhaps weary of continued narrow construction by lower courts of its earlier decisions, stated firmly the full import of all of its decisions in this area:

In the context of this case we deal with a cooperative union of workers... But the principle here involved cannot be limited

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30 *Id.* at 509-10.
33 The merger of the Brotherhood of Railroad Trainmen into the new United Transportation Union in 1969, after the first entry of the Michigan decree and before the hearing by the Supreme Court, accounts for the difference in the styles of the cases.
36 *Pro hac vice* means literally "for this one particular occasion," *Black's Law Dictionary* 1363 (4th ed. 1951). It refers to the admission of an out-of-state attorney to practice before a court on an individual case basis and is a matter of discretion with the admitting court. *See* 7 C.J.S. *Attorney and Client* § 15 (1965).
to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP v. Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers, Trainmen,* and *NAACP v. Button.*

III.

In 1970, a new *Code of Professional Responsibility,* replacing the *ABA Canons of Professional Ethics,* became effective. The influence of the Supreme Court decisions previously discussed is particularly evident in Canon 2 of the new *Code.* Canon 2 notes that legal services delivered in the traditional manner may be beyond the means of even the middle-class citizens; the *Code* provides that a lawyer may receive compensation from a source other than the client, with "the knowledge and consent of his client after full disclosure," thus opening the door for organizations to pay legal fees for their members. But the provision which is most directly aimed at the decisions of the Supreme Court on group legal services is Disciplinary Rule 2-103(D). This section, setting forth *mandatory* standards of conduct, provides in part that an attorney may participate in legal aid service, military legal assistance, lawyer referral service,

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38 Canon 2 provides that "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." *ABA Code of Professional Responsibility Canon 2.*
39 Unlike the old Canons, the new ABA *Code of Professional Responsibility* is divided into three types of statements of principle. There are now nine Canons with Ethical Considerations [hereinafter cited as EC] and Disciplinary Rules [hereinafter cited as DR] as subparts under them.

The Canons are statements of axiomatic norms. . . . the general concepts from which the Ethical Considerations and Disciplinary Rules are derived.

The Ethical Considerations are aspirational in Character and represent the objectives toward which every member of the profession should strive. . . .

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *Id. Preamble and Preliminary Statement.*

40 "Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors." EC 2-24.
41 EC 2-21.
legal services activity of a bar association, or in the legal services activity of

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal services activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.
(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter (emphasis added).

The Disciplinary Rule permits participation in group legal services only to the extent that the Supreme Court so requires such permission by “controlling constitutional interpretation.” It limits permissible activity to the fact situations in the decisions which prompted the rule; that is, although the organization must not have the rendition of legal services as a principal purpose, the services provided must be related to the primary purpose—the raison d’etre—of the organization. The group must derive no financial benefit from the legal services and the attorney-client relationship must be preserved. It remains to be seen what tests of these provisions of the new Code may be made. Disciplinary Rule 2-103(D)(5) indirectly challenges the Supreme Court in asserting that the profession will permit only such participation in group legal services as is required by the Court. It may be expected that some group will confront the Code and force a test before the Court, perhaps by forming an organization solely for the purpose of rendering legal services or by some already established group’s providing legal services not related to the primary purpose of the organization. This might include, for example, a union’s providing legal assistance to its members in estate planning, property transfers, and even minor lawsuits.

42 DR 2-103(D)(5).
43 Id.
44 DR 2-103(D)(5)(a).
45 DR 2-103(D)(5)(b).
46 DR 2-103(D)(5)(c).
47 DR 2-103(D)(5)(d).
As a result of the adoption of RCA 3.475, the ethical guidelines for furnishing group legal services are set forth in detail in Kentucky. Of course the entire ABA Code of Professional Responsibility has been adopted by the Court of Appeals, so the ABA's strict reading of the Supreme Court decisions discussed previously is in force in this state. RCA 3.475 is consistent with Disciplinary Rule 2-103, but it serves to guide the practitioner in much more specific terms than does the Code. The Rule begins with a definition of the term "group" as "a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise, whose primary purposes and activities are other than the rendering of legal services." The definition is commendably broad, for the Supreme Court's use of a first amendment rationale throughout its decisions would certainly dictate that even a loose association of persons be permitted to carry on such activities. The definition also indicates, however, that the group must be one formed for some other purpose than rendering legal services. This is consistent with the failure of the Court to rule specifically on any such arrangement and with the ABA's position of the acquiescence only to "controlling constitutional interpretation at the time of the rendition of the services." Additionally, the legal services "must be no substantial services rendered by the group but incidental thereto." This provision indicates that legal services may not be a principal program of the group; it should not be read to mean that the services may not be substantial in scope.

The next requirement is that the group must seek out the attorney who will serve it—and not the reverse—and must conform to a list of ten restrictions or safeguards. These provisions are worthy of discussion. The first requirement is that a member of the group must be free to obtain independent counsel if he so desires. It has been suggested that the group should pay the legal expenses of a member who finds he must obtain independent counsel because

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48 RCA 2.130.
49 RCA 3.475 (emphasis added).
50 ABA Code of Professional Responsibility DR 2-103(D)(5).
51 RCA 3.475 (emphasis added).
52 The programs of the UMWA and the Brotherhood of Railroad Trainmen were certainly substantial in terms of the numbers of members served and of attorneys engaged in services, but the programs were incidental to the essential "collective bargaining" purpose of a labor union.
53 For the attorney to recommend himself for employment to the group would be in clear violation of DR 2-103(A). But see Cady, supra note 10, at 425, in which it is argued that an attorney who has not been instrumental in forming the group should be as free to seek such employment as he might seek any other job.
54 RCA 3.475(a).
of a conflict of interest with the group. The Rule next provides that neither the group nor its agents or members may control the performance of duties by the group's attorney, nor may they share in the fees received, nor may an unlicensed person engage in the practice of law under the arrangement. These provisions are fundamental to preserving the independence of the attorney, but they also raise some interesting questions. To what extent, for example, may other group members or employees aid the attorney in performing his duties? If they may do so and are compensated, is the attorney in violation of the proscription against fee-splitting?

Another unanswered question is whether the group, if it does not interfere with details of performance by the attorney, is in violation of the Rule by instructing the attorney that the overall objectives of the group are to be furthered in all litigation.

The next safeguard adds to the requirement that the services be only incidental to the group's purposes the somewhat contradictory provision that they also be reasonably related to its purposes. This is the result of a strict reading of the Supreme Court's decisions and clearly at variance with the Court's own analysis of its position. It conforms, however, to the attitude of the ABA as expressed in the Code of Professional Responsibility.

Any publicizing of the availability of group legal services must be limited to "simple dignified announcements to the members of the group" without naming any attorney who renders such service. This provision is consistent with the attitude of the profession toward publicity in general. One might question, however, whether the limitation on publicizing the service to group members only is a realistic one. If an automobile club chose to provide legal services within the guidelines of the Rule, would it be proscribed from indicating to prospective members that it provided such service, or

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55 Cady, supra note 10, at 424.
56 RCA 3.475(b).
57 RCA 3.475(c).
58 RCA 3.475(d).
59 The facts in Trainmen, UMW, and United Transp. Union indicated that members of the unions engaged in investigative and other duties, for which they were compensated. There is no indication of actual preparation of cases by non-lawyers, however.
60 ABA Code of Professional Responsibility DR 3-102.
61 See Pitts, supra note 10, at 636.
62 RCA 3.475(e).
64 RCA 3.475(f).
65 ABA Code of Professional Responsibility DR 2-101.
66 This hypothetical does not imply any opinion as to whether such an arrangement would be of itself permissible under the Rule and the Code.
would this be—as the secret handshake of a fraternal society—information available only after admission to membership?

The attorney must charge the group a "reasonable fee" for his services. Minimum fee schedules are not compulsory, but local bar associations may be expected to examine carefully any consistent rendering of services for less than the minimum fee. One fear of the ABA is that group legal services could result in an overall decrease in fees and a concomitant decrease in the quality of legal services provided. As long as the total fee is reasonable in light of the services rendered, it seems unlikely that bar associations would insist that an attorney for a group charge the minimum fee on a case by case basis.

The final three provisions of RCA 3.475 are administrative in nature. An attorney who provides legal services to a group is required to inform the Kentucky Bar Association of the arrangement and to report annually on any changes in it. This policing provision is cast in broad terms and may include arrangements that are not, properly speaking, group legal services. The last two provisions indicate that the Rule is intended in no way to supersede the Code of Professional Responsibility and that any violation of the Rule will be treated as unprofessional and unethical conduct.

The argument over group legal services will doubtless continue for some time. The points are well taken that there are dangers of abuse in some of the suggested programs and that there are probably alternative means of reaching the desired goal of providing meaningful legal services for every citizen. But until those alternatives can be realized or until some group begins forcefully to promote them rather than simply attacking the proponents of group legal services, the requirement of serving a "real public interest," as articulated by the Supreme Court, should be the only check on the rendering of such services.

67 RCA 3.475(g).
68 ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 190 (1939).
69 ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16.
70 RCA 3.475(h).
71 The word "arrangement" as used in this paragraph means any agreement or understanding whatsoever with groups or any representatives of groups whereby any legal services are to be provided to group members, and all systems or practices of referral whatsoever of group members by or through a group, whether such agreements or understandings or systems or practices of referral be written, oral, or tacit. Id.
72 RCA 3.475(i).
73 RCA 3.475(j).
74 See Reisler, supra note 10, at 10.
75 See Voorhees, Group Legal Services, 39 PA. B.A.Q. 13, 14 (1967).
Unlike group services, prepaid legal services is enjoying tremendous acceptance among attorneys. In a California survey, 91 percent of the lawyers polled "approved the implementation of a state-wide prepaid legal services program," and 71 percent of these attorneys "indicated they would be willing to participate in the program." The California program involves periodic payments by the participants, or on their behalf, into a fund from which disbursements are made to meet the legal services needs of participants. The plan is not envisioned as an insurance program; rather it is a pooling of funds to be managed through a non-profit corporation, all of whose members would be lawyers participating in the program. A formalized pilot legal insurance program currently underway in Shreveport, Louisiana, has also attracted a great deal of attention. The Shreveport Plan is designed to provide actuarial data on the "frequency of such occurrences as inter alia, adoptions, successions, real estate transactions, domestic relations problems, preparation of wills, mortgages, leases, and consumer matters." In addition to providing vitally needed actuarial data, the Shreveport Plan is also supposed to "determine the causes and consequences of failure to make timely use of legal services" and to test the specific program of benefits being used in the Plan. An examination in some detail of the Shreveport Plan should indicate what legal services insurance in general is all about.

The Plan provides benefits for the insured in four major areas: "(1) advice and consultation, (2) office work, (3) judicial and administrative proceedings, and (4) major legal expenses." In the first category, there is a basic coverage provision of $100 per year for consultation, limited to $25 per visit. There is no attempt to dictate what the attorney may charge, so if the fee is $40, for example, the insured must pay $15 of the total amount for that visit. One criticism is, of course, that each insured may desire to

76 California Lawyers Give Strong Support to State-wide Prepaid Legal Services Program, 58 A.B.A.J. 948 (1972) [hereinafter cited as California Survey].
77 Id.
78 Id.
79 Politz, The Longshot Answer?, 7 TRIAL 29 (March/April 1971). The program was begun on January 1, 1971, and is to run for two years.
80 Id.
81 Id. at 30.
82 Much of the popularity of prepaid legal services among attorneys stems from the fact that the participant is free to select his own attorney and the attorney, to set his own reasonable fee. The California Plan includes a provision, however, that participating attorneys must accept any rate schedule set up by the
get his $100 worth of benefits each year and thus may consult the attorney even for trivial matters. The counter-argument is that the plan encourages individuals to consult attorneys for legal planning and preventive legal services, and that few persons will visit their attorney if they have nothing of substance to discuss. The "office work" benefit includes "investigation and research, conferences and negotiations with opposing parties or attorneys, or document drafting and review" with a maximum annual benefit of $250, subject to a $10 pre-payment by the insured.83 The third major benefit covers the cost of going to court or to an administrative hearing and provides "$325 for legal fees, $40 for court costs, and $150 for out-of-pocket expenses preparatory to such proceedings," subject to a $25 pre-payment "if the insured is a moving party in litigation."84 The pre-payment requirement is similar to the "deductible" clause in casualty insurance plans and is designed to prevent trivial and harassing suits. The final benefit covers major legal expenses and provides that "if expenses exceed the litigation benefits, the plan will reimburse 80 percent of the next $1000 of such expenses."85

The plan is clearly geared to the needs of the middle-class insured since, at most, he would realize less than $2000 in benefits in a given year—assuming he has only one major lawsuit! When one considers that "certain business expenses, successful contingent fee cases ... fines and penalties" and other items are excluded from coverage,86 then the chances for abuse of the Plan appear remote indeed.

One of the biggest questions concerning prepaid as well as group legal services is whether there is a need for such programs. One writer argues that "almost without exception, people at every social level can get lawyers when they want them, on a basis they can afford,"87 while another points to the absence of any documentation of the need.88 It may be that the question of need for the services is one that will require redefinition in the context of group and prepaid programs. For example, the current wave of consumer awareness indicates that many more individuals will need the services of attorneys in this area in the future. Much of the need envisioned

(Footnote continued from preceding page)

board of directors of the corporation that is to administer the fund. California Survey, supra note 76, at 949.
83 Politz, supra note 79, at 30.
84 Id. at 31.
85 Id. at 32.
86 Id.
87 Cedarquist, Panel Discussion on "Group Legal Services," 33 UNAUTH. PRAC. NEWS 12, 15 (Fall 1967).
88 Hourigan, supra note 10, at 23.
by proponents of prepaid legal services is in the nature of "preventive law," a concept which has never really meant much to anyone other than businessmen engaged in tax planning and similar activities. It is expected that the insured client will consult his attorney before encountering problems and that the attorney can utilize consultation visits to diagnose minor legal problems before they develop into major ones. On the other hand, it may be argued that legal insurance does nothing more than assure that all or part of the bill will be paid and provides no direction or incentive to visit an attorney for diagnostic consultation. Clearly, "legal insurance of itself is not going to help people identify problems as legal [ones] or guide them to a lawyer."

There are a number of other problems which are treated in a comprehensive article on legal services insurance by Professor Preble Stolz. Stolz argues that legal problems are usually concomitants of pocketbook issues; the amount in controversy in a particular case or the amount of legal fees required to reach the end desired by the client frequently determines whether a legal solution to a problem will be sought as well as the extent to which it will be pursued. It is argued that legal insurance may upset the balance of nature in the legal world by encouraging the employment of an attorney "in instances when the value of the services is disproportionate to the value of the underlying claim." Similarly the presence of insurance may affect "the lawyer's decision as to the amount of legal service to provide." The client's claim simply may not be worth the expense of extensive research and expert testimony. As discussed by Professor Stolz, the problem is one common to all sorts of insurance, that of the insured's "using the proceeds of insurance to pay for something that the insured would not buy if it were not for the insurance benefit." The client may use his benefits plus additional personal funds to pursue a small claim beyond its economic feasibility under the present system in which the client pays the entire bill. Thus it may be seen that legal insurance could encourage trivial and harassing suits by removing part of the financial barrier to such actions. One answer to the problem is the threat of disciplinary action against

81 Politz, supra note 79, at 29.
82 Stolz, supra note 89, at 422.
83 Id. at 432.
84 Id. at 433.
85 Id. at 434.
attorneys who maintain harassing lawsuits or advance unwarranted claims on behalf of their clients. 96

RCA 3.476 provides the ethical ground rules for prepaid legal services in Kentucky and does not treat directly the problems of implementation and abuse. Like the Rule governing group legal services,97 it is a cautious statement of principle and adheres rigidly to the ABA Code of Professional Responsibility. A prepaid legal services plan is defined by the Rule as a “plan, program or insurance policy” which pays, in whole or in part, the attorney’s fees of a member either directly to the attorney or through reimbursement of the member.98 This definition covers both formalized legal services insurance and any plan, however informal, whereby legal fees are paid for group members. Clearly this could include a program operated by a union or similar group to reimburse members out of a special fund allocated for legal expenses. If the group does no more than pay the fees and has no program of solicitation or control, there would appear to be little reason for objection from the legal profession.

The Rule next lists seven requirements for prepaid legal plans. The plan must allow a member to choose his attorney, and “no agent, servant or employee” of the plan may even recommend the services of any particular attorney or law firm.99 This provision makes clear one major difference between group and prepaid plans: the member is entirely on his own, both in terms of freedom of choice and of lack of direction, in finding and engaging the services of an attorney. It is next required that “no agent, servant or employee of the plan or the plan itself” may interfere with the attorney in the performance of his duties.100 nor may they receive any profit or any part of the consideration paid to the attorney.101 These are identical to requirements under RCA 3.475 and are of obvious merit in preserving the independence of the legal profession. There are no “staff” attorneys employed under prepaid plans, so there is no problem, as in the case of an attorney who is hired on a salary basis, with whether he is perhaps sharing his fee for services with the group. It should be noted that there is a potential conflict between the first three requirements under the Rule and a plan similar to the informal California plan discussed previously.102 That program provided for a limitation

96 ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102.
97 RCA 3.475.
98 RCA 3.476.
99 RCA 3.476 (a).
100 RCA 3.476(b).
101 RCA 3.476(c).
102 California Survey, supra note 76.
on selection by the client-participant to attorneys agreeing to participate in the program, and it established certain requirements for participation by attorneys, including the setting of fees. To the extent that there is merit in the California plan, the Kentucky Rule should be modified to permit a plan reasonably to limit selection of attorneys to those agreeing to participate by adhering to any requirements consistent with the ethical practice of law.

The fourth provision restricts publicity and soliciting activities to “simple, dignified announcements setting forth the purposes and activities of the plan or the nature and extent of the legal services or both.” No attorney’s name may be mentioned in any such publicizing activities. There is no indication of any limitation on the frequency with which publicity announcements may be made nor on the communications media that may be employed. It is, of course, a considerable liberalization of the restrictions under the Code of Professional Responsibility on publicity by individual attorneys. The plan may advertise when an attorney cannot, but it may be expected that the requirement that publicity be simple and dignified would result in careful scrutiny by local bar associations. Since, under RCA 3.477, no practitioner may have any financial interest in a group or prepaid plan, the fourth provision of RCA 3.476 will not provide a means of circumventing the proscription against advertising.

The fifth requirement of the Rule—that a reasonable fee be charged—would seem compatible with even the California plan so long as it is not construed to require that the minimum fee schedule of a local bar association rigidly be followed. The last two provisions are again the same as in the Rule governing group legal services. They provide that RCA 3.476 is intended to conform to the Code of Professional Responsibility and that violation of the Rule is unethical conduct which subjects the violator to possible disciplinary action.

It should be noted finally that the third new rule, RCA 3.477, which prohibits any person actively engaged in the practice of law

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103 RCA 3.476(d).
104 ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 and DR 1-102.
105 RCA 3.476(e).
106 RCA 3.476(f).
107 RCA 3.476(g).
108 Defined in RCA 3.020 as:
109 any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.
from having any financial interest in any group or prepaid plan, also permits the establishment by the Kentucky Bar Association of a corporation to render prepaid legal services. As indicated previously, there are potential conflicts between the restrictions of RCA 3.476 and the realities of establishing a plan operated by a non-profit corporation such as the one proposed in California.

V.

In recognizing the need to establish, "through court approved rules, standards which delivery systems must meet before a lawyer can render his services to the plan," the new Kentucky Rules also evidence a need for the establishment of improved delivery systems for providing legal services to the middle class. By providing ethical standards for their operation, the Kentucky Bar Association and the Court of Appeals recognize the efficacy of some forms of group and prepaid legal services plans and may thereby encourage the development of such programs along responsible lines. It has been argued that few people would actually take advantage of such plans if they were available, but there is impressive evidence that middle-class Americans do not sufficiently utilize preventive legal services and that many "are not adequately served by the legal profession because they cannot afford legal services at the time the need arises." Similarly a growing awareness that lawyers can remedy legitimate individual grievances, as in the area of consumer complaints and protection, should substantially increase the need for legal services. The private bar could hardly be supplanted by group services since business and property clients, currently the mainstays of the profession, could never satisfy their needs for legal services under currently suggested group or prepaid plans.

There is, of course, a strong public interest in preserving an independent bar, and any proposed plan should be scrutinized as to the possibility that it might result in the demise of the independent

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109 Whitmer, supra note 2, at 25.
110 Reisler, supra note 10, at 12. Reisler points to the case of the Los Angeles Culinary Industry Legal Aid Program in which only 3.23% of the covered union members actually used the available services over a three year period. The program eventually was dropped.
111 Stolz, supra note 89, at 418.
113 Christensen, supra note 10, at 236.
solo practitioner. With this in mind, the best solution to the problem of delivery of legal services may well be utilization of legal services insurance in combination with greatly expanded lawyer referral systems. An individual covered by an insurance program such as the Shreveport Plan would be encouraged to seek legal advice without fear of incurring a large fee for legal services. But, beyond this, the average citizen needs guidance in seeking out an attorney, and this phase of the need could be met by a properly functioning system of lawyer referral. Armed with his legal insurance coverage, an individual should be able to call or visit the local bar association and obtain the name of a qualified attorney, willing to handle his particular problem. There is a potential conflict in this area with the profession’s restrictions on specialization, but lawyers are permitted in many referral systems to designate the particular categories of cases they are willing to handle—without holding themselves out as specialists in those areas. Combined with an ethical program of alerting the public to the benefits of preventive legal services, broad legal insurance coverage and meaningful lawyer referral could make the services of attorneys more readily available to the average citizen as well as aid the profession by providing clients informed and interested in taking advantage of its services.

David C. Fannin

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114 Copaken, supra note 10, at 1238.
116 Id. DR 2-105.