Prepaid Legal Services: A Proposal for State Regulation

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NOTES

PREPAID LEGAL SERVICES: A PROPOSAL FOR STATE REGULATION

I. INTRODUCTION

Laws are generally found to be nets of such a texture as the little
creep through, the great break through, and the middle-sized are
alone entangled.

—William Shenstone

Throughout his term of office as president of the American Bar
Association, Robert Meserve expressed a great deal of concern over
whether the legal needs of all Americans were being met. In an
article published in the American Bar Association Journal, he seriously
questioned the effectiveness of existing methods for delivery of legal
care and suggested that the average middle-income citizen is, in effect,
"The Forgotten Client."

The problem postulated by Mr. Meserve may well have been the
natural result of the activism of the 1960's. The legal needs of low-
income Americans were formally recognized during this period, and
mechanisms for providing limited legal assistance to such individuals
were developed. The more affluent elements of society never have had
a problem securing assistance to meet their legal needs. The vast ma-
ajority of Americans, however, do not belong to either of these groups.
In spite of an increasing awareness of their legal rights and the role
the judiciary can play in society, they have found it nearly impossible
to avail themselves of legal representation.

Although the barriers to effective legal service for the middle
class have been myriad, the primary obstacle appeared, and appears,

   See also ABA SPECIAL COMM. ON PREPAID LEGAL SERVICES, COMPILATION OF REFERENCE
   MATERIALS ON PREPAID LEGAL SERVICES, SURVEYS AT 1-23 (1974) [hereinafter cited as
   Compilation]; ABA SPECIAL COMM. ON PREPAID LEGAL SERVICES, SPECIAL REPORT TO
   NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES 4 (1972) [hereinafter cited as SPECIAL
   REPORT].
4. See, e.g., Cheatham, A Lawyer When Needed: Legal Services for the Middle Class,
   SHREVEPORT PLAN 33-38 (1974) [hereinafter cited as SHREVEPORT PLAN]. The statistical
   breakdown of lawyer usage by members of Laborers Local 229 prior to implementation
   of the Shreveport Plan and the accompanying discussion are particularly informative
   relative to barriers to effective legal service for middle-class America. ABA, TRANSCRIPT
   OF PROCEEDINGS: NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES, APRIL 27-29, 1972
   at 20-28 (1972) [hereinafter cited as PROCEEDINGS].
to be the cost of such services. In response to this problem individual groups with specialized legal needs began experimenting with various programs aimed at improving the delivery of legal care to at least some middle-income Americans. It is from these early experiments that the sophisticated prepaid legal services programs of today are derived.

This note will outline the principal types of existing programs and then will examine the response of the judiciary and the bar to the increasing demands for improvements in the traditional methods for delivery of legal services. In addition, the specific experience to date in Florida will be discussed. The note will conclude with discussion of a statutory scheme of regulation designed both to provide the public with minimum necessary protections and to establish a foundation in law for those interested in developing prepaid legal programs in Florida.

II. PREPAID LEGAL SERVICES PLANS

Even at this early stage it is apparent that prepaid services plans can become a major mechanism of the future for delivery of needed legal services to persons of middle and low incomes.

—Leon Jaworski

A. Question of Need

Proponents of prepaid legal services often appear to accept without question the need for such programs, whereas opponents have been reluctant to accept the conclusion that the traditional practice of law is not responsive to the legal needs of the public. While the


7. As with most areas of the law, the field of prepaid legal care is full of semantical problems, often caused by a tendency to use general language as a special term of art. For the purposes of this note, all programs of legal care based upon a pooling of funds prepaid by individuals who will be reimbursed according to a schedule of benefits for subsequent use of an attorney are referred to as prepaid legal services programs. The difficulty of establishing straightforward definitions of terms in this entire area is well known. See, e.g., ABA Special Committee on Prepaid Legal Services, A Primer of Prepaid Legal Services 3 (1974).


9. See Fisher, Future Options of the Private Bar in the Field of Prepaid Legal
empirical data to date are not conclusive, it is rather self-evident that the complexities of modern life create a greater need for legal representation today than at any other time in history.10

Education is one of the key factors involved in the determination of need for legal representation. Until the average citizen is aware of his rights, it is really not possible to determine his legal needs. Where the information is available, however, experience suggests that the need does, in fact, exist. In California, where bar association rules allow legal services programs to operate with a minimum of regulation, a United States Justice Department inquiry revealed the existence of 658 legal services programs.11 If these programs were not meeting a public need simple economics would seem to dictate their demise. As the proponents of prepaid legal care are quick to point out, every established program to date has served an educational purpose; once exposed to this education and to an economical means for acquiring legal representation, group members have recognized sufficient needs to make the program feasible.12 These combined problems of education and economics make prepaid legal services the only viable method for providing legal representation to middle-class Americans; a simple increase in the number of practicing attorneys cannot overcome the barriers denying this group access to needed legal care.

B. Format

There are two significant aspects to the basic concept of prepaid legal services as it is known today: a recognition of the benefits provided through use of "risk spreading," and recognition of the economic gains derived from the cash flow generated by prepayment. The result is a legal services plan that accumulates assets paid by members of a group and subsequently uses such money to offset the cost of legal services rendered at some future date.13 The variations on this con-

10. See Compilation, Surveys at 1-23. The experience of existing prepaid legal plans also suggests that conclusions regarding the need for improved delivery methods are valid. See, e.g., Shreveport Plan at 77-83. The results of a survey by the American Bar Association Special Committee To Survey Legal Needs are to be published in early 1975. This will constitute the first national survey ever conducted regarding the legal needs of the American public.


13. The best evaluation of the application of traditional insurance concepts to prepaid legal care programs is found in Stolz, Insurance for Legal Services: A Pre-
cept are numerous and include various methods both for holding pre-
paid funds and for disbursing such funds once legal services are
rendered. In addition plans vary as to the types of legal service
covered and the amount to be reimbursed. The basic use of prepay-
ment and of spreading the risk among a group of participants is
common to all plans, however.

The mechanics of any given plan, such as its schedule of benefits,
member fees, and methods of collection and reimbursement, are not
the subject of much debate. It is generally recognized that these ele-
ments of the plan will vary and usually will be a function both of the
needs of the members and the actuarial needs of the plan. One aspect
of plan organization, however, has been the subject of considerable
debate: What should be the relationship between the plan and the
attorneys who represent plan members? The ABA favors an "open
panel" approach, in which the plan, in effect, plays no role in the
selection and use of an attorney by its members. Plan members may
engage the services of any licensed attorney and the plan will pay for
such service up to the limits of a predetermined schedule of benefits.
Labor unions and consumer groups, on the other hand, favor the
"closed panel" approach, in which an attorney is hired by the group
to act as counsel for all its members. For reasons of economy and
efficiency this representation is generally limited to predetermined
categories of service.

liminary Study of Feasibility, 35 U. CHI. L. Rev. 417 (1968). It should be noted that the
model prepaid program analyzed by Professor Stolz did not anticipate any risk-taking
on the part of the plan. To achieve broad coverage at a reasonable cost some degree
of risk must be assumed by the plan. See Shreveport Plan at 7, 73-76.

14. The daily details of managing a prepaid legal services program go beyond
such basic policy questions as amount of member fees and attorney reimbursements.
Such details include payment collection, eligibility verification and claim processing.
Most bar-sponsored plans have opted for a nonprofit corporate structure to manage the
plan, with daily administration handled for a fee by some private concern. This was
the approach used by the Shreveport Bar Association. The plans proposed by the various
insurance companies tend to leave the administrative duties to the companies themselves.
See Compilation, Plans at iii-iv.

15. See Compilation, Plans at 1-123. See also ABA Special Committee on Prepaid
Legal Services, Five Plans of Prepaid Legal Services (1973). The Shreveport Plan has
a maximum annual benefit package of $1,665, broken down into the areas of advice
and consultation, office work, judicial and administrative proceedings, and major legal
expenses. Any legal work related to a business venture, tax filings or class actions is
excluded. The plan proposed for the Texas teachers has maximum annual benefits of
$900 spread over categories of advice and consultation, office work, and litigation. Ex-
clusions include class actions, tax filings and legal problems related to a business venture.

16. See Justice Department, supra note 11, at 791.

17. See Transcript at 179-81. See generally Proceedings at 172-214; Fisher, Future
Options of the Private Bar in the Field of Prepaid Legal Services, 58 MASS. L.Q. 243
III. JUDICIAL RESPONSE

Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.

—Justice Hugo Black

The Supreme Court has responded on four separate occasions to attempts by state bar associations to impede the development of prepaid or group-type legal programs. Each case involved an attempt to bring the traditional lawyer-client relationship under the protective umbrella of the state and to deny members of the public access to legal care through their membership in a union or some other group. The Court rejected such restrictive state action on the grounds that an individual's right of representation is meaningless unless effective access to such representation exists.

In 1963 the Court in NAACP v. Button sustained the use of counsel employed by the NAACP to represent members of the organization involved in legal proceedings resulting from their activity in the civil rights field. Initially, the political nature of the cases handled by NAACP attorneys was viewed as a factor restricting the ruling that allowed use of attorneys not directly solicited and paid by the client. This restrictive view of Button was dismissed by the Court in Brotherhood of Railroad Trainmen v. Virginia, and was completely rejected three years later in UMW v. Illinois State Bar Association.

In Trainmen the Court upheld a union legal-referral program developed to aid members in finding adequate counsel at a reasonable fee to pursue their workmen's compensation claims. In UMW the Court dismissed an attempt to limit Trainmen to situations where

(1973); Baron & Cole, Real Freedom of Choice for the Consumer of Legal Services, 58 Mass. L.Q. 253 (1973); Smith, President's Page, 60 A.B.A.J. 369 (1974). For an excellent bibliography on prepaid legal services see Brickman, Legal Delivery Systems—A Bibliography, 4 U. Tol. L. Rev. 465, 502-08 (1973). The most recent survey of the entire field of prepaid legal services is C. Lilly, Legal Services for the Middle Market (1974). Lilly not only presents an informative discussion of relevant issues, but also includes summaries of existing plans and the regulatory position taken by each state.


21. Id. at 444.

22. 389 U.S. at 221.

23. 377 U.S. 1, 8 (1964). Cf. id. at 11 (Clark, J., dissenting).

counsel is sought to represent union members for causes of action created by federal legislation:

Our holding in Trainmen was based not on State interference with a federal program in violation of the Supremacy Clause but rather on petitioner's freedom of speech, petition, and assembly under the First and Fourteenth Amendments, and this freedom is, of course, as extensive with respect to assembly and discussion related to matters of local as to matters of federal concern.25

The Court also rejected blanket prohibitions of financial connections between the union and attorneys who represent union members.26 Finally, when a similar program of union assistance was attacked in Michigan, the Court in United Transportation Union v. State Bar27 sustained the union's plan and forcefully spelled out its position relative to group legal representation:

In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited 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.28

The right propounded in United Transportation has not been addressed subsequently by the Court. Following an initial positive response by the bar,29 a negative attitude seems to have reappeared regarding collective activity and legal services, at least where it takes some form other than the traditional lawyer-client relationship.30 As a result of this change in attitude it reasonably may be assumed that the Court soon will be asked to elucidate the dicta in United Transportation.

25. Id. at 224 n.5.
26. Id. at 225.
28. Id. at 585-86.
29. See notes 33, 44 infra.
IV. Bar Response

If we are to keep our democracy there must be one commandment—thou shalt not ration justice.

—Judge Learned Hand

The position taken by the Supreme Court in *United Transportation* suggested that programs providing legal care for their subscribers do have a foundation in law. The Court's decision did not mean, however, that the legal profession would quietly accept such a revolutionary change in the traditional methods of delivering legal services. The bar was concerned that any adjustment of the traditional lawyer-client relationship would have negative ethical and financial effects. Where the client did not directly solicit and pay for the services of his attorney it was felt that the opportunity existed for third party influence on the lawyer-client relationship. This fear was incorporated into ABA Disciplinary Rule (DR) 2-103, which accepted nonprofit prepaid programs only "to the extent that controlling constitutional interpretation . . . requires the allowance of such legal service activities" and only for organizations "whose primary purposes . . . do not include the rendition of legal services."

The restrictive approach taken by the ABA and adopted by most state bar associations was based primarily on a distinction between open and closed panel plans. Variations of DR 2-103 were approved in several states, some favoring prepaid programs and others restricting such programs.

31. Address by Judge Learned Hand, Legal Aid Society Anniversary Dinner, February 16, 1951.
32. See *Justice Department*, supra note 11, at 794-95.
33. See ABA Code of Professional Responsibility DR 2-103(D)(5) (1973). But see ABA Comm. on Professional Ethics, Opinions, No. 332 (1973); ABA Special Comm. on Prepaid Legal Services, Interim Standards for Prepaid Legal Services Plans (1972). The committee recognized the importance of establishing prepaid legal services plans and excepted from application of DR 2-103(D) participation in open panel plans which meet the Interim Standards.
35. Twelve jurisdictions adopted DR 2-103 with some change thereto. In Idaho, Iowa, Louisiana and Mississippi changes apparently were aimed at proscribing prepaid programs. Hawaii, New Mexico and the District of Columbia, however, struck the language "controlling constitutional interpretation" thus taking a more favorable view
Following the *United Transportation* decision in 1971 and the increasing pressure from labor and consumer groups, the ABA Standing Committee on Ethics and Professional Responsibility began to redraft the disciplinary rules relating to prepaid legal services. The 1974 mid-year meeting of the ABA House of Delegates considered amendments to the disciplinary rules offered by the Standing Committee on Ethics and Professional Responsibility and recommended favorably by the Special Committee on Prepaid Legal Services. These amendments, which did not distinguish between open and closed panel plans, were rejected in favor of substitutes offered by the Section on General Practice. The newly adopted disciplinary rules tacitly recognize closed panel plans, but perpetuate the policy of the old rules, which makes it difficult for an attorney to represent clients served by a closed panel program without subjecting himself to the possibility of violating professional ethics.

The negative attitude of the House of Delegates toward the development of all prepaid legal programs is reflected in the new Ethical Consideration (EC) adopted in conjunction with the amendments to the disciplinary rules. EC 2-33 questions the freedom and independence a lawyer can have under a closed panel plan and concludes by stating: "[T]he standards of the profession and the quality of legal service to the public will suffer because consideration for economy rather than experience and competence will determine the attorneys to be employed by the group." The newly amended disciplinary rules require that any prepaid program be approved by the bar association before any bar members may become affiliated with it in any way. The key distinction between the old and new rules, however, is the difference established between open and closed panel plans. Open panel plans may be operated for profit and may have as their primary purpose the provision of legal services. Closed panel plans may not be operated for profit and the of prepaid programs. Tennessee adopted a rule which makes the decisions of the Tennessee Supreme Court controlling. Florida, Missouri, Oregon and Washington added registration or approval requirements for programs within their jurisdiction. See Bartosic & Bernstein, *supra* note 34, at 413 n.9.


37. *See Justice Department, supra* note 11, at 795.

38. *See ABA Code of Professional Responsibility, Ethical Consideration 2-33*, which was adopted at the 1974 ABA midyear meeting.

39. The text of the amendments adopted at the 1974 midyear meeting of the ABA is set out as appendix B to this note. *See* pp. 730-31 infra.

40. *See Justice Department, supra* note 11, at 794.
sponsoring organization must have a primary purpose other than providing legal care. The closed panel plan also must be "open" to the extent of allowing any member to see an attorney other than the counsel provided by the plan. In such a case the outside attorney would be reimbursed at the rate such services would normally cost the plan. The difference in treatment of open and closed panel plans under the rules does not appear to have a substantial basis in reality; there is no evidence of third-party influence under either program. By formally perpetuating a distinction between prepaid programs that utilize "house" counsel and those that allow members to see any attorney, it is very possible that a violation of antitrust law will result.

Thus, while the ABA has accepted the legality of prepaid legal services, the battle continues as to the exact format such programs will take. Although the rhetoric in support of Canon 2 continues, the practical effect of the new disciplinary rules is to view the question of prepaid legal services in a narrow, provincial manner with little or no consideration of whether the legal needs of the middle class are actually met. The fallacy of this approach is that it protects the tra-

41. Id.
42. See id. at 791-93; COMPIlATION, Antitrust passim.
43. See Justice Department, supra note 11, at 793-95.
44. The American Bar Association first declared its support for increased availability of legal services in February 1965 by adopting the following resolution:

WHEREAS . . . it is recognized that the growing complexities of modern life, shifts of large portions of our population, and enlarged demands for legal services in many new fields of activity warrant increased concern for the unfilled need for legal services, particularly as to persons of low income, and that the organized bar has an urgent duty to extend and improve existing services and also to develop more effective means of assuring that legal services are in fact available at reasonable cost for all who need them . . . .

NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association reaffirms its deep concern with the problem of providing legal services to all who need them and particularly to indigents and to persons of low income, who, without guidance or assistance, have difficulty in obtaining access to competent legal services at reasonable cost; and authorizes the officers and appropriate Sections and Committees of the Association . . . to improve existing methods and to develop more effective methods for meeting the public need for adequate legal services . . . .

Proceedings of the House of Delegates, 51 A.B.A.J. 393, 399 (1965). It is difficult to find the new disciplinary rule amendments consistent with this earlier resolution. See Justice Department, supra note 11, at 795-96.

Although the ABA did reject the disciplinary rule amendments recommended by the Special Committee on Prepaid Legal Services, another recommendation made by the Committee was adopted. American Legal Service Programs, Inc. (ALSP), was created to assume permanent responsibilities in the area of prepaid legal services. The purpose of ALSP is to increase the availability of legal services and to assist in the formation of legal service programs that are in the public interest. See House of Delegates Acts on Group Legal Services, Shield Legislation, Court Organization Standards, and
ditional practice of law from a non-existent enemy. Clients who benefit from prepaid programs are the very individuals who would have lived with their problems rather than seek legal assistance. Existing clientele likely will not turn to prepaid programs because in most cases the schedule of benefits provided by such plans will not meet their needs. The isolated cases in which middle-income Americans do seek legal assistance will not change drastically. Open panel plans will provide such clients even broader access to the legal system and the prepayment provisions will ensure the attorney early and complete payment for his services.45

V. THE FLORIDA EXPERIENCE

A. Regulatory Agencies

In enacting disciplinary rules relative to prepaid legal programs, the Florida Bar took the narrowest possible view of the Supreme Court cases discussed above. The key element in the Florida rules is the requirement that a proposed prepaid program be approved by the Florida Bar before any members of the Bar are allowed to affiliate with it in any manner. Since the Florida Bar is integrated, all attorneys in the state are members of the Bar and subject to its disciplinary proceedings. This means group legal services are precluded from operating in Florida unless approval is received from the Bar, since no attorney can risk the sanctions participation in an unapproved plan could bring.46

45. Although there is not a significant amount of empirical data in support of the conclusions reached in the text, the experience of existing prepaid plans does show that before joining a prepaid legal services program most members had difficulty in recognizing areas where legal assistance would be desirable. The majority of those who did recognize the need often felt that assistance was unavailable to them due to economic or social factors. See Shreveport Plan at 77-83; Compilation, Surveys at 1-23. The economic benefits to the legal profession derived from a sure knowledge of payment for services rendered should result in additional benefits for the public as well: Elimination of some collection problems should result in increased services or, at least, some reduction in existing costs. Cf. Note, The Role of Prepaid Group Practice in Relieving the Medical Care Crisis, 84 Harv. L. Rev. 887, 921-27 (1971).

46. Disciplinary Rule 2-103, as promulgated by the Florida Bar, is set out as appendix A to this note. See pp. 729-30 infra. The Florida Rule does not recognize closed panel plans.

Uniform Divorce, 60 A.B.A.J. 446, 448-49 (1974). As of June 1974 no state had adopted the amended version of the disciplinary rule. This fact, in conjunction with the Justice Department charge that an antitrust violation may result, has led the ABA to take further action regarding the amended rules. Legal counsel has been employed to advise the ABA on the issue, and an ad hoc study group has been created. See The Code and Group Legal Services, 60 A.B.A.J. 1210 (1974).
As of October 1974 one plan has received permission from the bar to operate in Florida. This plan is located at Florida State University and began operation in the fall of 1974. The program is designed to give students basic legal assistance and will operate on an open panel basis allowing students to engage the services of lawyers of their own choosing.

After the Taft-Hartley Act was amended in August 1973 to include prepaid legal services as a recognized benefit for purposes of collective bargaining, there have been increased signs of interest in prepaid legal services in Florida. Three insurance companies filed applications with the Department of Insurance requesting permission to offer legal insurance plans in Florida on both a group and individual basis. Each of these filings ultimately was denied on the ground that lack of actual experience in this area precluded substantiation of the rates proposed for the coverage offered. While this was the official reason for denial it is obvious that no new line of insurance coverage could ever be developed if actual experience were required to support rates. It is suggested that the Department was in effect acquiescing to the Florida Bar while the Bar attempted to formulate a position relative to prepaid legal care. As yet the Florida Bar has not reacted to the new disciplinary rules promulgated by the ABA at its 1974 mid-year meeting, and the future position of the Florida Bar is difficult to forecast.

47. Labor-Management Relations Act (Taft-Hartley Act) § 302(c), 29 U.S.C.A. § 186(c) (Supp. 1974). Although prepaid legal services now may be bargained for collectively, for tax purposes such benefits are not treated the same as similar benefits in the health field. Under INT. REV. CODE OF 1954, §§ 105-06, employer contributions to health plans are not taxed as income to the employee-recipient and the employer is allowed a deduction for these contributions. See Randolph, What Bars Should Consider in Prepaid Legal Services Plans, 60 A.B.A.J. 797 (1974).

48. The Ranger Insurance Company, of Houston, Texas, Stonewall Insurance Company, of Birmingham, Alabama, and the Stuyvesant Insurance Company, of New York, New York, all filed proposed rates and policy forms for legal insurance to be sold in Florida to individuals and groups. The filings were denied by the Department of Insurance on the grounds that proposed rates were not supported actuarially. Interview with C.H. Wester, Department of Insurance, Tallahassee, Florida, July 15, 1974.

49. At the time the filings were disapproved the Florida Bar was actively reviewing the question of prepaid legal services and had engaged the services of an outside consultant to this end. In addition, amendments to DR 2-103 were proposed by the Committee on Prepaid Legal Services for the Bar's consideration. As of this writing the proposed amendments have not been acted on by the Board of Governors. See letter from Mr. Hugh E. Reams, Chairman, Committee on Prepaid Legal Services to Mr. Jack Herzog, Staff Director, Committee on Insurance, Florida House of Representatives, January 9, 1974.

50. See note 49 supra. At the September meeting of the Florida Bar Board of Governors, however, the approval for a closed panel prepaid legal services plan for the United Teachers of Dade was withdrawn, apparently in reaction to the ABA action. See letter
B. Proposed Statutory Regulation

A serious void has been created by the failure of the Florida Bar and the Department of Insurance to adopt a realistic view of prepaid legal care and to exercise their authority to aid its development in a fashion that will be in the best interest of both the public and the profession. The development and implementation of prepaid programs in Florida is impeded because of uncertainties resulting from the negative, or at least noncommittal, attitude exhibited by existing regulatory agencies. Current uncertainties include the question of whether the Department of Insurance suddenly will decide that prepaid legal programs are insurance and, therefore, will subject all such programs to the various regulatory provisions of the Florida Insurance Code. Also unresolved is the formal position of the Florida Bar. These and other questions suggest that a basic regulatory program should be established legislatively in order to foster the growth of prepaid legal care. Such a conclusion is of necessity premised on the belief that such growth is in the best interests of the Florida public.

A proposed statute designed to remove some of the uncertainties discussed above is set forth as Appendix C to this note. While examples from Tobias Simon to the Honorable Norman A. Faulkner, October 16, 1974. The withdrawal also may have been in reaction to the federal enactment of the pension reform law, Pub. L. No. 93-406 (Aug. 31, 1974). See note 59 infra.

51. Letter from Mr. Walter F. Prayer, Stonewall Insurance Co., to Mr. Charlie E. Gray, Department of Insurance, October 1, 1973. Authority to regulate employment-related prepaid legal programs at the state level was preempted by federal legislation. Legislation passed by the House and Senate in slightly different versions was amended in conference to preempt state regulation of employee-employer fringe benefit programs. This would include prepaid legal programs arising out of the employment situation. See Federal Bill Preempts Prepaid Regulations, TRENDS IN LEGAL SERVICES, August 1974, at 1; note 47 supra.

52. FLA. STAT. ch. 625, pt. I (1973) covers regulation of the assets and liabilities applicable to insurers in the state. It also sets forth the minimum reserves required by type of coverage written. FLA. STAT. § 624.02 (1973) defines insurance as: "[A] contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies." All insurers must be granted a certificate of authority before they may legally transact business in the state. FLA. STAT. § 624.401 (1973). Capitalization requirements for a new insurer for a single line of coverage are currently set at $500,000. FLA. STAT. § 624.407 (1973). Section 624.408 requires additional surplus for a new insurer in the amount of $750,000 or 50% of its paid-in capital stock, whichever is larger. Legal insurance is not a defined line of coverage and whether it would be considered casualty insurance or require the development of a new line has not been determined.

In 1972 the legislature statutorily recognized the need for development of prepaid health care programs and the difficulties such programs would face if they were required to meet the regulatory provisions of the Florida Insurance Code. See FLA. STAT. § 641.18 (1973). Therefore an independent regulatory scheme was promulgated which exempted health maintenance organizations from the regulatory provisions discussed above. See FLA. STAT. ch. 641, pt. II (1973).
of model legislation do exist, most do not lend themselves to direct application in Florida. This is primarily due to two factors. The first, of somewhat lesser importance, is the pervasive nature of existing regulation under the Florida Insurance Code. If prepaid plans were required to meet the provisions of the Code it is very unlikely that any program would ever get beyond the planning stage. Emerging health maintenance programs faced this same problem. The capitalization and reserve requirements for health insurers were entirely too burdensome for groups with such a limited scope of operation. As a result specific statutory regulation was enacted for health maintenance organizations similar to that now proposed for prepaid legal programs. The reduced capitalization and reserve requirements for the health maintenance organizations reflect a balancing of the need to protect the consumer with the desire to enhance future development of a concept of potential benefit to the public at large. The second factor making Florida somewhat unique is the existence of an integrated bar and the constitutional provision that gives the judiciary sole regulatory control over attorneys. Under article V of the Florida constitution the supreme court has the responsibility to license and regulate attorneys who practice in the state. Any attempt by the legislative or executive branches of government to regulate any aspect of the practice of law would be viewed as an invasion of the rights of the judiciary in violation of the separation of powers doctrine. Thus, any proposed regulation of prepaid legal services in Florida must limit itself to the administrative aspects of the program, and must defer to the judiciary for regulation of the conduct of attorneys serving clients through such plans.

The statute proposed herein attempts to establish the necessary regulation within the restrictions posed by the two factors just discussed. The lawyer-client relationship is not addressed by the statute. Regulation is aimed at securing the protections necessary to assure


In addition to the NAIC Model Act and Cole's proposed statute the following legislation was found helpful in the drafting of the proposed Florida legislation: Ore. Rev. Stat. ch. 73 (1973); Tex. Laws 1973, ch. 582; Conn. H.R. 8141 (1973) (not enacted); N.J.S. 2255 (1973) (not enacted); Wis. H.R. 903 (1973) (not enacted).

54. See notes 48, 52 supra.


the public that individuals cannot set up a plan and, once prepayment has established a cash flow, disappear with the plan's assets. As to the adequacy of legal services, the public will continue to look to the Florida Bar and its grievance procedures for any remedies. Recognizing that the exact format of any given prepaid program will and should be a function of the group it represents, the statute does not require one specific approach. Thus, as long as the basic requirements are met, a plan may be open or closed.

VI. CONCLUSION

At the present time there is no strong interest in Florida in the creation and development of prepaid legal services. Interest is increasing, however, and the recent amendment to section 302(c) of the Taft-Hartley Act can only add to that increased interest. Also under consideration are revisions to the Internal Revenue Code that will give employer contributions to legal services programs the same tax exempt status enjoyed by similar contributions to health care programs. Such a revision will give further impetus to interest in prepaid legal services programs.

It is obvious that interest in and demand for prepaid legal care will continue to grow. Florida has the opportunity to ensure that the response to such demand meets basic regulations necessary to protect the public. The appended statute is not a panacea. If it serves as a vehicle for eliciting discussion and action, however, it will have served a valuable purpose.

J. RICHARD LIVINGSTON

59. At its November 23, 1974 meeting the Board of Governors of the Florida Bar approved a proposed closed-panel legal services program for the 10,000 member Dade County Teachers Union. Interview with Tobias Simon, General Counsel, Dade County Teachers Union, in Tallahassee, Florida, November 26, 1974. This action seems to indicate that the Bar now is willing to adopt a realistic attitude toward the development of prepaid legal services. If the Dade County program is adequately regulated and administered, it will represent an important step toward the provision of legal services for all middle-income Floridians.
APPENDIX A

The following is the text of Disciplinary Rule 2-103 of the Florida Bar. Differences between the Florida Rule and the proposed version initially promulgated by the ABA are indicated in italics. The Disciplinary Rules are published in THE FLORIDA BAR, CODE OF PROFESSIONAL RESPONSIBILITY (1973).

DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

(B) Except as permitted under DR 2-103(C), a lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.

(C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:
   (a) Operated or sponsored by a duly accredited law school.
   (b) Operated or sponsored by a bona fide non-profit community organization.
   (c) Operated or sponsored by a governmental agency.
   (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists, and approved by the Board of Governors of The Florida Bar pursuant to Article XIV of the Integration Rule of The Florida Bar and the By-Laws promulgated thereunder.

(4) A bar association representative of the general bar of the geographical area in which the association exists.

(5) Any other nonprofit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and 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.
   (e) The organization has procured the approval of the Board of Governors of The
Florida Bar pursuant to Article XIX of the Integration Rule of The Florida Bar and the By-Laws promulgated thereunder.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

APPENDIX B

The following is the relevant portion of the 1974 amendments to Disciplinary Rule 2-103, as promulgated by the American Bar Association. New or changed provisions are indicated in italics. See House of Delegates Has Midyear Meeting, 60 A.B.A.J. 446, 448 (1974).

DR 2-103. Recommendation of Professional Employment.

. . . .

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that:

1. He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fee incident thereto.

2. He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (5) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organizations; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client without direction or regulation by the organization or any person connected with it.

(D) A lawyer shall not knowingly assist a person or organization that furnishes, or pays for legal services to others, to promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as permitted in DR 2-101(B). However, this does not prohibit a lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, from being employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, if his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

. . . .

4. A bar association representative of the general bar of the geographical area in which the association exists or an organization operated, sponsored or approved by such a bar association.

5. Any other organization that furnishes, renders, or pays for legal services to its members or beneficiaries, provided the following conditions are satisfied:

(a) As to such organizations other than a qualified legal assistance organizations

(i) Such organization is not organized for profit and its primary purposes do not include the recommending, furnishing, rendering of or paying for legal services.

(ii) Said services must be only incidental and reasonably related to the primary purposes of such organization.

(iii) Such organization or its parent or affiliated organization does not derive a profit or commercial benefit from the rendition of legal services by the lawyer.

(iv) 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.

(v) Any of the organization's members or beneficiaries is free to select counsel of his or her own choice, provided that if such independent selection is made by
the client, then such organization, if it customarily provides legal services through counsel it pre-selects, shall promptly reimburse the member or beneficiary in the fair and equitable amount said services would have cost such organization if rendered by counsel selected by said organization.

(vi) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.

(vii) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

(viii) The articles of organization, by-laws, agreement with counsel, and the schedule of benefits and subscription charges are filed along with any amendments or changes within sixty days of the effective date with the court or other authority having final jurisdiction for the discipline of lawyers within the state, and within sixty days of the end of each fiscal year a financial statement showing, with respect to its legal service activities, the income received and the expenses and benefits paid or incurred are [sic] filed in the form such authority may prescribe.

(ix) Provided, however, that any non-profit organization which is organized to secure and protect Constitutionally guaranteed rights shall be exempt from the requirements of (v) and (viii).

(b) As to a qualified legal assistance organization (not described in DR 2-102(D)(1) through (4)):

(i) The primary purpose of such organization may be profit or non-profit and it may include the recommending, furnishing, rendering of or paying for legal services of all kinds.

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

(iii) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.

(iv) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

APPENDIX C*

A bill to be entitled

An act relating to prepaid legal services corporations; creating chapter 642, Florida statutes, consisting of §§ 642.01-.18; authorizing prepaid legal services corporations; providing for certification by department of insurance; providing for public regulation of prepaid legal services corporations; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 642, Florida statutes, is hereby created, consisting of §§ 642.01-.18, as follows:

642.01 Short title.—Sections 642.01-.18 may be cited and known as the "prepaid legal services act."

642.02 Purpose.—The purpose of §§ 642.01-.18 is to authorize state certification and regulation of corporations that provide programs for the prepayment of the costs of legal services.

642.03 Definitions.—As used in this chapter:

(i) "Department" means the department of insurance or a person properly designated to act in its place.

* The author gratefully acknowledges the assistance of Chad Motes and Frank J. Santry, with whom the author worked in preparing an earlier version of this model statute.
(2) "Prepaid legal services corporation" means a corporation organized under the laws of the state for the purpose of establishing, maintaining and operating a plan whereby the costs of legal services provided by attorneys at law to subscribers under contract which entitles such subscribers to payments or benefits in fixed or variable amounts for the cost of such legal services are reimbursable to the subscriber to the extent of the contract.

(3) "Costs of legal services" means, but is not limited to, attorney's fees, court costs and directly related expenses incurred in the exercise of any services performed by an attorney.

(4) "Subscriber" means any individual who contracts for prepayment of legal costs with a prepaid legal services corporation certified in accordance with this chapter.

642.04 Prepaid legal services corporations authorized.—Any corporation qualifying under the provisions of this chapter, upon obtaining a certificate of authority as required in this chapter, may operate a prepaid legal services program for the purpose of establishing, maintaining and operating a plan whereby the cost of legal services provided by attorneys at law to subscribers under contract which entitles such subscribers to payments or benefits in fixed or variable amounts for the cost of such legal services is reimbursable to the subscriber to the extent of the contract.

642.05 Application for certificate.—Before any entity may operate a prepaid legal services program, it must obtain a certificate of authority from the department. Each application to the department for such certificate shall be on such form as the department shall prescribe and shall set forth or be accompanied by the following:

(1) A copy of the basic organizational document of the applicant and all amendments thereto as certified by the office of the Secretary of State;

(2) A copy of the bylaws, rules and regulations, or similar form of document, if any, regulating the conduct of the affairs of the applicant;

(3) A statement generally describing the prepaid legal services corporation, its operations, the location of its facilities and the manner in which subscribers will make contact with attorneys;

(4) Forms of all legal services contracts the applicant proposes to offer the subscribers, showing the benefits to which they are entitled and the rates proposed to be charged for each form of contract;

(5) A statement of the assets and liabilities of the applicant.

642.06 Issuance of certificate of authority.—The department shall issue a certificate of authority within sixty (60) days of the filing of the application to any entity filing an application in conformity with § 642.05, upon payment of the prescribed fees and upon being satisfied that:

(1) The applicant has established reserves guaranteeing the performance of its obligations. Such reserves shall be maintained in an amount not less than twenty-five thousand dollars ($25,000);

(2) The terms of the contracts that the applicant proposes to offer will in fact assure that the legal services required by subscribers will be rendered;

(3) The procedures for offering prepaid legal services to subscribers and terminating same will not discriminate on the basis of age, sex or race. However, this section shall not prohibit reasonable underwriting classifications for the purposes of establishing contract rates, nor shall it prohibit experience rating;

(4) The rates proposed for legal services contracts to be offered by the applicant are not excessive, inadequate or unfairly discriminatory;

(5) The forms of all legal services contracts to be offered by the applicant meet the requirements of this chapter.

642.07 Legal services contracts.—

(1) Any entity issued a certificate and otherwise in compliance with this chapter may enter into contracts in this state to reimburse an agreed upon set of comprehen-
sive legal care services to subscribers or groups of subscribers in exchange for a prepaid per capita, or prepaid aggregate, fixed sum.

(2) The rates charged by any prepaid legal services corporation to its subscribers shall not be excessive, inadequate or unfairly discriminatory. The department shall define by rule and regulation what constitutes excessive, inadequate or unfairly discriminatory rates and may require whatever reasonable information it deems necessary to determine that a rate or proposed rate meets the requirements of this subsection.

(5) If a prepaid legal services corporation desires to amend any contract with its subscribers or desires to change any rate charged therefor, it may do so upon filing with the department any such proposed amendments or change in rates. Any such proposed change shall be effective immediately, subject to disapproval by the department within thirty (30) days from the date of filing. However, it is not the intent of this subsection to restrict unduly the right to modify rates in the exercise of reasonable business judgment.

(4) No single contract between any legal services corporation and its subscribers shall entitle more than one (1) person to benefits, reimbursement or indemnity, except that a single contract may be issued to any person for the benefit of such person and his dependents; to any employer for the benefit of its employees, or any class thereof, and their dependents; to any labor union for the benefit of its members, or any class thereof, and their dependents; to the trustees of any fund established by one or more labor unions or one or more employers or combination thereof for the benefit of their member or employees, or both, or any class thereof, and their dependents; and to any other entity or combination of entities which may be approved by the department. Such contract shall be in writing and a copy thereof shall be furnished to each subscriber and shall contain the following provisions: (a) a statement of the amount payable to the corporation by the subscriber and the manner in which such amount is payable; (b) a statement of the amount of benefits, reimbursement or indemnity to be furnished and the period during which it will be furnished, and, if there are to be exceptions, a detailed, clear and understandable statement of such exceptions; (c) a statement of terms and conditions upon which the contract may be cancelled or otherwise terminated at the option of either party; (d) a statement that the contract includes the endorsements thereon and attached papers, if any, and contains the entire contract; (e) a statement that no statements by the subscriber in his application for a contract shall void the contract or be used in any legal proceeding thereunder, unless such application or an exact copy thereof is included in or attached to such contract; (f) a statement of the period of grace that will be allowed the subscriber for making any payment due under the contract, which period shall not be less than ten (10) days; (g) a statement that no civil action based upon or arising out of the attorney-client relationship shall be maintained against a legal services corporation; (h) a clear and understandable description of the prepaid legal services corporation’s method for resolving subscriber grievances.

642.08 Notice, hearing and review.—When the department has reasonable cause to believe that grounds for the denial or revocation of a certificate exists, it shall notify the legal services corporation in writing, stating the grounds upon which the department believes the certificate should be denied or revoked. Within fifteen (15) days of receipt of such notice, a hearing may be requested. The hearing procedures shall be in accordance with chapter 120.

642.09 Administrative fine in lieu of revocation.—The department may, in lieu of revocation of a certificate of authorization, levy an administrative penalty in an amount not less than one hundred dollars ($100) or more than ten thousand dollars ($10,000), provided reasonable notice in writing is given of the intent to levy the fine and the legal services corporation has a reasonable time within which to remedy the defect in its operations which gave rise to the penalty citation.

642.10 Annual report.—Every legal services corporation authorized under this chapter
shall, annually on or before March 1, on forms prescribed by the department, file a verified report with the department showing its condition on the last day of the preceding calendar year. Such report shall include:

(1) A financial statement of the organization, including its balance sheet and receipts and disbursements for the preceding year;

(2) A list of the names and residence addresses of all persons responsible for the conduct of its affairs, together with a disclosure of the extent and nature of any contracts or arrangements between such persons and the legal services corporation;

(3) The number of legal services contracts issued and outstanding, the number of legal services contracts terminated, and a compilation of the reasons for such terminations in each case;

(4) A description by location and specialty of the lawyers, if any, retained or otherwise engaged by the organization to satisfy its contractual obligations with its subscribers;

(5) Such statistical information as shall be requested by the department reflecting the legal services corporation's rates for all comprehensive legal care services provided under legal services contracts;

(6) The number and amount of claims for legal services initiated against the legal services corporation and the disposition, if any, of each such claim; and

(7) Such other information relating to the performance of legal services corporations as shall be required by the department.

642.11 Examination by the department.—The department shall make an examination of the fiscal affairs of any legal services corporation subject to this chapter as often as it deems it expedient for the protection of the interests of the people of this state, but not less frequently than once every three (3) years. Every legal services corporation, its officers, and its agents shall submit their books and records relating to the legal services corporation to such examinations. For the purpose of examinations, the department may administer oaths to and examine the officers and agents of a legal services corporation concerning its business and affairs. The expenses of examination of each legal services corporation by the department shall be paid by the organization. In no event shall expenses of examination exceed a maximum of ten thousand dollars ($10,000) per year. Any rehabilitation, liquidation, conservation or dissolution of a legal services corporation shall be conducted under the supervision of the department, which shall have all power with respect thereto granted to it under the laws governing the rehabilitation, liquidation, conservation or dissolution of life insurance companies.

642.12 Fees.—Every corporation subject to the provisions of this chapter shall pay to the department the following fees:

(1) For filing a copy of its application for a certificate of authority or amendment thereto, one hundred fifty dollars ($150).

(2) For filing each annual report, one hundred fifty dollars ($150).

642.13 Rules and regulations.—The department may make reasonable rules and regulations necessary for or as an aid to the effectuation of any provision of this chapter as referred to therein. No such rule or regulation shall extend, modify or conflict with any law of this state or the reasonable implications thereof.

642.14 Acceptable payments.—Each legal services corporation subject to this chapter may accept from governmental agencies, corporations, associations, groups or individuals payments covering all or part of the cost of contracts entered into between the legal services corporation and its subscribers.

642.15 Investment of funds.—The funds of any legal services corporation subject to the provisions of this chapter shall be invested only in securities permitted by the laws of this state for the investment of assets of life insurance companies.

642.16 Insurance companies.—Nothing in this chapter is to be construed as a prohibition against issuance by an insurance company licensed in this state of a legal in-
insurance policy approved for marketing by the department in accordance with the applicable provisions of the Florida Insurance Code.

642.17 Authority to form legal services corporation.—The Florida Bar or any number of persons not less than five (5), all of whom shall be residents of this state, may form a legal services corporation under and in conformity with the provisions of this chapter.

642.18 Construction and relationship to other laws.—Except as otherwise provided in this chapter, the Florida Insurance Code shall not apply to legal services corporations.

Section 2. This act shall take effect October 1, 1975.