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GROUP LEGAL SERVICES

Proceedings of a Conference on Prepaid and Group Legal-Aid Plans November 18-20, 1969

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GROUP LEGAL SERVICES

The Institute of Industrial Relations at the University of California, Los Angeles, has sponsored many conferences, seminars, workshops, and research in the field of negotiated employee fringe benefits. For example, during the early fifties it sponsored an outstanding program to alert labor-management leaders to the many problems generated by the rapidly growing group health plans. The Health Plan Consultants Committee, endorsed by a large segment of organized labor in Southern California, has achieved nationwide recognition and acclaim. Later programs dealt with negotiated pension plans, plans for dental and vision care and prescription-drug services, educational plans and other forms of fringe benefits.

In November 1969, the Institute and the School of Law at UCLA cosponsored the first labor-management conference in the United States dealing with prepaid and group legal-aid plans as fringe benefits. The conference was part of a joint effort by the Southern California Professional Engineers Association, the Motion Picture Costumers, Local #705, IATSE, AFL-CIO, and the Laundry Workers Union, Local #52, AFL-CIO, to determine the legal needs of their memberships. Attorneys who are leading the struggle with bar associations for the removal of ethical restrictions against prepaid legal services, lawyers who have been dealing with the legal problems of labor union members for many years, and industrial relations experts attended.

The Proceedings of the Conference on Group Legal Services, held on November 18–20, 1969, in Los Angeles, California, are now available for participants of the conference as well as all those interested in this latest form of negotiated fringe benefits.

Ted Ellsworth
Administrator of Public Programs
Institute of Industrial Relations
University of California, Los Angeles

Published in 1970

Copies of this volume may be purchased
at $2.00 each from the Institute of
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California, Los Angeles, California 90024

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INTRODUCTORY REMARKS

Murray L. Schwartz

I am listed on the program as Chairman for the evening, and I was sort of hoping I'd have a chance to say a word before dinner, because I have always wanted to say, "The eating will come to order." I would like to welcome all of you to this session both on behalf of the Law School and on behalf of the Institute of Industrial Relations, if I may speak for my colleague, Ben Aaron, who is not only a Professor of Law but also the Director of the Institute of Industrial Relations.

The Law School has cosponsored this affair and has done so for two reasons: first, because of my own personal interest in the subject matter; and second, because the Law School as an institution has been terribly concerned during the past several years and continues to be concerned about the whole problem of providing legal services to the American people.

It is very interesting to look at this program, which contains such a long list of distinguished participants. Some of them come from other states, but most of them come from California; and that is as it should be because, as everyone who knows anything about the subject is aware, most of the progressive work in the area with which we are concerned has taken place in California. This is so unlike the American Bar Association, whose recently adopted code of ethics gave an enthusiastic endorsement of group legal services to the effect that if group legal services were constitutionally required that then they were all right, but no more than that. So at least in this respect the American Bar Association is still being dragged kicking its feet into the twenty-first century.

My function here tonight, however, is not to make bad jokes or to give a long introduction about these matters, but really to introduce our principal speaker. Mr. Nahstoll graduated from Michigan State University in 1940 and got his law degree from the University of Michigan in 1946. He had two years military service in the United States Navy, and then was admitted to the Oregon State Bar in 1947. He became a member of the Board of Governors of the Oregon State Bar in 1962, and its President in 1964. While President of the Oregon State Bar, he won the Laws Essay Contest Award sponsored by the American Bar Association on the general subject of the role of federal courts in the reapportionment of the state legislature, which is a remarkable achievement for a man who is both a practicing lawyer and President of the State Bar. He also demonstrated unusual ability in taking a very difficult subject and writing a distinguished scholarly essay about it. He has been a member of a Special Committee on the Availability of Legal Services of the American Bar Association, and

he is a Fellow of the American Bar Foundation. More important, I think, than all of these honors and his distinction, is the fact that he is nationally known as a leader of the Bar and one who is truly concerned about the structure of the legal profession and about the extent to which it performs its primary function--that of providing legal services to the American people. As a consequence, ladies and gentlemen, it is a great pleasure and an honor to introduce Richard W. Nahstoll.

THE OBLIGATION OF THE BAR TO FURNISH LEGAL SERVICES

Richard W. Nahstoll

I am very grateful for the opportunity to be here. I don't know when I would ever have expected the questionable privilege of trying to talk for what I see is scheduled to be an hour on a subject this involved, with a group that has just spent an hour and a half at a cocktail hour. But I am a little reminded of the kid who went to his dad and said that he had been told by his teacher to write a theme at school. He thought he'd like to write about penguins and wondered what his dad could tell him about them. His dad thought this was a marvellous opportunity to introduce his boy to the mechanics of research and scholarship. So he went to the library and brought back a two-volume work on penguins, and he said, "Now, you go read this, and you'll find out all you'll need." The kid returned the books a few days later, and his dad said, "Well, how did you like it?" And the kid said, "Well, frankly, I learned a whole lot more about penguins than I ever had any desire to know." This may give you an idea of what you'll be involved with before the evening is over, but I plan to take all my time.

Now, let's understand first what we have in mind in talking about group legal services arrangements. There are still a lot of people who think that this is somehow involved with groups of lawyers furnishing legal services. What we are talking about are plans and programs and systems under which a lawyer or a group of lawyers will furnish legal services--legal services rendered by lawyers. We're not involved here with any unauthorized practice problems. Lawyers are furnishing these legal services to individual members of a group that is organized with some common purpose, even though it is nothing more than the common purpose of wanting legal services. But they are furnished to the individual members of the group under a program in which the lawyer is recommended, paid, or furnished by the group.

I think the first thing to do is to recognize that all we're talking about here is a vehicle for the distribution of legal services. This doesn't make any sense unless we overcome the great burden under which many lawyers have labored, the notion that it is somehow degrading to the legal profession if one thinks of it in commercial terms. They restate the cliche, "Oh, well, that's rank commercialism," attempting in a way to protect the legal profession. But labels of that kind have no place in the consideration of group legal services. Indeed, I believe that we must think of it as a system of distributing an economic commodity. The lawyers' services are something that is produced by labor, and they must, if they are to be marketable, be produced and available at a price and a quality attractive to the consumer. And they must be accessible to him at a time and a place where he can utilize them. These economic characteristics make legal services, in fact, an economic commodity.

But we're also thinking here of a vehicle to market these services to a particular part of American society. The wealthy have always been reasonably well served by lawyers; the poor, the indigent, are now beginning to be well served. But the guy in the middle--the middle-income group--is the one who hasn't received any attention, and I submit that under these legal services arrangements he can become the beneficiary of legal services if the lawyers will let him. It's a system of distributing legal services to that middle-income group.

Group legal services are nothing new. It isn't simply since the State Bar of California had its progress report from its Group Legal Services Committee that group legal services have become something that exists. Lawyer referral services, legal aid programs, legal service programs for military personnel (for which Professor Brown is the ABA Chairman), and neighborhood law offices such as those recently established in Philadelphia and elsewhere in the country are forms of group legal services. The bar has tolerated and even assisted in promoting these types of group legal services simply because they haven't made any economic difference to the practicing lawyers. They haven't constituted any threat or apparent threat, and therefore the organized bar has tolerated them.

But these services are primarily for the lower income groups. In the upper economic echelon, we have had a lot of ad hoc group legal service arrangements: realty boards, apartment house owners' associations, trade and industrial associations, organizations of contractors, religious and ethnic groups, the casualty and insurance industries, and employers, who, through their own house counsel, particularly during World War II, were furnishing legal services to their personnel. All of these things have been going on and have been tolerated quite systematically. Large trade and industrial organizations, through their newsletters, bulletins, house organs, trade journals, their convention seminars and other vehicles, have distributed legal services to their members as groups, and have also supplied individual legal services. This has been done without any particular formal acknowledgment or recognition, but certainly with no restrictions from the organized bar--and it has been going on for years.

It was not, incidentally, in the State of California that this idea was born. Let me read to you a quotation that appeared in the Oregon Law Review twenty years ago. It was a Stanford Law School professor, Professor Turrentine, who wrote twenty years ago: "The simplest, most immediate way of bringing the cost of legal services within the reach of large numbers of our people is to amend Canon 35 of the American Bar Association's Canons of Professional Ethics so as to permit nonprofit organizations of all kinds, such as trade unions, fraternal orders, consumers cooperatives, mutual automobile clubs, and business and professional associations to employ counsel to advise and represent members in their individual affairs." That was written twenty years ago! And this would sound like the Communist Manifesto to a great many in the organized bar even today.

Even the old stalwart Henry Drinker, whose book, Legal Ethics has been the bible for professional ethics and is often quoted and cited as the defense of the establishment, even he wrote in 1953: "Much could be said in favor of the propriety as well as the practical wisdom of permitting a corporation to furnish as part of its contract of employment legal services to its employees where this is for the benefit of the corporation where the relation between the lawyer and the employee is direct and no conflict of interests exists between the employer and the employee." "It is not believed," he continues, "that the Canon (he was discussing Canon 35) will prevent the labor unions from finding lawyers who will advise their members. The whole modern tendency is in favor of such arrangements, including, particularly, employer and cooperative health services, the principles of which, if applied to legal services, would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the Bar is believed to be the loss of income to the lawyers and concentration of service in the hands of fewer lawyers. These features do not commend the profession to the public." Nobody ever seems to have read that part of Henry Drinker's book because the same argument, the same baloney, is being heard all over the country today in opposition to the establishment of group legal service programs. We'll go into that a little more in a moment.

In 1964, your farsighted California Committee on group legal services filed its progress report and introduced a new concept of group legal services. As you are aware, its report was rather shot down before your Bar got through with it, but at least it got people started thinking again about the subject--and high time! This was followed by the three U.S. Supreme Court cases with which you are familiar and which I won't discuss in detail because Judge Gray will be doing that later on in this program. The Button case held that, at least in civil rights cases where representation was not otherwise available, it was all right for an organization (in that case the NAACP) to furnish legal counsel; this was guaranteed as a constitutional right under the First and Fourteenth Amendments.

This was followed by the Brotherhood case, the Brotherhood of Locomotive Engineers against Virginia, in which it was established that the channeling of compensation cases arising under a federal compensation statute to a lawyer selected by the union was also constitutionally protected to the union and its members. And then the Mine Workers case from Illinois went a step further and said that not only the channeling to a lawyer who made his own arrangements for representation and compensation was to be permitted, but that equally protected by the Constitution was the right of a union to furnish legal services for compensation cases through a salaried attorney.

These cases have shaken up the Bar, but not to the point that it is prepared to recognize what lies ahead. So, what's the hang-up? Perhaps Canon 35 was not mentioned in the passages that I quoted. Canon 35 is the one which opponents of group legal services arrangements are now quoting as prohibiting a lawyer from engaging in legal

practice where there is a lay intermediary; that is, if any nonlawyer is involved in the relationship between the lawyer and his client, or involved in any way in bringing the lawyer and his client together, it is a violation of Canon 35. Opponents to group legal services say this is a violation because of the presence of a lay intermediary. Now, Canon 35 actually doesn't say this at all, but that's the way it is being read. Canon 35, in fact, prohibits exploitation or control of a lawyer by a lay intermediary. But these are quite different things: the mere presence of a lay intermediary is a very broad thing, while the avoidance of exploitation or control of a lawyer by a lay intermediary is a much narrower thing. I suggest to you, my enthusiasm for group legal services and my support for their recognition notwithstanding, that the avoidance of exploitation and the avoidance of control of the lawyer are two things in which the lawyer and the organized Bar, as a matter of fact, have a very legitimate interest. These are things which, under any group legal service arrangement, must be protected. They must be protected and the Bar has a duty to the public to see that those matters are not imposed upon when group legal services are accorded recognition.

If Canon 35 has been read and interpreted to confine the Bar's interest to those two concepts, it would have been all right; we wouldn't have the trouble we are having today. But since it wasn't confined to its actual provisions, the Bar has taken the position that all group legal service programs are bad because lay intermediaries are involved, and they're not even thinking very much about the word "intermediary." They are saying anytime there is a layman involved at any point, the Bar opposes. So, Canon 35, as misread, is the problem.

Now the only real hazards--and let me reiterate this because I think it is an area of specific interest--the Bar should be concerned about for the protection of the public are these: to avoid any arrangement that is going to lend itself to exploitation of the lawyer, and to avoid any program in which the independence of the lawyer's judgment is going to be imposed upon. The latter involves, in its broader sense, the directness of the representation of that individual client by the lawyer. The group, whether it's a union or any other kind of group, cannot be in a position in which it can impose or intrude into the directness of the relationship between the lawyer and his individual client. With things in this posture, the Supreme Court having decided the cases, and Canon 35 having been raised over and over again, the American Bar Association appointed a committee, which is styled a Committee on the Evaluation of Ethical Standards; it has been busy for the past four or five years redoing the great blizzard of ethical opinions and canons that have accrued over the years and trying to codify them into some up-to-date form. This was long overdue.

In 1934 Mr. Justice Stone, who was later Chief Justice, had said, "Before the Bar can function at all as a guardian of the public interest committed to its care, there must be an appraisal and

comprehension of the new conditions and the changed relationship of the lawyers in regard to his professional brethen and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to the more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics, for the most part, are generalizations designed for an earlier era." Though he had called upon the Bar in 1934 to get off the dime and recognize that the old days of establishing a relationship between a lawyer and client were simply gone; the days when a potential client knew the lawyers in town and knew them personally and was able to get in touch with them on the basis of a relatively informed judgment; the days in which the law was simple enough so that a lawyer could pretend, with what validity I leave to you, that he was competent to practice all kinds of law; the old illusion of the lawyer as a kind of squire in the community--this has been long gone, and Justice Stone recognized it in 1934.

The American Bar Association got around to following his suggestion and four or five years ago appointed The Committee on the Evaluation of Ethical Standards. The committee has done a great deal of work, and it came out in July of this year with a modified code of professional conduct, a Code of Professional Responsibility, as it is called. This has reduced all of the canons and guidelines for the professional conduct of lawyers to nine "Canons," number 2 of which is as follows: "A lawyer should assist the legal profession in fulfilling its duties to make legal counsel available." Now, that's the underlying fundamental canon, but each one of these canons is supported by a number of concepts styled "ethical considerations," in which the different principles are discussed that make up the specific considerations which are of materiality under the canons. And so it was done with the fundamental canon. The committee that drafted this Code has referred to and discussed the need for legal services, the enlightened respect given by the Bar to the changes in society, and the changes in the sophistication of the law and the legal profession that we all know about. They have discussed these for eight or ten pages under the caption, "Ethical Considerations."

Now, broken down from the fundamental canon through the ethical considerations, you get to the nitty-gritty of this Code in what is styled "Disciplinary Rules"; and this is where the real rules for the conduct of the lawyer come in. In the ethical considerations under Canon 2, there is a very clear recognition that it is the obligation of the profession--and thereby the obligation of the individual lawyer--to satisfy the need of people for legal services in three fundamental ways: First of all, a client must recognize that he has a legal problem. It is the duty of a lawyer and the duty of the Bar to assist him in this recognition. Now, think for a moment how close this gets to what we have thought over the years of captive clients and ambulance chasing. In the text of its ethical considerations, the Bar has said it is the duty of a lawyer to help a person recognize that he has a legal problem.

The second element fundamental to getting legal services to a client is selecting a lawyer. The lawyer must find a way to help that prospective client find a lawyer who can serve him. Now, what kind of curcumstances have we always had? Circumstances in which a client has no idea really how to find a lawyer except to play roulette through the yellow pages of the phone book. We don't allow a lawyer to inform the public of what his specialties may be, of what his areas of special competence may be. We don't even permit, as the doctors do, the indication of a limitation of practice. We have perpetuated in the legal profession a myth of omnipotence, which says to the public, "Every lawyer is competent to handle every kind of legal work, and every lawyer is the equal of every other to handle every kind of legal work." You and I know that's a complete pile of hogwash. This is simply not true. Yet, it's the thing which the legal profession has continued to require of its members, and we assiduously protect the public from the information upon which it could make an informed decision in the selection of a lawyer. And now our new code of ethics, our new code of professional responsibility, says it's a lawyer's job to assist the public in recognizing that they have legal problems, to assist them in the selection of a lawyer. And how better can we do this than by having people with a common interest--and some experience with particular lawyers--channel their members to those who they know have some special competence, experience, and expertise in the field concerning that common interest?

After we help them recognize that they have a problem and select an attorney, the third element considered essential to establishing that lawyer-client relationship is the availability of a lawyer to serve that client with respect to his problem on a basis that is mutually satisfactory; and that's just another way of saying that he can get paid for his services. To those three ends, group legal service arrangements lend themselves admirably.

In what was called the preliminary draft of the Code of Professional Responsibility, which came out in January, the Committee on Evaluation of Ethical Standards acknowledged this and provided rather liberally for the recognition of group legal services. They have gone through three drafts. They had what was called a--I've forgotten what they called the first draft--but the second one was this preliminary draft, published in January of 1969. Between then and July of 1969, when the final draft came out, they had changed their position insofar as it was promulgated in these disciplinary rules.

The fundamental canon itself wasn't changed and none of the ethical considerations discussing the need for legal services were changed, but the disciplinary rules were completely reversed: The Committee limited permissible group legal service arrangements, exclusive of some of those which the canons had always recognized, such as legal aid programs. The Committee said, first, group legal service arrangements must be confined to nonprofit organizations. I'll come back to that one. Second, even though they are nonprofit organizations, such services are allowed--and I want to quote you these words because you'll never believe it--"to the

extent that controlling constitutional interpretation at the time of rendition of the service requires the allowance of such legal service activities." I want to read that again. They are allowed and are ethical only to the "extent that controlling constitutional interpretation at the time of the rendition of the service requires the allowance of such legal service activities." What they are saying, as Murray Schwartz indicated to you, is that the legal profession is prepared to go as far in the service of the public, notwithstanding the generous words that are in the canon and in the ethical consideration, as the Supreme Court forces it to go. It will go grudgingly that far and not a bit farther. I suggest to you that this is a deplorable standard and statement from a service profession.

That's the situation we're in now. This Code, which you may want to keep in mind, notwithstanding the change between January and July of 1969, was adopted by the House of Delegates of the American Bar Association without any change in that portion of it, that is, without any change in Disciplinary Rule 2-103(D)(5). It was the only portion of the Code that actually was discussed at all at the annual meeting of the ABA in August in Dallas, and it was discussed in connection with the motion to modify that section of the Code, a motion put by the members of the ABA's Committee on the Availability of Legal Services, the McCalpin Committee. That committee moved the House of Delegates to substitute its recommendations in lieu of that portion of the Code, the one which said, in effect, we will only go so far as the Supreme Court says we must.

Now, there are two or three other rather technical parts of this that you want to have in mind in your deliberations this week. First of all, Disciplinary Rule 2-103(D)(5) limits group legal service arrangements even as required by the constitution; it limits them to nonprofit organizations, and then only to those whose primary purposes do not include the rendition of legal services. This has come to be known as the "primary purpose doctrine." And it is something which you want to keep in mind, because it is part of the considerations you should bear in mind with respect to the California rule submitted to your supreme court, which Judge Gray will be discussing later on.

The rule retains the requirement that the furnishing of legal services not be within the primary purposes of the organization. Now, what would this do? It would prohibit a group legal services arrangement analogous to the Blue Cross plan, for instance; it would prohibit the furnishing of group legal services under a program similar to the Permanente Medical Clinics, which, I think, exist all along the coast in Oregon and in California. It wouldn't be permissible for lawyers to organize a comprehensive clinic of that kind under lay administration and furnish comprehensive legal services to its subscribers or members. There are lots of difficulties with respect to the actuarial problems of prepaid group legal service programs that will be discussed here, but the point at which the present Code of Professional Responsibility would attack them on the primary purpose doctrine has no place, I think.

Similarly, as I said, the ABA Code would limit legal services programs to groups not organized for profit. I submit to you that this is a completely artificial obstacle and regulation. I think it is imperative that the programs be ones in which the organization or the group does not exploit or profit from the services of the lawyer. But this is a quite different thing from saying that it cannot be a group organized for profit. And let me suggest what I mean by that distinction.

The Acme Hardware Company down the street here decides that it would like to give each of its eleven employees the opportunity to discuss with a lawyer whether they need a will. They hire a lawyer to come down to Acme's office, and they say, "Come and talk with our employees; find out if they need a will. If they do, draft it for them and we'll pay you your regular going rate." I can see no possible defensible justification to any prohibition against that, and the fact that Acme is organized and in business to make a profit has nothing at all to do with it. The lawyer isn't being exploited, and there is no possible way in which Acme is going to intrude upon the direct attorney-client relationship that is established. The mere fact that he is being paid by or solicited by an organization that is organized for profit has nothing to do with it.

On the other hand, there are plenty of ways for an organization that is organized for profit to avoid a prohibition of this kind if it wanted simply to set up a corporation organized not for profit and run the program under that entity. The prohibition is not only unnecessary, it is much too broad. It is also a kind of an illusion because it has no practical application or way of prohibiting an organization organized for profit to avoid it; there is no way to police it. I also think, as I have indicated, that the primary purpose doctrine has no place because not only can an organization not have the furnishing of legal services as one of its "primary purposes," Rule 2-103(D)(5) requires in addition that the organization be one in which the recommending, furnishing, or paying for legal services to its members is "incidental and reasonably related to the primary purposes of the organization." Only one who is genius enough to know from time to time what the "controlling constitutional interpretation" is with respect to these matters would be genius enough to know how an organization could not have as one of its primary purposes the furnishing of legal services and yet have the furnishing of legal services reasonably incidental and reasonably related to one of its principal purposes. How anybody walks that line, I don't know. So I say to you, in this ABA disciplinary rule there is simply no guideline to let anybody know what is expected of him or what is prohibited. I don't know how anybody can set up a program which has an organization that does not have as one of its principal purposes the furnishing of legal services and yet has purposes, including the furnishing of legal services, incidentally and reasonably related to its principal purposes.

I think that in chickening out in the adoption of this rule, the American Bar Association has defaulted on its obligation to furnish some kind of leadership and some effort to guide the future and the

evolution of group legal services. Oddly enough, those who have screamed the most about wanting to avoid group legal services at all costs, and those who have screamed the loudest about what's being done to wreck the legal profession by the court decisions in the Button, Brotherhood, and Mine Workers cases, are the ones who have supported this rule which virtually says the Bar and the lawyers are throwing up their hands and have nothing to do with group legal service arrangements, leaving the development of it entirely to a case-by-case judicial determination; this, I think, is a default of a very serious character. So, I feel that the adoption of this rule has been unrealistic, and it is inadequate. I think it is an unprofessional position for the Bar to have taken, and, by virtue of that collection of characteristics, I think it is also an irresponsible position for the legal profession.

Now, going back, the two things in which the public and the Bar have a need for continued protection are to avoid exploitation of the lawyer and to avoid any control of or intrusion upon the independence of good judgment and the professional relationship between the lawyer and the client. As long as these two things are protected, this is all that the Bar has a right to do. And if the public wants the distribution of legal services in the form of group legal service programs and those two necessary things can be accommodated, then the Bar has no right, I would say, to throw up any obstacles to these programs.

What are the alternatives then? I've spent a lot of time saying that this is a mistake, but what are the alternatives? Your California Bar has submitted to the California Supreme Court a proposed Rule 20, which presents a rather acceptable position, I think, with a couple of exceptions. It retains the nonprofit requirement as a characteristic of the sponsoring organization. I believe this is unnecessary and unrealistic. It also retains the "primary purpose" of prohibition, limiting legal service arrangements to an organization which does not have as one of its primary purposes the furnishing of legal services.

I suggest to you that a preferable alternative is the rule proposed by the ABA Committee for the Availability of Legal Services to the House of Delegates to the American Bar Association, which was shot down. It does not have the nonprofit limitations; it does not have the primary purpose limitations; and it does not have the incidentally-related to the primary purpose limitation. It does say this: if the organization is one which is organized primarily for the furnishing of legal services, then its program must be filed in writing with the proper regulatory authority in the jurisdiction and approved by it. It requires this approval as an affirmative condition with respect to those groups as a substitute for a general primary purpose prohibition. A group under this limitation could be organized for the primary purpose of furnishing legal service, but if it were, its program would have to be filed and certified by the regulatory authority. There are a number of guidelines in its program primarily to insure the independence of the lawyer. Among these are a recognition by both the sponsors of the plan and the participating lawyer, expressly acknowledging that the relationship between the

lawyer and his client is one which is completely uncontrolled by the organization; and that if that very necessary fundamental relationship is violated, then it becomes a matter of ethical violation and the lawyer cannot participate in the plan. I suggest to you that the lawyers among you and others, if you can, take the affirmative step of trying to encourage your state supreme court to substitute this alternative for the portion of the Code that was adopted as a recommendation by the American Bar Association's House of Delegates. This Code when adopted by the ABA becomes merely a recommended code and has no efficacy until it is adopted by the Supreme Courts or other regulatory authorities in the several states. If, before that is done, they can in their wisdom adopt the proposal of the ABA's Availability Committee as a substitute provision, I think you will have done for yourselves, for the public, and for the Bar a very real service. You have been very kind, and I thank you for hearing me out.

ON THE MEANING OF GROUP LEGAL SERVICES

Florence Bernstein

Gentlemen, most of you will find in front of you a small, printed folder telling just briefly something about the Blue Gavel Plan. Let me, for those of you who are part of the labor movement, make my explanations and apologies for the brochure not having a union label. Somebody "goofed"; however, it was printed under union conditions and the absence of the bug will be corrected in later printings.

Let me indicate why I was selected to chair this meeting this morning. I believe it is because I have been, for the last couple of years, going up and down the state whipping up enthusiasm for what I think is the biggest advance to be offered to low and middle-income citizens, and that is group legal services. I will not go into detail as to what precisely group legal services means because there will be plenty of speakers doing that, but I will say what it means to me: It is the opportunity to offer the services I was trained to offer business interests to the average American. I say trained to offer business interests because that is the basic orientation of the law schools, and because of the way we practice law today we cannot possibly afford to offer those services to the average, middle-income American.

I was very shocked when, after a couple of years of service to the people we called indigent in the Public Defender's office and a year as Consumer Advocate for California Rural Legal Assistance, I went into private practice and found they were all indigent--all of middle-class America is legally indigent!

It never occurred to me to ask whether or not middle-income people needed legal services because I had seen the need first hand. In my tour of duty serving the poor, I knew, and it was common knowledge, that those who refused services because of their affluence could not afford to have their legal needs met by the private sector of the profession, and those needs were not being met.

Illustrative of such unmet needs is the situation in the Los Angeles Municipal Court, where in 97 percent of the small civil cases filed--cases involving between $300 and $500--are defaulted. These defendants get clobbered, not because they are without defenses but because they are without defenders and cannot afford to file responsive pleadings.

Defense of cases, such as the small Municipal Court cases I referred to, are not economically profitable for the legal profession. On the other hand, it has been profitable to the legal profession to bring those cases, in volume, on behalf of certain business interests. The consequence of the situation I have just described is that creditor and business interests are amply and effectively represented, while individual

defendant-debtors find little social justice in our courts. Perhaps the ingenuity of defense lawyers can be stimulated by the collective determination of organized middle-income people to see that their legal needs are met, i.e., group legal services.

An additional factor complicating our legal lives is the incredible expansion of credit. Credit has been merchandised and casually extended, with a corresponding broadened potential for legal involvement. Simply put, today we are all debtors and the potential for unmet legal needs, in that one observation, is enormous.

The question no longer is whether legal services must be made more broadly available. The question is by what means will such legal services be made available. We know that we are going to have to devise new ways to provide effective legal services if those universally touted rights of the average American are to be effectively exercised.

And now I want to give you the man who is responsible for my interest in group legal services. Charlie Hackler came to my office at California Rural Legal Assistance and turned me on and tuned me in to group legal services. He is that rare commodity, a member of the labor bar who admits the legal needs of union members are not being met, and who is trying to do something about it. Charlie was for 16 years a partner in Hackler & Brundage, and is today a lecturer at the School of Business Administration at U.C.L.A., and Chairman of the Board of Governors of Preventive Law Bar Association. He has a long list of credits, most important of which is he is a brilliant lawyer and a fine man. I give you Charlie Hackler.

IS THERE A CONSUMER NEED FOR GROUP LEGAL SERVICES? FOR PREVENTIVE LEGAL SERVICES?

Charles Hackler

I want to say, first of all, that I have no more expertise in the subject matter of this conference than anyone else here--probably less. As a lawyer I think I can be most helpful to you talking from the standpoint of a lawyer describing his own business and professional interest rather than from the standpoint of some vague public interest. But before I begin, I think it would be helpful, particularly for lawyers, to take a look at the recent history of the distribution and sale of medical services to people in our country--to take a good, long, hard look at what role the organized medical profession played in bringing about the substantial change in how medical services are channeled, purveyed, and provided for the American people. I hope, and this is one reason I am interested in this subject, that the legal profession does not play the kind of role of resistance when a change is at hand that the doctors played--a change willed by no one in particular but brought on by the urbanization of our society; a change in the complexion of the services needed and demanded by the public which the profession is supposed to serve.

Let me quickly mention a couple of things it is easy to forget: the inadequacy of medical care 25 or 30 years ago had the greatest impact upon modest-income families, however you define that term; and, it was not the genuinely poor, primarily, who suffered from inadequate medical care.

It is noteworthy that the great mass of middle and lower income Americans who were not getting the medical and hospital care that the technology of the society was able to provide made no great outcry. There was no mass movement among middle-class Americans, although they were the ones most forgotten. They didn't take to the streets and say, "Look, medical care of a decent kind is beyond our economic reach, and the way things are organized we're not prepared, even if we do have money to seek out specialists whose services translate into good medical care." But changes in medical care did come about because of protests from the deprived middle-class consumer. Time after time objective studies showed that this great group of people were not getting even minimal services. As things grew worse there developed pressures at the governmental level to do something about it. Successive studies under government auspices, both in Democratic and Republican administrations, demonstrated a shocking situation. The response of the medical profession was, first, to deny that there was an inadequacy of medical care because they hadn't heard about it at all; then, to attack the people who made the studies asserting that they had axes to grind; and finally to characterize all programs as being a step toward socialized medicine. It is now conveniently forgotten that this learned profession had to be pushed into a

corner to force upon it a willingness to shoulder its social responsibilities. The organized doctors had to be convicted of violations of the antitrust laws of the United States before the public became aware of their divorcement from the public interest.

Associations of doctors were convicted of violating statues which, in substance, meant that for the private profit of their members they had engaged in and were engaging in restrictive practices designed to maintain their incomes at the expense of the nation's health. The medical association used their considerable disciplinary powers over their members, the recalcitrant ones, to keep them in line, to maintain that conspiracy, designed to enhance property and money interests. Now one reason this background is rarely mentioned is that the doctors have, I think, a better PR apparatus than we lawyers have. These antitrust cases had to be tried, and in the political forum the doctor-made issue over socialized medicine had to be met. Finally, out of these conflicts has come a system which very largely obtains today for the medical care of middle-income people. Medical and hospital care is, for the most part, paid for from centrally administered funds, partly public and partly private, upon which middle-income people have a claim based upon public or their own contributions. Whether by a trust or otherwise, it is group pooling of resources through which the middle-income people have begun to have access not only to more medical care, but also on a regularized basis to have the service of specialists and the benefits of modern medical technology. Until such group pooling of resources occurred, the middle-income group of Americans fell behind each year in terms of medical care.

Now after the hue and cry was over, as everybody in this room knows who has anything to do with health, welfare and trust funds, the doctors found pleasure and, to their surprise, that the changes didn't hurt them professionally or financially. It is a bonanza for them. They have found that they can do what I like to think professional men want to do--be professional men and only secondarily businessmen, assured that they will be paid at the going rate for their services without loss of overall income. They can now, if they wish, concentrate upon their specialities. By this time it has become increasingly clear in the medical field that in spite of the hue and cry about the virtues of the general practitioner, cast as the family adviser and godfather figure, no great value was lost by the channeling of medical care through a funding agency to clinics of specialists. Many other things had to go by the board, but strangely enough the doctor prospered more and became less vocal. The big problem today, as everyone connected with union trust funds in this room certainly knows, is to keep the doctors and hospitals from eating up the funds through the furnishing of unneeded services merely because the funds are there to pay for them. There is a small minority of doctors who do that.

Now what I am really saying, really suggesting, is that lawyers are going to be misled as a profession if they follow the doctors' example

and say that the legal services actually being utilized are adequate for people of modest means. To demonstrate the inadequacy of such services I refer you to a very interesting pamphlet. It is an American Bar Foundation study by Barlow F. Christensen, which contains some interesting data on this subject. He took persons in the 1965 special census who earned between $5,000 and $15,000 a year, constituting some 28 million family units or 60 percent of the family units in the United States. He took the $5,000 figure as being a kind of above-poverty figure. He wanted to put it not too low and not too high. He took the $15,000 figure, I think, for statistical reasons to define a group containing a substantial number of families. He compared the legal services of that group with other groups in our society, just as was done earlier in the medical case studies. Before looking at the results, let us consider some basic facts about the distribution of legal services.

Well, they are distributed on a personal basis, officially at least. Let me read to you a statement that has been in the canons of legal ethics for years. "The most worthy and effective advertisement possible even for a young lawyer and especially with his brother lawyers is the establishment of a well-merited reputation for professional capacity and fidelity and trust." No one can quarrel with this as a worthwhile aim in our society. But when we assert the corollary that legal services shall be obtained upon the theory that people will seek and find lawyers on that basis, we are talking about a different society. We are talking about the small town 50 or 100 years ago. And here I have a little advantage over some of my fellow attorneys. I practiced law in a town of 5,000, a county seat, for eight years when I was first out of law school; 20,000 people in a country county, 5,000 people living in the county-seat town. The county had twelve lawyers. You could throw a rock from one lawyer's office through the window of practically every other lawyer's office around the main town square. In the middle of the square was a courthouse with a courtroom presided over by one judge--the typical nineteenth century marketplace for legal practice. The canon statement was true when I entered practice there. You could not have convinced me otherwise, and had you done so it would not only have been wrong but it certainly would have been against my economic interests.

The public could with assurance select lawyers. We were not specialized. For example, I never thought of the tax aspect of the settlement that I could get from the Missouri Pacific Railroad if I was lucky enough to win a crossing accident lawsuit against it. Tax aspects! My clients didn't pay many taxes. It was in the thirties. Whole segments of the population were not directly taxed. We had divorce suits, one lawyer against the other. We didn't worry about tax aspects of divorce settlements. Land transfer was based upon our written opinions as to whether the title was merchantable based upon the reading of the abstracts of title. Money was loaned. Instruments were drafted. They weren't complex. One didn't have to read all the fine print to find out about prepayment penalties because they had not been invented. We didn't have form instruments. This pattern of the lawyer being a jack of all legal trades was feasible then. He could try a criminal case one day, open an estate in the probate court the next, and he could advise someone as to a will or title dispute the following day.

A community of lawyers known to the prospective clientele on the basis of ability, of proven accomplishments, reputation, and personal acquaintances largely is gone so far as the client of modest means is concerned. But, paradoxically, the small-town patterns for the selection and payment of lawyers still exists and functions effectively in the business and commercial communities of large cities, at least with respect to larger business enterprises. Mr. Christensen stated how this works better than I can. He is speaking of the community of business property and commercial clients in the large city. "This community is relatively small and very close-knit. Its communications are good, although its members often have highly complex problems. Their knowledgeability and sophistication more than compensates, so they are able to recognize legal problems and see the appropriate use and desirability of the very highly specialized legal services available to them." This is an interesting and, I think, important observation. The people of the business community, in cities and in medium-size towns, recognize that they have a legal problem. They don't have one thrust upon them as most frequently happens to wage earners or non-business people. Furthermore, when they do decide to get legal advice or services, they are likely to obtain them from large firms with which they already have established relationships.

If they do not have retained attorneys, their business, professional, and social contracts provide them with a ready source of reliable information about the capabilities and costs of available lawyers and firms so that selection of counsel is relatively easy and safe. Of course, he did not have to add that the cost factor was not the important one here. Normally there are available funds to pay the going rates of the firms they select. The selected firms, I don't have to tell the audience, are as highly specialized as any doctor's clinic which you can find in this city. A particular business matter starting at one end of that law firm might go through the trust department, the antitrust department, the tax department, the labor department, the litigation department, and on down the line. I know that as a lawyer when I deal with these large city firms in the labor law field, I have my opposite number say--well, the labor lawyers say it looks all right, but I think we'll run it through these various other departments before we finalize anything. This is getting the benefit of highly specialized legal service not by direct client selection but through what amounts to a legal clinic.

In a very ironical sense, I find that the business community has the very considerable advantages of the small town and country community of 30 to 40 to 50 years ago in being able with some degree of reliability to get capable counsel and good legal services. It was just like that in the little town I was talking about. It was common knowledge that some of the twelve lawyers there did a better job in some areas than others. John is good at defending a criminal case; so-and-so is better in a title action; this man is really good on probate. Those men specialized in those areas, perhaps first by accident but later because they felt confident in those areas. They liked those areas; they felt at home in them; they were more interested in those kinds of cases. These are all

professional considerations that, I believe, still apply to lawyers generally. We like to handle those things with which we are comfortable and feel we are doing a good job. We generally handle other things for economic or other reasons if we have to.

Let's move to another area, and I am not going to discuss the details. Ten years ago, at the other end of the spectrum, the poor did not have highly specialized, competent, paid-for legal council. They were not informed, indeed, as to whether they had legal problems nor of the way to obtain a good lawyer. The legal profession has attempted many things in this area, such as the lawyer referral service and legal aid. It has been in the forefront of the fight for small claim courts, an arrangement under which you exclude lawyers if less than $300 is involved on the theory that the poor, the people at that level, can save attorneys' fees by being their own attorneys. But these charitable approaches were not adequate. Nearly every bar association in the country said over and over again we've got to do something better in this area, but because lawyers were both in the business and in a profession at the same time, they couldn't do much about it and didn't.

Largely without organized bar support the ethos of this country has changed. Money is now being expended by government bodies to provide legal service to the poor and, believe me, it is quality service. It's being provided by attorneys who are on the payroll of government and foundation agencies. It is attractive to some of the brightest young men who are coming out of our law schools. It is part of another change in the ethos of our country that the lawyers and, indeed, doctors and others who are being turned out are saying: look, we are not interested in spending half of our lifetime trying to find clients and buttonhole clients and make law-firm connections to get clients in the big city. We're interested in practicing our profession and to be reasonably remunerated and to do meaningful things in the legal field. And they're doing it.

There isn't a lawyer that I have talked to, a good lawyer, who hasn't confessed to me the feeling that one of the lawyers expressed about their activities last night at our dinner. He said when he reads some of the recent appellate court decisions he wonders how in all these years he didn't think of such an idea! These young lawyers have developed a fresh way to attack problems, an innovative approach to the law on behalf of the least advantaged people in our society. There is a hue and cry against these services in some quarters. The same old socialist bug-a-boo is trotted out, along with the taxpayer argument against government money being used to sue government agencies. They shouldn't sue the government and initiate class actions that establish principles that will protect the rights of large groups of people, the critics say. There are cries that they ought to go on a case-by-case, one-by-one basis. But it is not likely that such a backward step will be taken for long because of the obvious public interest in settling as many controversies as possible at the least expense. I read the other day that large corporate or law firms on Wall Street were finding a new kind of recruiting situation. Graduates

of eastern law schools who were among the top young men in their classes were saying to these firms: We will come to work for you at your attractive starting pay rates, but you must allow us some time to do legal things that have nothing to do with your business but do make us feel like we're doing something worthwhile in the community, handling cases of our own selection because we're interested in being a service professional. And interestingly enough, the Wall Street Journal said that this didn't put off the heads of these law offices at all. "If that's what it takes to get the guy, okay, we'll hire him. Give him a month to do his thing. He's still good for us," said one recruiter for the law factory.

To say that these things are indifferent is, I think, mistaken. They're here to stay. What does this spell? You might say, well, this is fine. Our consciences ought to be clearer. The disadvantaged people who can never employ a lawyer under the system are now being taken care of by the government. That still doesn't answer what happens to the middle-income people. I'm saying that as these cases are tried and as these services become more prevasive, the pressures that are not here today will develop among middle-income people.

There are numerous employed middle-income people who do not under the present system get adequate legal service. I mentioned the difficulty of connecting up with the lawyer. How do persons in this group make the connection? Well, first of all, I think irrationally, we still say in our code of ethics that the lawyer can't advertise. How do you expect people--when you don't have the small town situation--to choose a lawyer? People who work in industrial plants and perhaps live in the suburbs--how are they going to know about the young man whose light shines so brightly that his merit is, supposedly, known and people will seek him out. A man has a bankruptcy problem. How does he proceed? Does he go to the yellow pages? Yet the man who specializes--and because he specializes knows more about that law, does a better job than the non-specialist--is forbidden to let the fact be known that he specializes. At least at the low end of the spectrum--and this is a generalization--I am sure this is not true, and I hope that Mr. Green will address himself to this problem. You don't have this problem at the high end of the spectrum. The need is in the middle.

In 1966 the federal courts made a comprehensive revision of the Class Action Section of the Federal Rules of Civil Procedure. As you read in the paper two days ago, a suit was filed here questioning some practices of the police department on behalf of certain named minority-group plaintiffs. The court entered an order for the plaintiffs under Class Action Section of the Rules to notify all the people of the affected groups through a newspaper advertisement of the pending civil action. Any interested parties could become part of the class action or employ a lawyer to come in on their behalf. Now, the court didn't do that because of any abstract interest in maximum justice. It did it because the dockets are crowded. And the courts are looking sympathetically

upon the idea of not repetitively trying the same case over and over again, so that different lawyers can have different clients and present different arguments and make the same points over and over again. The extension of class actions itself shows the need for group, as distinct from individual, legal services in many areas of the law.

We all know that a judge would much prefer to have a capable lawyer in front of him instead of a well-meaning general practitioner in a field he doesn't know anything about. We have all found ourselves at times in court in areas that we did not feel we were as competent as we would like to have been. Specialization facilitates justice; it helps the administration of justice. Now, when the people in the community have been, by court order, notified that a pending lawsuit might affect their interest, inviting them to join, you can't square that with the old fashioned Canon of Ethics that says it's wrong to let the public know where specialized legal services can be obtained. This is more or less what Mr. Christensen points out in his article. He's not addressing himself specifically to group legal services. He's saying, isn't it time to take another look at the idea of hiding the lawyer's light under a bushel so people in this middle-income group can't find him?

Legal services can be made available in other ways. People come together in places such as their employment. They come together in their unions in urban America. Being a union lawyer representing the institutional interests of unions and specializing in the field of labor-management law by no means qualifies me as an attorney to handle the private legal problems of the members. But because of the very set of circumstances I am talking to you about, the absence of the "community" big business still maintains, the absence of an agency that can acquaint wage earners with legal services and provide them on a quality basis, they go to first one place and then to another. One place they go to is their union. Frequently union officials recommend that they see the union's attorney for their personal legal problems.

There are, of course, some things that these union members almost automatically go to a union lawyer for because they are job related. They have something to do with employment relations such as problems arising under labor contracts or industrial accidents. Some of these are cases in which the member is going to sue somebody, and out of the possible recovery pay an attorney. In a sense his problem of attorney-selection is a difficult one because there are a great many specialists. There isn't any question that he can get a good specialist because he has a fee-generative case. Since the cases are usually handled on a contingent-fee arrangement basis the problem of fee payment is not present and, lawyers being in a private business, the industrial accident or personal injury claimant is never really "legally indigent." His problem is to find a competent specialist to handle his case. Precisely because the fee-payment is not a problem, there are more attorneys willing to handle the case than there are qualified specialists who will handle it competently. Even here group legal services can help solve the specialist selection problem.

But most of these "refined" matters are band-aid cases. They are cases where the legal problem, if there was one, has long since gone down the tubes, and the problem is picking up the pieces. And the wage earner found out by bitter experience that the average answer he gets is "Well, it's too bad. If you had just consulted an attorney before you signed your compromise and release, you wouldn't be in this trouble. Now, the best I can do if they are about to attach your wages or sue you is to talk to that collection agency, and get you off the hook for another week or month." But maybe he should be advised to take bankruptcy. His debts more often than not are honest debts. All his money has been taken by the creditors whose claims could have been legally and successfully resisted if the wage earner had seen an attorney before he yielded to the threatening letters and paid off. Perhaps he didn't have any legal advice when he signed these contracts that they now have pushed him into paying, it could have been avoided had he had a little preventive legal service. Under the present system for channeling legal services wage earners, even substantial ones, simply get no appreciable amount of preventive legal service.

The business man does not normally run and find a lawyer when he is sued. Lawyers are at his elbow all the time. They are drafting the contracts that these other people in the middle range are signing. And increasingly, the group of people I am talking about are signing what amount to contracts of adhesion. They're not negotiating agreements with anybody. They buy a house. They sign the prepared contract. If they want to take a franchise for a MacDonald's hamburger stand--there it is. I just read an article in the Wall Street Journal a few days ago about this whole franchise business. The franchise small businessmen are beginning to organize. They've found they've been had in too many cases. They were so anxious to get into business: where do I sign? Theirs were contracts of adhesion, not negotiation. They didn't have any legal advice and they find they are so tied up that every time they turn around another lien springs out of the wall. Every time they want to do something in the management of the business, they are told--why you can't, unless you pay--that's covered by clause 43. I'm not here talking about putting upon poor people. I'm talking about putting upon middle-class Americans who are still wanting to go up the ladder to become entrepreneurs instead of or in addition to being wage earners. I'm talking about the accumulated savings of middle-class people. They walk into a law office. I don't care whether it is a general law office in Pomona, Covina, Santa Monica, or a labor-law office like mine. Neither my office nor the other offices are likely to have a qualified lawyer to give competitive legal advice to a wage earner who has no choice except to bat in a league that has the best legal specialists on its side.

Most lawyers cannot afford to set up what amounts to a legal clinic for the middle-income group or wage earners. The best, ablest, brightest young lawyers soon come to and act like the old country-town general practitioner. They cannot spend the amount of time in the books necessary

to give good advice in the entire field of law, because economically it is unsound to do so. They know there are people who, off the top of their heads, know the answers to questions that they are researching in the library, because these other people have a volume of that work day in and day out. Quality of legal service? We are kidding ourselves, but not the clients. Many middle-income people have become used to the idea that, well, why go to a law office? All they tell you is, you're too late; or you should have read the fine print; or you should have had more sales resistance; or this is borderline fraud, but not quite fraud; or you signed a confession of judgment when you signed that document to avoid a wage attachment.

You naturally feel good when people come to your law office. You say--well, the guy wants some service here and whether he is referred by a friend, a union, a neighbor, or a satisfied client, it is hard for a lawyer to say, "I can't handle that competently and at a reasonable charge." This is not because we're dishonest, but perhaps because we are still living with the idea that we are expected to run a law office like a general store. In any event, the absence of adequate legal service at a price that can be afforded by middle-income people is a long-standing fact.

You and I know that many lawyers find themselves brokering legal business--not because they are taking brokerage fees so much as the problem of what to do with and for the client. The lawyers know that the practice of law is burdened with this cultural lag--a small office, a small-town concept for people of modest means. What we really are saying is, "Well, we are not able to do a very good job in this particular field, but we'll try to push him along to someone else because we want his good will. He may come along with a case either in my specialty, and I will want his good will, or he may come along with a fee-generative case outside my specialty which I can make certain is well handled.

I'm suggesting that that system isn't going to last much longer. Right now the pressure is on the contingent-fee arrangements, particularly in the personal injury area. You can read the papers and the studies and see the cost of personal injury litigation in terms of court time and increased casualty insurance rates. The public or politicians may, without adequate study, sweep away the economic basis of contingent-fee litigation, the fee-generative cases, and lawyers may not have public support for any substitute unless they can show that they are facing up to the problem of adequate service. We'll have less support than the doctors had.

That is why I feel some form of group legal service has the following things running in its favor. It's with the times, in my opinion, in that it makes it possible for legal specialists to develop in their specialities, to have an adequate number of clients in their specialities to compensate them as private attorneys, not government attorneys, at a rate of their own selection and justified by their demonstrated abilities.

They won't have to worry about where the clients come from because they are brought through the group plan, the same as the doctor's patients come to the clinic. The fee schedule may be an established one, lower substantially than the going rate of general practitioners. Everyone of us knows that if you are a specialist, you can handle ten cases in your specialty in the same amount of time in which the general practitioner can handle two. So, group legal services can work economically both for the client and the attorney. I think pressures for group legal service from lawyers will pick up as sources of income of general legal practitioners dry up, notably the one I mentioned, fee-generative cases, as surely as workmen's compensation dried up legal services in some law offices. The personal injury matter is going to be reexamined somewhere in the very near future.

I think that perhaps these things will start modestly a kind of group legal service, in certain areas maybe, and maybe not overall, depending upon how much money there is available. I think the most disastrous thing that can happen, and I think the dangerous thing--I say dangerous because those of you heard that very excellent speech last night know what I'm talking about--is the adamant position of the official bar in trying to prevent any changes in this area, to be unreceptive of changes, to interpret every court decision in a narrow way to maintain the small-town concept of the lawyer which in urban America necessarily deprives wage earners and middle income citizens of competent and reasonably priced legal service. I think that the time is now. Lawyers can only suffer if they wait until they are pushed. I think the time is now, both with our bar association and with our clients.

In the case of unions, group legal services could be a fringe benefit negotiated with management. We have people on the program here who will discuss this. I think employers, without unions, can develop group legal service programs too. The fundamental idea to me is preventive law marketed as a dignified service, purchased through group arrangements and safeguarded as to quality and cost. After all, there is no reason why middle America can't get the kind of preventive law that other segments of the community enjoy. I think group legal arrangements will increase the number of legal hours spent by lawyers serving the middle-income groups and actually increase the volume of overall legal services in our society. This alone should commend it to the lawyers once they realize that this is true. It would give quality to the public, which it does not now have. It would diminish litigation, and it would at the same time go a long way toward satisfying the idealism that young lawyers are exhibiting today.

THE CALIFORNIA RURAL LEGAL SERVICES AND OFFICE OF EMPLOYMENT OPPORTUNITY EXPERIENCES

Sheldon Green

Permit me to establish some credibility in this area since I believe that it doesn't carry over from the Medi-Cal case except perhaps to establish me as a thorough-going muckraker. My early experience was in the area of life insurance. I was counsel to a life insurance company, and before that I worked in the Ohio Insurance Department in the same capacity. I was concerned with the rates of Blue Cross and Blue Shield, and I derived from that concern an interest in the prospects of the legal profession providing services to large groups of the community on other than a one-for-one, fee-for-service office arrangement.

I'll begin by telling you a few things about the Office of Economic Opportunity and its legal service program, then perhaps tell you a few things about the CRLA, and then give you a brief, rambling outline on a few of the basic needs, as I see them, for group legal services. The OEO legal services has a fund of about $42 million annually. From this they employ about 1800 lawyers in about 350 projects across the United States. A client community is probably something like 30 million poor people, and activities range from organizations of 30 men who are concentrated in cities to handle predominantly divorce and bankruptcy cases to more esoteric institutes that are associated with universities and are engaged in thinking about law reforms and providing assistance for some of the special-impact cases. There is also a program that annually trains about 300 young law graduates, the Reginald Heber Smith Program. It provides additional training after their law school training to give them special orientation in group legal services, particularly in the social-economic problems of the poor.

CRLA is one of these programs--I think the largest one in the State of California. We have a grant of about a million and a half dollars and ten offices. We have spun off a program that deals specifically with Indian problems. We have spun off another program that is engaged in rural development in the construction of housing and ultimately economic development along the Mexican border in Calexico. We have a program that provides assistance to senior citizens, not individually but specifically in doing research in the area of medical programs, federal and state medical programs. It is also sponsoring, and I think this should interest you, a training program for elderly persons as health advocates to deal with the problems of senior citizens with the health programs such as medicare and medi-cal. We also have a Legislative Advocate in Sacramento.

While we are funded to do work for the poor, a lot of the things that we do transcend the interest of the poor and assist the middle-income

groups generally. For example, a lawsuit that challenges the California constitutional provision that two-thirds of the people had to vote for a school-bond issue is obviously not just related to the interests of the poor, but positively affects the middle class as well. Another example is legislation handled by our Legislative Advocate that is concerned specifically with the protection of the consumer in creditor or in sales situations. I can point to Florence Bernstein, who in her tenure with CRLA was very active in trying to put through laws of this sort that do not just affect the poor. Perhaps to a much greater extent they benefit the middle-income group. I could give you a number of illustrations, but I think those two are sufficient to demonstrate not only the character of the broad-base orientation of a legal service program funded by the OEO, but also that more must be done representing people as a community rather than as individuals.

OEO and CRLA have their weaknesses, and I'm not going to spend too much time on them. One of them, I think, is currently epitomized by the Murphy amendment, and I am not going to dwell on that. Suffice it to say that it is designed to give governors absolute veto over legal-service program funding on a line-by-line basis as well as a program basis, and that the purpose of it, as Senator Murphy has indicated, is to give the governor a say-so in the kind of cases that are brought and the kind of programs that the organization undertakes. But this is only one of the many cooks that are involved in the soup. Other groups are boards of trustees or boards of directors who often wield a very very repressive influence on the conduct of a program. Local advisory committees are sometimes very constructive and sometimes relatively destructive. And, of course, as I said, there are the roles of the state agencies having a political orientation in opposition to a program. Whether or not any group legal-service program, whatever form it takes, overcomes this is irrelevant.

I only mention it to indicate that this is one of the limitations that the OEO Legal Services Programs are confronted with. They have to be adept at dancing over the logs that are thrown in their path to keep them from doing the kind of effective work that they should be doing. Many of them, in fact, don't do very effective work because they become so bogged down in the morass of day-to-day problems that the attorneys never have time for problems that have more impact or meaning to a group as a whole. In fact, the legal service program or attorneys who do become involved in the impact cases probably are exceptions. The area that we cover in legal services for the poor corresponds to the type of legal services that practitioners would engage in for the middle income groups. Services might range from getting a mentally incompetent person out of the pokey because he drifted onto the freeway and was arrested by a highway patrolman all the way to a case which might represent 60,000 farm workers in trying to require the state to enforce newly promulgated minimum wage laws.

An effective legal service program that might be oriented toward the middle class is going to have the same kind of spectrum, and it's

going to have the same problem--the problem of continually working out some priorities, continually fighting with selectivity. My experience in the medical area indicated that the more services are provided, the broader the exposure in the prepayment plan; the more utilization, the higher the cost; and the attorney or the doctor, if it's an effective program, or the hospital is always trying to run to keep up with the expanding utilization. He's never in a position where there's a kind of stasis between his costs and the time that he expects and the utilization by the client community. There are a number of variables in this area. Attorneys who are engaging in group legal services are going to have to always be making the determination of whether or not they will provide real quality in representing individual cases and do a harum-scarum job with most of the others, or whether they will be selective and pinpoint one case and invest a lot of time in it because it is going to be important to establish some point. They may have to set up some power relationship between his interests and, let's say, the creditors association in his community. I can recall instances in which associates of mine have spent upwards of two months on a single consumer problem--taking it right to the Supreme Court, gone on writs of mandate, any number of esoteric briefing problems that involved long long hours of cutting fresh trails, and the same consumer problem could have been discharged in a couple of hours.

Of course, that is the long and short of what group practice is about, and for that matter I think it is the long and short of what everybody's practice is about, except that in group practice you are concerned many times with a fixed number of attorneys and an infinite number of clients and an obligation to perhaps serve that infinite number of clients to the extent that they demand that you serve them.

The nature of the program's variations will affect its cost, whether it's a prepayment program or a program in which a group of attorneys are funded by a central source and where there is no insurance factor or prepayment factor. This is a variable that will probably only resolve itself over the next decade as these programs become operative. I'm not going to try to give you any bench marks for how much a program would cost. I had some figured out when we were thinking about group legal services for middle-income groups, but I think perhaps the actuaries are best able to make that determination. From my experience in the life insurance business and with actuaries, it's one thing with death tables and another thing when you are dealing with utilization of medical services and related services that are based upon casualty incidence and variance rather than the finality and certainty of death reckoned among fifty million people.

If group legal services are to be really effective and if people are to get the most for their money, and if the costs are to be low enough which is not feasible except for multi-million dollar organizations where costs might not be an immediate factor, the attorneys are going to have to reorient their approach to para-professionals and automation. The law

firms that are going to effectively serve groups will be law firms which become to some extent factories, employing their expertise to the maximum effectiveness in utilization of time and at the same time using banks of para-professionals in much the same way that an insurance company uses a secretary to assemble a number of different forms that have already been established for different eventualities in a sense, and then to put them together in a contract, and to have a salesman out there who is going to deliver it.

Most attorneys are aware that there are experiments with automation. At this point there are automatic typing devices that also have memory banks. I am sure most of you have seen demonstrations or read about demonstrations of them. Divorce and domestic relations can be pretty much formalized in this way so that all of the work for perhaps 20,000 or 30,000 clients, active clients, could be filtered through one divorce data processing center. The time the attorneys might expend could be restricted to very little more than the consultation with the secretary, possibly consultation very briefly with the client, and, of course, the relatively formalistic appearance.

The para-professionals can be used very efficiently in a number of other areas in tracking down simple administrative problems that involve agencies and in dealing with petty bureaucrats. In legal services they are being used very well in welfare problems, qualifying people for welfare, changing their benefits, and in some instances even going through the fair hearing. I must say that some of the community workers who are employed are very effective advocates, very proficient in welfare law, much more so than the attorneys who haven't developed the expertise in it because they think they want to do something more important. At any rate, automation of the legal processes, to the extent that it is feasible, and the use of para-professionals are really in my judgment indispensable if group legal services are to function effectively.

You know that the needs of the community go beyond what Charlie Hackler was describing as preventive law in day-to-day problems, and they go beyond even being available for consultation after the automobile accident or taking care of criminal matters or doing a little estate planning for the person who is in the middle-income bracket. I think the real significant contribution that group legal services can render right now to what President Nixon terms the silent majority is to have people available, attorneys available, to serve the same function in the legislative body, in the administrative agencies, in the town council, which lobbyists and representatives of special interest organizations now perform. Our analysis in legal services is that the legislatures and administrative agencies are not so much unresponsive to most of the people in the United States. It's not so much that. It's because the average American who is not associated with the National Rifle Association or whose interests are not related to the League of Bowling Alleys, but who is just there as a consumer, as a taxpayer, as the grocery buyer, is not represented or is represented on a totally inadequate basis.

Right now, unfortunately, a great deal of this has fallen on the shoulders of the union lobbyists, and I think they've got their own problems. It's hard enough for them to handle in the legislature and in the administrative agencies just the problems that relate specifically to unions as organizations. To some extent there are very under-capitalized consumer organizations that purport to represent the silent majority. I think that group legal services, and I am extrapolating from our experience in representing the low-income groups, can have a presence in every administrative agency, with every quasi-legislative session that has impact on the general community, that can ride herd on the legislature, not with one person or with two people but with 100 lobbyists to at least balance against 500 lobbyists who now present special interests. And by so doing they can provide that participatory democratization which is lost when government gets too big and too removed from most people, and perhaps restore the franchise that most people have lost by being components of enormous population units or simply urban areas.

So, I think that this and, of course, ministering to the daily needs of individuals are the chief functions that group legal services can serve initially over and above preventive law functions. I think with attention to efficiency and borrowing from the assembly lines and borrowing from business this can be both feasible and viable; and personally, as somebody who has been representing big groups I commend it to you as a task for the next few years.

GROUP LEGAL SERVICES--NEEDS AND DESIRES AS EXPRESSED IN GROUP SURVEYS

Robert Leventhal

I can't tell you what a pleasure it is to be here today. It has been a long road, but it seems we are finally getting somewhere with the concept of prepaid legal services. Knowing of our interest in the matter, Ted Ellsworth contacted me some time ago about the possibility of having a conference of this type. It was from this that the idea emerged of surveying the attitudes of several different labor groups toward legal services. Since I had a hand in preparing the survey, it falls upon me to try and make some observations about the results.*/

First, a few comments about the principal group I work with, the engineers. About 80 percent of these men have college educations; their average salary is $1200 per month; they generally have had exposure to legal situations. Prior to instituting a referral service in the Association (Southern California Professional Engineers Association), I took it upon myself to ask at a series of meetings how many would know what to do if they got arrested. Very few hands would go up. Worse yet, when asked how many of them knew an attorney they could rely upon, the majority answered in the negative. If members of this group of well-paid and relatively sophisticated men don't really know where to go in such situations, what group does? It seems that we have a big educational job ahead.

The items on Table I of the survey are rather self-explanatory, but look at the engineers' responses on Table III: 53.2 percent of them had something they thought was actionable--and by actionable I am defining something that they should have consulted an attorney about--and let the matter drop. That is probably again a function of the fact that the engineers are more aware of the actionalbe occurrences within the community than possibly a costumer or laundry worker. They knew about it; they just decided not to go through with it. Or they called our office and we told them it isn't worth suing the company for $25. Forget it.

We come to Table IV now, and you begin to see some uniform responses. I find it very interesting that the group of engineers who answered yes on Table II, that is, "yes, we have something to consult an attorney about, but we didn't go see him," they're the ones who think that we should do something. In other words, despite how they answered whether or not it was too expensive, they're really telling us point blank they didn't go for one or two reasons. It either cost too much money or, more importantly, they just didn't know where to go. They let it go and they think the collective bargaining organization has a responsibility to

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*/ Group Legal Service Survey, following this paper, pages 34-41

support these types of services. But we pretty well knew what the answer to that was going to be, because if you asked a guy, did he want a pot? The answer is yes. Would you rather have a pot with a chicken in it? The answer is always yes. Of course they would like to have the legal services.

The $64 question now comes up. Okay you want it--are you willing to pay for it? And you get into an interesting question, because for some groups you say we'll negotiate an employer contribution of 1, 2, 3, 4, 5¢ an hour, and that way the employer pays for it, and the guys say, Great! But it happens in our group that engineers are a little too sophisticated for that because they know there's no such thing. If you divert a nickel an hour from what the employer plans to offer into a dental plan, he just takes 5¢ an hour out of the wage offer for the dental plan. There's no magic in this thing.

So then you get a pretty good idea of what's involved here. Item 2 was put in on a lower-cost basis for the costumers and laundry workers because of the lesser income of these groups. We knew if we told them it would be $5 and $10, it would scare them all right out of the box. That's why you see it does not apply there. You can see the $5 and you can see the $10, and, of course, how the response and the interest in the service drops dramatically as the cost to the members goes up. Naturally, to get the union to pay for the whole thing out of the dues, they think that's just great. However, considering the pressure we place on the allocation of our dues income, you gentlemen in the legal profession, if you think you are going to get your prepaid legal care fees out of the union dues you had better forget it.

Then we asked them, in which areas did they consider there should be assistance from the attorney, and you could sort these out very quickly. They felt that the first and the primary area of assistance, if we have to limit what we are trying to do, would be assistance in civil matters. Now, ideally a full program of group legal services would meet all the requirements of the group, but being pragmatic when you start things you have to start in small boxes. So, now let's find out if we had to choose one area, which one would be the most efficient. We pretty much suspected what the answer would be, but once again suspecting and being able to back your assumption statistically based on a survey are two different things. The civil cases in all groups emerged as the area in which they would like to see a group legal practice operating through their union; misdemeanors, second, and felonies, third. Basically this is a result of the incidence of the necessity of legal support by unions. There are some miscellaneous items here that possibly Ted Ellsworth could talk about. I think some of those were written in because the people did not really understand what we meant by civil matters.

Then we came to Table V, where we asked, if your answer in Table IV(a) is yes, that is, if you want this service provided, how are we going to do this? I think we see an almost uniform opinion by the different groups with a very significant statistical variation. There is no clear-cut pattern.

We certainly don't have a majority saying we should negotiate a contribution from the employer. I don't understand, and I am going some day to try to figure out how the people who answered yes on Table II, that is, that they did not consult an attorney--and remember that half of that group said that they suffered some problems-- then turn around and don't seem to be in favor of having us negotiate an employer contribution. The engineer's mind is an amazing thing. They seem to be a little more in favor of having to pay through the organizational dues, and, of course, that carries with it the implication that we raise the dues $1 or $2 a month; and obviously we could pay through that vehicle. They are not clear cut on that either, so I would have to say that this would be a case where the labor organizations that are going to move into this area will have to exercise some leadership in making a decision. I can tell you basically that the thinking in our organization is that we are going to try to negotiate at the bargaining table. Our contracts don't come up until 1971, and maybe you will have your internal fight settled by then.

The question then comes down to what are we going to buy if we succeed in negotiating some money from the employer? I think the results here are the saddest, but it appears that Item 4 in Table V received the highest level of support, that is, free consultation and advice with a fixed fee for preparation of documents and for court representation. This is generally the type of arrangement that a number of us have in effect right now. We have our labor counsel handle the affairs of the union, and we don't mix the private practice or the general legal problems of the membership with the practice of the labor law firm that represents the union. We have understandings with the attorneys to whom we make referrals that they will analyze the member's problems without charge, advising him what his problem is and then tell him what it is going to cost; and supposedly at no less than minimum bar fee. You can have a lot of fun with this; as you know, there are a lot of bar schedules in this state.

The nonuser of legal services, going back to Table II, jumped on item 4, 56.8 percent. So I would say that initially, if we can't pay for everything, it certainly appears from this survey that we should be looking to find some type of a program that will provide for a consultation and then a fee schedule very similar to what has been done in the medical field. We will do this in the order of importance, taking civil cases first, misdemeanors second, and felonies third, depending on how far our money goes and our experience.

I hope that I haven't confused you completely with the results. I am not sure that I understand them except they do show us this: there is definitely an interest. Also, if we explain to people through our publications what some of the problems are, where they may be suffering an adversity because they are not having services of an attorney, within six months we can dramatically turn the results of a questionnaire like this around. Our members, with the exception of a couple of articles in our communication on wills, were hit cold over the concept of getting prepaid legal services, and we see a significant number of them indicating that they feel they should have such services.

I just will comment on one more thing and then I will be quiet. Prior to putting the trial program in the Engineering Association for a period of five months at every meeting I attended, usually groups ranging in size from 15 to as many as 300 people, I would ask one question: "If you are arrested on the way home from work or from this meeting and your car is searched and you are charged with illegal possession of marihuana, how many of you have an attorney that you can call?" Now, I won't ask this group that question; most of you are attorneys. I can tell you the response was somewhere between 10 and 15 percent. And then I asked: "How many of you feel that in this situation you would need an attorney?" And all hands went up, obviously. "Do you feel that the union has a responsibility to help you in this area?" And there was unanimous agreement. I have asked these questions not only of engineers, but of labor groups that I talked to.

One of the real problems is that I doubt that the rank and file members of the union have really thought about this, and if they are not thinking about it then a lot of the elected leaders who are responsible for the membership aren't either. I think this is something we have to do. This is something that the legal profession has got to do--get over their hang-ups about rendering these types of services. And we have got to do a better job of getting to these people who really need these services and make them understand what they may be suffering by not exercising the rights that are available to them.

Report on a Survey

made for

a conference on

GROUP LEGAL SERVICES

Sponsored by

The School of Law

and

The Institute of Industrial Relations

University of California, Los Angeles

In organizing the first conference on Group Legal Services, the planning committee for the conference requested the University to undertake a survey of the attitudes, needs, and desires of union members, in regard to their interest in group legal services.

Insofar as we have been able to determine, only one previous survey has been conducted. This survey was undertaken by the Los Angeles Joint Board of Hotel and Restaurant Employees and Bartenders Unions, AFL-CIO. It was supervised by Bertis L. Jones, M.S., UCLA. Partially as a result of this survey, a group legal service, based on need, was established in the Hotel and Restaurant Industry. Mr. James Denison, a participant in the conference, as counsel for the labor-management trust fund of the industry,was instrumental in its establishment and implementation.

Part of this survey parallels the survey that has been undertaken by the Institute of Industrial Relations, and the results are shown on the attached charts. In general, the results are not substantially different from the results of the current survey--with one outstanding exception. In Table I, it should be noted that the number of members who had used the services of an attorney for violations of law was substantially higher than for the other three unions surveyed. However, it should be noted that the Culinary survey asked for the number of instances in which an attorney was used, whereas the current survey requested only whether or not services had been used. In most cases there was no substantial difference. However, in regard to violations of law, there were about two cases per person which would reduce the comparative percentage figure from 48% to 24%. Part of the reason for this high ratio is probably due to the nature of the industry, but part of it is also probably due to the fact that the current survey was by mail, the Culinary survey by individual interviews.

Of the 20,212 members, 571 were interviewed. It is interesting to note that if free services were provided, based on answers to the questionnaires, the survey team estimated the increase in lawyer consultations would be from 5 cases for each 22 members to 5 cases for each 18 members in one year-- or from 36% to 44.17%.

The current survey was conducted in cooperation with three employee organizations. The primary organization was the Southern California Professional Engineers Association, and secondary organizations were the Motion Picture Costumers, Local #705, IATSE, AFL-CIO, and the Laundry Workers Union, Local #52, AFL-CIO. These were undertaken with the cooperation of the executive officers of the three organizations--Mr. Robert Leventhal of SCPEA, who will report on the survey, Mr. William K. Howard of the Costumers, and Mr. Harold Chandler of the Laundry Workers.

In regard to the survey, the Engineers' survey was conducted on a scientific basis so that no one area or class of workers would have more than a proportionate sample in the survey. In this context, each twentieth name was selected at random. In the case of the Laundry Workers, each twentieth name was selected, and in the case of the Costumers, each tenth name was selected. Returns were about 40% from the Engineers, 25% from the Costumers, and 15% from the Laundry Workers.

Characteristics of the groups are as follows:

Engineers:
- Number of Members--5,000 approximately
- Type of Employment--Major aircraft companies in Long Beach, Huntington Beach, Santa Monica, Culver City
- Education--Most with B.A., B.S., or Ph.D.
- Salary--Average $10,000-$15,000 annually
- Turnover--Group fairly stable, fluctuating at times because of defense industry cut-backs. Mostly native-born--few minorities--almost all male

Costumers:
- Number of Members--1,000
- Type of Employment--Making and handling of costumes for motion picture and television companies and costume houses. Routine checking to border-line designing and creative costuming
- Education--Majority at least high school--up to and including Ph.D.'s--and vocational training
- Salary--Fluctuates because of periodic employment from less than $3,000 annually to as much as $25,000
- Turnover--Because of declining production, turnover is high, but probably more stable than industry as a whole. Many foreign-born and minorities, especially in needle trades--over 50% female

Laundry Workers:
- Number of Members--5,000, approximately
- Type of Employment--Production and service in dry cleaning and laundry industry in Metropolitan Los Angeles and other Southern California Counties
- Education--Large number with less than high school education--very few with college education
- Salary--Many in $3,000 - $6,000 bracket--some higher
- Turnover--Probably substantial. Many minorities--quite a few foreign-born--majority probably female.

The results of the questionnaires are shown herewith in Tables I to V.

GROUP LEGAL SERVICE SURVEY

November 17, 1969

QUESTION (all figures in percentage)	ENGINEERS (all questionnaires)	ENGINEERS (only "yes" answers on Table II)	COSTUMERS	LAUNDRY WORKERS	CULINARY WORKERS (1956)
Table I					
Divorce	11*	5.3	19	3.6	10
Annulment	--	--	5	--	.5
Failure to support	--	--	5	3.6	2.1
Landlord disputes	2	8.1	10	--	2.3
Sale of home	10	8.1	16	--	3.5
Homestead document	4	10.6	11	--	1.9
Sale of personal property	2	5.3	15	--	1.7
Mortgage of personal property	1	--	5	--	.5
Mortgage of home	1	--	6	--	.6
Collection of money(plaintiff)	16	13.5	--	3.5	6.3
Collection of money(defender)	1	2.7	--	--	4.5
Wage Garnishment	--	--	--	--	1.8
Adoptions	8	10.6	--	--	.8
Workmen's Compensation(on-the-job injury)	2	--	5	7.5	1.9
Personal injury(excluding on-the-job)	3	2.7	12	--	2.8
Naturalization	--	--	5	3.5	3.8
Violation of law	6	10.6	11	--	48.3
Consultation with lawyer (Miscellaneous)	26	27	28.6	--	12.1
Making of will	26	18.9	19	3.5	.6
Child visitation	--	--	--	--	.2
Bankruptcy	--	--	--	--	.5
Dispute over income tax	1	2.7	6	--	.2
Damage to property	6	10.6	11	--	.2
Other(write-in items)					
Dispute over wills	3	--	--	--	--
Purchase of home	3	--	--	--	--
Illegal credit card actions	1	--	--	--	--
Property dispute	--	--	5	--	--
* No service indicated	36.2	40.5	40.8	82.1	--
Multiple answers(2-4 items)	30.9	32.4	4.5	3.6	--
Multiple answers(5 items and over)	5.3	8.1	18.1	--	--

* Total over 100% due to multiple answers

QUESTION (all figures in percentage)	ENGINEERS (all questionnaires)	ENGINEERS (only "yes" answers on Table II)	COSTUMERS	LAUNDRY WORKERS	CULINARY WORKERS (1956)
Table II					
(a) During the past year did you hold back from consulting an attorney in regard to any of the situations listed on TABLE I.					
Yes	41.5	--	23.8	14.3	--
No	58.5	--	71.4	78.5	--
No answer	--	--	4.8	7.2	--
(b) Do you feel that you suffered any ill effect (financial loss, inconvenience, etc.)					
Yes	22.3	48.6	19	14.3	--
No	64	51.4	59.4	63.3	--
No answer	13.7	--	21.6	22.4	--
Table III					
If you did hold back from consulting a lawyer check below the reason or reasons:					
(a) Too expensive	25	53.2*	23.8	14.3	18.2
(b) Got advice from a friend	2	5.3	5	--	2.1
(c) Got advice from some public or community agency	1	2.6	5	--	Does not apply
(d) Handled matter myself	10	21.3	14.3	10.7	3.9
(e) Got advice from a professional person other than an attorney	2	5.3	--	--	2.5
(f) Just let the matter drop	26	53.2*	11	--	5.6
No answer	34	--	40.9	--	--
* Total over 100% due to multiple answers					
Table IV					
(a) Do you think there is a need for your organization to make the services of an attorney available to its members?					
Yes	72.3	86.5	66.7	60.7	--
No	20.1	13.5	28.6	32.1	--
No answer	7.6	--	4.7	7.2	--

QUESTION (all figures in percentage)	ENGINEERS (all questionnaires)	ENGINEERS (only "yes" answers on Table II)	COSTUMERS	LAUNDRY WORKERS	CULINARY WORKERS (1956)
(b) If answer to (a) is "yes" please indicate in appropriate box which of the following methods you would prefer.					
1. Should the attorney be used for advice by telephone only(cost to be borne entirely by your union)?	34.2	43.2	19	25	--
2. Should he be available for consultation, advice and legal help except for court representation(part of cost to be borne by union and contribution of about $2.00 per month by member)	Does not apply	Does not apply	28.6	17.9	--
3. Should he be available for consultation,legal advice & court representation(part of cost to be borne by union and contribution of about $5.00 per month by member)	22.3	21.6	19	7.1	--
4. Should he be available for consultation,legal advice & court representation(part of cost to be borne by union and contribution of about $10.00 per month by member)	5.3	11.8	Does not apply	Does not apply	--
No answer	38.2	23.4	43.4	50	--
(c) List in order of importance the types of cases for which you believe an attorney should be available for consultation.					

QUESTION (all figures in percentage)	ENGINEERS (all questionnaires)	ENGINEERS (only "yes" answers on Table II	COSTUMERS	LAUNDRY WORKERS	CULINARY WORKERS (1956)
1. Felonies					
First choice*	8	5.9	10*	46.4*	--
Second choice	6	2.9	--	--	--
Third choice	48	51.4	--	--	--
No answer	38	26.4	--	--	--
2. Misdemeanors					
First choice	3	--	16	10.7	--
Second choice	51	51.4	--	--	--
Third choice	12	5.9	--	--	--
No answer	34	42.7	--	--	--
3. Civil cases					
First choice	66	67.6	38.1	10.7	--
Second choice	8	5.9	--	--	--
Third choice	5	--	--	--	--
No answer	21	26.5	35.9	32.2	--
* The Costumers and Laundry Workers were only asked to check the item that they considered most important.					
Miscellaneous items mentioned	Auto Insurance	--	Slander	Unemployment Insurance	--
	Auto Accident	--	Tax Service	--	--
	Consumer Fraud	--	--	--	--
	Probate	--	--	--	--
	Medical (Patients)	--	--	--	--
	Estate Handling	--	--	--	--
	Union-Company Matters	--	--	--	--

QUESTION (all figures in percentage)	ENGINEERS (all question-naires)	ENGINEERS (only "yes" answers on Table II	COSTUMERS	LAUNDRY WORKERS	CULINARY WORKERS (1956)
Table V					
If your answer to TABLE IV (a) is yes, answer the following:					
(a) Should your organization negotiate for a contribution from your employer in order to establish such a plan?					
Yes	32	32.4	33.3	32.1	--
No	40	57.4	19	21.4	--
No answer	28	10.2	52.3	46.5	--
(b) Should the cost of such a plan be paid for through your organizational dues?					
Yes	40	43.2	38.1	28.6	--
No	24	21.6	19	13.3	--
No answer	36	35.2	42.9	58.1	--
(c) If such a program is established, check the methods of payment to the attorney that you would prefer.					
1. Entirely free of charge at time of service	8	5.3	--	13.3	--
2. A small fixed charge for each service	26	21.6	19	3.6	--
3. One visit free - follow-up visit small fixed fee	8	10.2	14	25	--
4. Consultation and advice free with fixed fee for preparation of documents or court representation	39	56.8	38.1	25	--
5. Miscellaneous answers	1	--	--	--	--
6. No answer	18	6.1	28	33.1	--

ARE GROUP LEGAL SERVICES FEASIBLE? AN ACTUARIAL STUDY OF GROUP PREPAID COSTS

Frederick W. Kilbourne

When speaking to a group not directly involved in insurance activities you have to define what an actuary is. I have come across several definitions; a good short one is that an actuary is someone who draws credible conclusions from incredible data.

I think the basic aspect of actuarial work as it relates to the problem at hand is the evaluation of contingencies. Something is going to happen, or maybe something is going to happen; what is the probability that it will happen, and if it happens how much will it cost. If we can come up with the answers, we can establish some sort of mathematical model. This morning reference was made to mortality tables, which are an example of pure actuarial work. The probability of dying eventually is very high and the probability of dying at a given age can be determined fairly well. A mortality table is a mathematical model from which life insurance premiums can readily be established, which is why actuaries generally work for life insurance companies.

Prepaid legal costs are not the same but there is an analogy, though I will lean somewhat more heavily on the insurance analogy than is warranted since insurance is my major area of training and experience. I expect prepaid legal cost plans to evolve over a broad spectrum, but probably short of actual insurance.

Group legal services, of course, can be provided in many ways, such as by house counsel; or a regular or special-purpose bar association; or an indemnity program where you get your own lawyer and are reimbursed for actual expenses. In any of these cases I think that the basic concept of an insurable hazard plays some part and should be considered before setting up the program. An insurable hazard requires a verifiable event; since you are going to be providing services, you can pretty well establish whether this requirement is met or not. An insurable hazard should be infrequent, but this may not be a must in this case as there are service-type plans and insurance plans that cover frequent rather than infrequent events. It also should be costly, and here is something I will refer to later. It also should be fortuitous, and here again we depart because in some cases the demand for legal services does not result because of a fortuitous event. What we have is a mixed bag resulting in a lot of places where we can make mistakes.

I will continue to list some insurance principles and I think the analogy will be pretty clear for some of you. The next is participation.

You know that most insurance contracts require minimum participation which is expressed in a number of ways, as in reference to the dental plan talked about, 5,000 members as a minimum, I think. This is certainly arbitrary. I think that large groups would be best at first, because the start-up expenses will be fairly considerable and you will need a large base to spread those expenses. If you are going to have your early plans with small groups, you are going to have costs that will exceed the amount of money that will be coming in. This should be a good enough reason to start off with a group of substantial size to take up a bit of the slack.

Percentage participation is an important thing. Most group contracts require a 75 percent participation rate or so. I think that there are possibilities in group legal service for what we call anti-selection. As a matter of fact the chances for people coming into the group because they have legal problems are much more severe than in the case of medical plans. I would expect that the plans for the foreseeable future would be without employee contribution, even perhaps in the form of direct service plans. I haven't heard any argument that the unit coverage should be other than the family. People get sick individually, but they have legal needs primarily as a family, whatever the family makeup is.

Eligibility of the group is another element that is very important. Last night you heard of the primary-purpose situation. I think that a group that was formed primarily for the purpose of securing prepaid legal services would be one that would not work out financially. The range of needs for legal services varies so tremendously that you have very considerable costs involved for some people. If you just leave the doors open and allow people to come in whenever they wish, you would get into a situation where you have to constrict benefits. I would recommend against that type of an operation.

There are other underwriting requirements, too. There are some groups that, although they were not formed primarily for the purpose of securing prepaid legal services, would probably be unsuitable for the purpose. For example, the Mafia wouldn't work out too well. I will suggest another one, Parents Without Partners, or how about a special group for Parents who wish they were without Partners?

Coinsurance is something we are involved with quite a bit, and this can take a number of forms. You are probably all familiar with deductible requirements. This technique can be used to good advantage, I think, if you are trying to control utilization. If you have a plan where you do not want to have too many people coming in with minor problems which eat up your available funds, then you could impose a deductible. This should be considered, at least in the form of an appointment fee or the same thing by some other name.

Percentage coinsurance is also effective as a means of ensuring that the person receiving the services really needs them. It may be helpful for people to have someone to talk to about their problems,

but it will deplete your funds considerably if you are going to have to pay a doctor or lawyer to provide this service for problems in general.

The purpose of the program has to be worked out before the program is established. Preventive law is very important and has a very useful social purpose. There are other social purposes, such as providing services to the middle-income groups who are legally indigent at this time. Another purpose might be providing additional work for lawyers. If the trend in automobile insurance is to continue, I think there will very likely be some type of auto compensation system which will hit the legal profession rather hard. It would be desirable to have additional legal work in other areas into which the liberated attorneys could move. The program could provide additional work for lawyers in a way that would perhaps be an improvement over the existing situation.

The last insurance principle that I will mention is equity. The idea is that no matter how you subdivide the group, everyone will come out without advantage at the expense of another segment of the group; in other words, without subsidy. For example, a couple of ways in which built-in subsidies could operate are programs set up so that the costs were geared to income and the benefits were not. Then you would have a subsidy from the wealthy members of the group to the lower-income members. The situation could be worked the other way: you could have open benefits and a level of premium costs that would give a subsidy by the rank-and-file in order to pay for the heavy business expenses of a few. In either case, if this whole idea is going to spread and if we are not going to have direct control over it by some governmental body, then you must be competitive. You are going to lose out if you provide a plan that has a marked subsidy of Group A by Group B, because someone will come in and ignore the one and take the other one away from you and you are going to be in trouble. This has happened many times in programs like this and it is something to be particularly careful about.

What about the benefits themselves? The underlying cause in determining benefits has to be public demand. You can light fires under the public, but you will get nowhere without consumer support. Continuing with the medical analogy, I just saw in the U. S. Statistical Abstract that people spend some twenty billion dollars annually for medical services and only five billion for legal services, although there are roughly the same number of doctors and lawyers. Paramedical personnel account for much of the difference, for I don't think that doctors in general earn four times as much as lawyers, although I won't count on it. Much of the five billion is spent on corporate law, so we have a very light public demand for personal legal services, though the need is probably there.

Another way to find out about the public demand is to make studies or to review previous studies. The Coos study made in 1949 looked into working and middle-class utilization, and there are a number of others. I think that special surveys like these are essential to measure the public demand, which can be expected to vary considerably from one

group to the next. I think that surveys of lawyers would be important, too. Everybody has his own idea and knows what his friends think and so forth, but surveys often show a different picture.

Benefit structure, getting back to the insurance idea, can be considered in terms of basic and comprehensive benefits. The split might be between prepayment on the one hand and protection on the other, or, as I refer to them, as action and reaction benefits. You have periodic needs, for example, the preparation of a will. This could be covered within a basic plan as it is an action required on the part of the covered person. On the other hand, you have an arrest situation, which requires a reaction benefit that would be better covered under the more substantial element of the comprehensive part.

The question of exclusions also is interesting. I think that the public generally doesn't like exclusions. However, there are a number of legal services that should be excluded from whatever plan is worked out. For example, if I am in an automobile accident and I cause injury, I am covered for legal services as well as liability in financial terms by my liability insurance. The way it is set up now it would be pointless to duplicate the benefits. If I am the injured party, on the other hand, the contingency fund system probably works best because the effort required to develop a suit is such that a prepaid program is not the best vehicle. Contingency fees are best under the present system, I suspect.

The social aspects of some of the other benefits should be considered: divorce, criminal law, these things. However you feel about it yourself, I think that the public relations aspect of this should be considered, and we should find out whether or not most people feel that they want to have these benefits provided.

Once all these things are figured out we can get around finally to a price for the benefits. I have set forth the Woolworth rule of 5 and 10. If the cost is less than $5 per month then the benefit is too trivial and why bother with it. On the other hand, I don't see any evidence that public demand for legal services is such that the public is going to be willing to pay more than $10 per month. Once you have a price structure there are a number of other things that have to be provided for. I will start off discussing the contingency fund. In a brand new program like this a fund for contingencies is essential unless you have a substantial amount of free surplus so that you can afford to be hit a lot harder than originally anticipated. Somehow the money has got to be there for if you are caught short before the program has a chance to stabilize it will fail, which would be very unfortunate. Development of initial surplus is thus important for ultimate development. Surplus is needed for carrying out some of the social purposes, such as preventive law. Public education is needed, perhaps within the union that is involved, or perhaps the public at large would be the recipient of educational materials.

Probably the most important expense dollar should go toward securing management that will be able to operate the plan. You are going to have

a hard time finding someone who is experienced in the administration of prepaid legal expense plans. There should be a concerted effort for each plan that is set up to find someone who is experienced in an analogous field who can in some way draw on other experience to see that the thing gets going. This person may be a lawyer, but I would by no means be certain that this would be the best for the group. Then the program has to be sold. If it is treated as a fringe benefit, which would seem likely, then the most direct approach would be to use brokers and the existing vehicles to provide this service. Then, of course, you have to have a margin in the expense formula for actuarial fees--a very important part of the whole program.

Next we come to claim costs. Two things make up claim costs: the claim amount and the claim frequency. The product of the two is the claim cost of the program. The claim amount, first of all, is going to give you a fee schedule problem. I have spent some time lately with doctors on their relative value schedule, and they have terrific problems with the whole thing. I see no reason that there should be any fewer problems in the legal profession. Underlying it all is the determination of the value of the lawyer's time. This problem should be met head on because it has to be solved one way or another.

As far as the determination of frequency is concerned, this is partially the problem of statistics. Professor Stolz has gathered about the best compilation of these that I have seen. There are also government sources, special surveys, and then, most important, once the program is started there should be proper data design so that you can start evaluation of your own statistics as they develop.

Caution! I would use caution initially in the program because the early performance will be watched and a major failure would be very unfortunate. The proper collection of data is extremely important, and good communication is essential to that task. I remember saying that the first thing necessary is a list of all the local lawyers broken down by age and sex. The response was that it would be a lengthy list because it would include nearly all of them, with those not broken down by age and sex being pretty well bent by drink.

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DISCUSSION

Leventhal: What would you do if we walked into your office two years from now and said we have just got a clear contribution for an equitable analysis for a paid legal program? What would you do?

Kilbourne: The next thing you would say is that I have a week to work on it. Right?

Leventhal: What you have outlined is fine in theory, but I think when you get down to the very practical nitty-gritty of it, you are not going to be able to go out and survey every attorney in the community.

And if you did, they really can't answer your questions anyway except to say, "Yes, I handled fifty divorces last year." If we are going to insure identifiable groups, let's start with an indemnity plan and let's say that we accept the theory of a deductible in some total insurance. Those are good principles to avoid overutilization, erosion of your planned dollars, or overutilization on minor affairs. What would you do?

Kilbourne: After panicking, the next thing would be to draw together all the sources that are available. I consider, for example, the survey referred to earlier to be a source. It obviously has considerable flaws because the group you would be coming in with would probably be unrelated to this survey, but at least some idea of a claim distribution should be able to be projected. An evaluation can be made of the expected volatility, and my reaction would be to say that the contingency fund developed should be sufficient to reduce the probability of ruin to less than 5 percent over the first couple of years. (This would undoubtedly require an outside contribution to get the program started on a sound basis.) Other sources are also available. I'd go to Professor Stolz's study, for example. The governmental statistical sources, surveys, all of these things combine to form a fabric that is thin, but I think that it is not only better than nothing--it is something that can be used to move ahead, albeit cautiously.

Ellsworth: You get away from all this if you adopt a future philosophy of maintenance of benefits. You tell the employer it is going to cost him $5 a month, and then if it costs him $10, he'd have to pay it.

Question: I was wondering if you had an opinion as to what should be the expected administrative costs, assuming that you use a trust-fund approach rather than an insurance-company approach. What percentage should generally be applicable?

Kilbourne: Well, of course, it certainly should be kept down to a reasonable level. I think that anything much over 10 percent would be unreasonable. But here again, at least initially, I think that we get back to the idea of the minimum size of the group. Obviously there are certain fixed expenses. There should be a manager for the program, and his fixed salary is going to cause administrative costs to vary as a percentage of income as that income increases.

Question: Do you know what Blue Cross administrative costs are?

Kilbourne: I don't offhand, but I would estimate 10 percent.

Ellsworth: Well, group costs generally will be from 6 to 10 percent depending upon the size of the group for Blue Cross in Southern California. It's a little cheaper up in Northern California.

Kilbourne: Initially we might expect higher costs, I would expect, for two reasons: 1) it is a new program, 2) the premium level is less than that for Blue Cross.

Question: Fred, have you completed your studies for the Preventive Bar Law Association?

Kilbourne: The group legal services drawer in my office is getting more and more filled, but it's not yet closed. I am sure that anybody who is going to be getting into the statistical or actuarial element of this subject will start collecting their own material on it.

Question: Back to the question of what you would do if you came in with 5¢ an hour. Had you negotiated a benefit or negotiated a contribution? If you negotiated a contribution, then you might do what the Clerks do and that is to set up a fund to collect money and then decide how you're going to spend it. Would you spend it on conservative benefits initially and then develop your own statistics?

Kilbourne: It sounds good, yes, to have the flexibility that you need in the early stages. It's probably conceivable to do it without this flexibility, but there is a much greater chance of success if you have it. No question.

Question: You stated that one group subsidizing another would result in a breakdown. What group might be more susceptible? Would it be the higher-income group?

Kilbourne: I think it would be the reverse. The material that I have seen would indicate that medical costs can be expected to be fairly level. You've got one body, and things happen to it, though costs do go up with income fairly sharply. The evidence that I have seen would indicate that the curve for legal costs is quite a bit steeper. So if you have a broad benefit, one that encompassed almost everything, and charged a flat rate, there would be a very considerable subsidy of the rich by the poor within the group.

Ellsworth: The surveys, too, indicate that the higher income groups or middle income groups as compared to low income groups have a greater percentage of multiple cases during the year. In other words, one of the Costumers had thirteen different reasons why they went to an attorney in the previous year, and this is true in the other higher-income groups. Among the Laundry Workers though, only one of them had any indication that he had seen an attorney more than once.

Question: I was wondering from an actuarial viewpoint, if you had to choose between the three systems that you mentioned, the house counsel approach, the panel approach, or the indemnity or service approach. Actuarially which of these systems would be easier for you to compute a sound premium with?

Ellsworth: Did everybody hear the question? The question is, actuarially which of the three systems--a closed panel, a service, or an indemnity program--would be the best?

Kilbourne: Yes, or the easiest. The indemnity would probably be the easiest, though not necessarily the best. I can come up with a benefit

or cost of a benefit readily if you will tell me how much is going to be available. That would be the easiest, though we would have the problem of utilization to figure out. House counsel would probably be next easiest, because the principal factor there would be the work-load of the attorney and his staff. And next the service-type plan, such as the Blues initially were; this has the most problems on the one hand, but on the other hand, for reasons other than actuarial, it would seem to be the most promising.

Ellsworth: Any other questions? Thank you, Mr. Kilbourne.

INSURANCE FOR LEGAL SERVICES--A FEASIBILITY STUDY

Louis M. Brown

There are three things I want to talk about. One is to do a hop, skip, and a jump through group legal insurance for the last twenty years up to date. Second, I want to spend a few minutes on this notion of the legal needs of the people--a concept that I wish wouldn't be stated that way. I will suggest another way to state it and I will try to give the reasons. And, third, a suggestion with respect to group legal insurance that may have some kind of an answer to the question that was just posed by somebody up front: What would you do if you did have a fringe benefit negotiated? How would you use the money?

Part I

I started thinking about this twenty years ago. I wrote an article on the subject, a mimeographed copy of which you have in your folder. I want to tell you something about that. I explored this idea before I wrote the article, and decided that I was a very bad promoter. I wrote insurance companies; wrote lawyers; talked to lawyers; talked to insurance companies; and talked to some actuaries prior to 1952. I couldn't get anybody interested. I thought the idea ought to be explored, and that a good way to explore it would be to write it up and get it published in some national publication. So after writing it up, I sent it to a publisher of a legal journal who had previously published something I had written. The editor kept the article for a time and then wrote me the following letter in 1952: "I meant to write to you before now regarding the manuscript which you sent, but have found it difficult to decide just what to say. There is undoubtedly some merit to the proposal, and it probably deserves a hearing somewhere. There is sure to be opposition also to it, however, and after having published your other article (the title of which he gives) less than a year ago, I am a little reluctant to come out again so soon with another novel proposal by the same author."

I thereupon sent the article to the Insurance Law Journal, where it was published. After it was published I wrote some more letters enclosing reprints to insurance companies. I got no action. In 1957 there was a conference at the University of Southern California School of Law on legal cost insurance. I later saw a transcript of that conference. I was not invited to attend it. In 1957 I heard that the Los Angeles Joint Council of Hotel and Restaurant Employees and Bartenders' Union had started such a plan, and received some information about that at the time. You have a small excerpt of their survey in your red folder.

In 1958-59 and for a period of about five years thereafter, the California State Bar again had some hearings on group legal services. There was a report published in the Journal of the State Bar of California,

Vol. 34 at page 318 in 1959. Mr. Graham Sterling was the president of the California Bar Association at that time and published that report and invited comments. The Bar Committee stated as its basic conclusion: "The Committee is of the opinion that the need of the public for competent legal advice at fees which they can afford can be met without changing the existing restrictions upon the practice of law and upon the conduct of attorneys."

My comments in a letter to Mr. Sterling were, in part:

"I have a fundamental fault to find--not necessarily with the conclusion, but with the lack of facts upon which the conclusion is based.

"This report makes some unexpressed assumptions about the public needs. It does not state the extent of those needs, and its failure to do so is due to the circumstances that there has, to my knowledge, been very little done by lawyers or sociologists to ascertain those needs. I do not find the report at fault so much as its failure to give statistics about the public's needs as I do the apparent lack of appreciation that the first requirement for a report about the public's need is a relatively thorough inquiry about the public. . . .

"If I were a member of the Committee my minority report would have stressed the primary need for a solid survey of the public's need in California for legal services. I appreciate that such a survey takes time and money and, therefore, I might not necessarily await all of its results before writing a report on group legal services, but I would point out that the Committee is nevertheless in need of better knowledge about many things about legal services. We need to know, among other things, (1) how often members of the public now actually use the services of lawyers; (2) The kinds of problems concerning which the public consults us; (3) The number of instances in which members of the public do not consult lawyers [a most difficult thing to inquire about, because you're inquiring about a negative proposition essentially crucial, in my opinion.] (a) In those instances where the potential client knows or believes he has a legal matter, and (b) in those instances where the potential client has a legal problem but does not know it; (4) The kinds of legal problems which we will be called upon to service in order to supply the presently unserviced needs, if any; (5) The causes for the presently unserviced needs; and (6) The cost of the client, at present, of the services now rendered by lawyers and the extent to which cost is a factor in explaining the presently unsatisfied instances of the needs for legal services."

If I may be permitted a theoretical footnote or two, the legal thoroughness of this report, and it was a very thorough report in many respects, illustrated an interesting fact in the hands of the lawyers. We are trained to look to the authoritative writings of our own profession, cases and statutes for the solutions to problems presented. We are not trained to make a sociological inquiry. However, the problem presented is as much sociology as it is law practice. We do not often concern ourselves with how law and law practice work in our society, and when we do we tend to look for the issues in much the same way as though preparing a brief for the appellate court. But this report is really a sociological document and what we need is the help of persons trained outside the law to assist in compiling the data about the public upon which the report is based.

In 1960 the president of the State Bar was Mr. Burham Enerson. A committee composed of three lawyers, Messrs. Clarence S. Hunt, Victor R. Hansen, and E. Avery Crary was appointed to investigate group legal services and to write a report. I asked and was permitted to be present at the hearing held by this committee. My purpose was to make a pitch for legal-cost insurance. In stating that I would be pleased to be present at the hearing set by the Committee on Group Legal Services in a letter to Mr. Hunt in 1960, I said among other things, "If there were to be a prepaid plan, then I would draw a distinction between prepaid legal fees and prepaid costs expenses," a distinction that I find has not yet been made and to which I will again return, I hope, before my forty-five minutes are over. I also said to Mr. Hunt that I was of the opinion when I wrote the article in 1952, and I believe that I am still of the opinion, that there is no violation of legal ethics in connection with prepaid private insurance.

I appeared at the hearing, and after I answered such questions as were posed to me, I think I took about a half-hour at that hearing, I submitted a document I prepared which sketched the insuring provisions of a possible "insurance policy," and talked partly about that. Then, after appearing at the hearing, I was very disappointed, and so wrote Mr. Hunt another letter. I said, "I thought I would be asked a question at the hearing that was not asked of me. I thought I would be asked how and in what way could the State Bar do anything about legal cost insurance assuming that it desired to do so?"

There were a couple of American Bar Foundation Research memoranda on prepaid legal-cost insurance. Those are referred to in Mr. Preble Stolz's article. Then came the Hunt report. That report in the California State Bar Journal was published. I'll give you the citation: Journal of the State Bar of California, Vol. 35, pages 710 to 740--it's a long report, some 30 pages--dated 1960, although the publication probably didn't come out until 1961.

In any event, in January of 1961 I wrote Mr. Clarence Hunt another letter. "Dear Clarence: I hate to keep beating a dead horse even if the horse is a live one, but I especially dislike doing so if the horse

is a dead one. I am not sure, though, from reading the report on group legal services whether the legal-cost insurance is a dead horse. In fact, I get the impression that it is very much alive. What your committee report does say on the question is clear. 'The committee is also of the opinion that any voluntary program of legal-cost insurance has little probability of being successful.' I assume, but do not know, that this implies that if there were such legal-cost insurance, your committee would have no ethical objection to it. If my surmise is correct then I think, on this score, the committee takes a correct step forward. Unfortunately your committee report is rather evasive on whether you would so conclude."

[In my informal inquiries prior to 1952 and after that, most of the lawyers that I talked to, most of them, threw this ethical stuff at me. One of the first things that they always said was that it isn't ethical --not, is it ethical? but, it isn't ethical. Lawyers have this traditional and emotional attitude that anything that is new is unethical.

Let me tell you that we are born with that. Let me tell you that in the classes that I teach at Law School to people who are embryonic lawyers when I make a suggestion which appears to be novel, the first crack out of the box my students will come up with is, "It's unethical." And they don't research it. They just have that feeling. And where this comes from just amazes me.]

"In addition, I object to the statement that the committee makes. I do not think that your committee, or, indeed, any group of lawyers can adequately make an observation that any kind of insurance has little probability of being successful. In short, it is just not the function of lawyers to make that kind of prediction. Of course, there are vast underwriting problems, but I would not conclude from this that "There is no indication that the public would buy such insurance." Of course, there is no indication that the public would buy it, but I do not think it is the job of lawyers to make that kind of observation. I think the same kind of observation could have been made about lots of other kinds of insurance before insurance companies started to write such insurance.

"In short, I think I would have preferred that the committee report had said something like this. 'The committee need express no opinion as to whether or not voluntary program of legal cost insurance will be successful. There are undoubtedly vast underwriting problems and other economic problems in connection with writing such insurance, and whether or not insurance companies offer such insurance to the public is a matter that concerns them.'

"Then, if you really want to be conservative, you could add, 'We withhold an opinion as to whether or not such insurance as written would meet the ethical requirements of the Bar.' Or if you'd like to be a little more constructive, you could say, 'While we would prefer to withhold opinion as to whether or not such insurance as provided would meet the ethical requirements of the Bar, so far as we are now aware, it

would seem that such insurance could be written so as to meet the requirements of the Bar.'"

Mr. Hunt replied. I kept this reply confidential until about a year or two later when I asked him if it could be released, and he authorized its release which occurred at another meeting of the Board of Governors of the State Bar of California. Mr. Hunt's letter to me, dated January 1961, reads: "I noted your comments of January 13, 1961, with keen interest, and in passing I may say that whether the horse is dead or not may be questionable, but the demise of the committee is an accomplished fact."

To answer your inquiry concerning what this committee thinks about voluntary programs of legal-cost insurance, I can tell you what I believe it thought and I can tell you what I think. It was and is my impression that a voluntary program of legal-cost insurance, if properly written and which will permit the public to select counsel completely independently from any influence or restrictions, each such insured to select counsel of his choise, should not pose any problems from an ethical standpoint. It is my belief that it is the thinking of the other two members of the committee.

"I am quite sure that the language of the committee in expressing its position about a voluntary program of legal-cost insurance is the result of the thinking of the committee in connection with the problem after it had completed its study of the whole subject of group legal services. Perhaps we were wrong. We didn't think so."

Finally there was written in California a lengthy report in the Journal of the State Bar of California, Vol. 39, p. 639, in 1964, sometimes informally referred to as the Murray Schwartz report, now Dean of the UCLA Law School. A portion of that report has to do with legal-cost insurance. Pages 721 to 722 state the following conclusion: "In the face of this uniform negative response of the commercial insurance industry, this committee must conclude that the possibilities of developing plans for insuring the cost of legal services have not yet been demonstrated. We are not willing, however, to abandon the possibility completely. What is needed is further exploration and development primarily of the possible market for such insurance, a question which will, of course, require actuarial studies and public surveys of the need for legal services."

Nothing in that report as stated indicated any unethical propriety with respect to legal-cost insurance. My exchange of correspondence with the State Bar concluded December 20, 1964, in a letter to Mr. Burham Enerson, then chairman of the Committee of Group Legal Services of the State Bar, formerly president of the State Bar. "I might at some future time desire to comment upon the thorough report made by your Committee in the Journal of the State Bar of California, Vol. 39, p. 639. For the present I make only one minor point. In Appendix A, page 729, you outline several questions which would form the basic part of a survey. Question 6 concerns cost of legal services. I believe that there are two separate items in the cost of legal services: (1) fees to the lawyer, and (2)

other costs--usually court costs. In the terms of dollar cost of litigation, I often feel (I wish the data were available) that costs are an unfortunate deterrent to justice. For example, I wonder how often a deposition is not taken because its cost is too much for the client to bear; or cases in which a lawyer could better protect his client's rights, if he had the funds to provide certain expert testimony or make certain factual investigation. I must confess my own ignorance of the impact of any of such costs upon the rights of the people.

"One of the subsidiary hopes I had in presenting the idea of legal-cost insurance was to focus attention upon court costs and other such costs, as well as the costs of lawyers' services. It may well be that these other costs are insignificant and for that reason the report fails to identify them separately."

The hop, skip and the jump takes us to the present. And at present, though I am not aware of everything, I am aware of a few things, some of which have been mentioned here. The American Bar Association is to some degree in the act and has some kind of committee--I am not sure of the name of it at the moment--but there was a meeting in Dallas, Texas. Mrs. Florence Bernstein was present; I was present. Mr. Janofsky, the President of the Los Angeles Bar Association, was present, and Mr. Sharp Whitmore, of the L.A. Bar. A few other people were also present.

A discussion was held with respect to legal-cost insurance. The chairman of that committee was Mr. Goldberg, and we were informed, and I was informed, and you were informed of the following: that the Ford Foundation and the American Bar Foundation were jointly considering some contribution of dollars as a kind of start-up fund for two bar associations in this country to experiment with something in the nature of legal-cost insurance.

The American Bar Foundation had previously explored the possibility with some bar associations, and two bar associations were selected. The Los Angeles Bar Association, a large bar association, and the Shreveport Bar Association, a bar association of modest size. I believe that a third bar association in Oregon had been selected, but it fell by the wayside somehow or other. It is a small bar association. In connection with the preparation for this meeting, I wrote to Mr. Goldberg and others to try to get some information as to the current status of these experimental programs.

Mr. Goldberg wrote me on October 29th of this year. "Thank you for your letter of October 27th. We are making progress at a snail's pace in this area. Shreveport has been funded (and I'll tell you about that in a minute). Henry Pollocks will give you the details as to his progress there. (Henry Pollocks is a lawyer in Shreveport and chairman of the committee there.) The ABA voted to fund Los Angeles for three years on condition that Ford Foundation or any other foundation matches the $48,000 three-year grant. We do not have a definite answer on that, and this is the only thing that holds it up."

Mr. William Peters is the chairman of the Los Angeles Bar Association's Committee and he wrote me. I know a little bit about the goings-on in Los Angeles. I don't know that much about it, but the Los Angeles Bar Association has been, I am told, negotiating with the California Teachers' Association trying to work out a plan or a program with that Association. I have not seen anything that looks like a policy of insurance that gives the insuring clauses. I haven't seen that in the Los Angeles Bar Association proposal. I haven't seen any "premium" rates set up either.

The Shreveport Bar Association has had prepared for it a plan for prepaid legal services, a preliminary report, by the Southwest Administrators, actuaries and consultants, dated September 1969. That's this report that I have here. It was recently sent to me, and it appears to have information in it which defines the benefits which the insured would get somewhat in the form of an insurance benefit in terms of dollar figures.

As far as I know the Los Angeles Bar Association doesn't have this kind of thing. The Preventive Law Bar Association here does have what looks like a policy of insurance; it looks like a pre-thought out plan. It looks like the kind of thing that somebody can buy. It looks like it's for sale, so to speak. Shreveport and Los Angeles haven't gotten anywhere near that far, as far as I know.

That's the current status. Shreveport and Los Angeles hope that something like $100,000 advance money will be forthcoming to be a kind of a starting up fund. Something like the following has been talked about: a group of lawyers would agree--a kind of a lawyers' reference service in a way--to render services at scheduled rates and that organizations or members of an organization like the California Teachers' Association would pay a premium, say $100 a year, and would receive services of a defined sort. That's the general scheme and the general framework.

There isn't any problem now currently talked about in the way of the ethics of legal-cost insurance. I don't hear the ethics thing--the ethics thing doesn't ring anymore. It's past that. It's past that, in my opinion, for a curious reason that has to do with the background of the Stolz report--Preble Stolz' article in Vol. 35 University of Chicago Law Review 417 (1968). The title is, Insurance for Legal Services: A Preliminary Study of Feasibility. My guess of the background is (I am not sure whether this is a guess or whether this is information; if it's information, it came from Preble Stolz; if it's a guess, it is based on my conversation with him when he was working on a report) that segments of the American Bar Association are concerned about group legal services. Such segments don't like group legal services for the kinds of reasons that we heard last night. (The address by Mr. Richard W. Nahstoll) In this sense, legal cost insurance walks in through the back door, facing backwards. The reasoning may go something like this. Since we don't like group legal services, and because there may be a need for

means to pay and provide for increased amounts of legal services, we might look around for other solutions. Perhaps legal cost insurance is such a solution. If so, maybe legal cost insurance is less bad than group legal services. My own preference is to think of legal cost insurance as having affirmative value and entitled to walk in frontwards, and through the front door.

What I had in mind back in 1950 when I first wrote about legal cost insurance was affirmative. I didn't hear of the words "group legal services." These words weren't in the vocabulary then. That wasn't what I was thinking of. I'll tell you what I was thinking of. I used to work with my father in business (1937-39). It's very simple; it goes on today as it did then. I was on the management side, but I used to talk with--it was a small business--some of the employees. I was a lawyer at the time, although I wasn't practicing law. Occasionally these employees got into some legal troubles, for example, their wages got garnished. Anyhow, I found out that it cost money to represent these people. They had to pay the filing fee. They had to hire me or hire somebody else to represent them, and I felt bad about that. I felt bad then, and I feel bad about the cost of the defense now. Yet I just had the feeling there ought to be a better mousetrap; there ought to be a better way; something better has to be found. And one of the notions that occurred to me that might be better is something like Blue Cross legal-cost insurance. That's what put me on the kick, and I'm still there. End of Part I of the speech. I won't go on so long on the other two parts.

Part II

This expression, "The Need for Legal Services," is a rather unfortunate though popularly used expression, but it is really not what I like to think about as a lawyer. The trouble, you see, with the word "need" is that "need" is a subjective term, not subjective by the lawyer, but subjective by the potential client. And the potential client doesn't have a need until he has a felt need, until he feels it, and he doesn't feel it usually until it is there, and until a real crisis develops. I don't like to think of lawyers' services that way. I, among other people, for the last 20 plus years have been concerned with the notion of preventive law as a means of practice. It doesn't rise out of that kind of subjective felt need or crisis.

What I am concerned about is the "appropriate use of legal services" not the felt need of the individual, but rather that desirable, beneficial, and constructive use of legal services should be available. When we survey the <u>need</u> of the public, we are saying to the public, "You know when you <u>need</u> a lawyer. It is not for the profession to tell you when you need one. You tell us when you need to hire us." From a preventive law point of view that's putting the thing the wrong way around. I appreciate that from a selling point of view--if we're going to sell this kind of insurance--it has to be sold because the individual does have a felt need for the insurance. I understand that all right, but I

would suggest that at least there be a footnote in some of the surveys that are made that when they talk about needs, those needs are derived from ignorance of the potential client, not from knowledge of the profession--certainly not from preventive law knowledge.

Part III

Somebody asked a question earlier concerning the way in which a small amount of funds could be beneficially used. I'm no actuary. I don't know all the details, but I do know this, and I can make a prediction. I know that the major cost in terms of legal services are lawyers' fees. That's the major item. But there's a minor item. There's a minor item that lawyers call "costs" which sometimes in litigation are added to a judgment. More importantly, there are actual out-of-pocket expenses costing people money that don't go to the hands of lawyers, like the taking of a deposition, or the hiring of investigators, or the hiring of an accountant, etc. These are, if you want the analogy to the hospital and medical situation, like the hospital expense as compared with doctor-bills--something like that. I think that it might be possible to start this kind of insurance by insuring these kinds of extra costs. Not a penny into the pockets of the lawyers but dollars for these extra costs. Do you know that it costs $42 to file a superior court action in Los Angeles. It would cost--what is it--$50 or $100 a day to take a deposition, and then it costs more dollars to get it transcribed. It costs dollars to take an appeal.

It means mostly hard dollars out of middle-income pockets, and they can't afford it, $40 and $50 and $100. My office represents some wealthy people, and we just go right ahead and hire anybody we need, investigators and experts, and we usually have the funds, and we take depositions when advisable. I don't worry about the rich people, but I certainly worry about people in law and in the middle-income bracket. I say to the lawyers on this level, "Look, you ought to back this idea of insurance for costs. Why ought you back it? First, you ought to back it because it is just. The system of justice and legal administration in our society requires that. Second, it's a practical matter. You want to do a good job. You have to do these other things in litigation. You have to if you want to do a good job. But you can do a better job--let's put it that way. And the next reason is the pocketbook. To the extent that your client doesn't have to pay the filing fee, and to the extent that your client doesn't have to pay the deposition costs, he has more money in his pocket to pay you a fee. It's as simple as that."

Now I would suggest to you the following. From an acturarial point of view it is much easier to get hold of data and information about the amount of these incidental costs that have been incurred in Los Angeles County last year than it is for the amount of legal fees. That's a much more findable kind of fact. That's more ascertainable. It's a much more controllable kind of a fact. At the lunch table today I learned something about the attitude of union people in connection with the

thinking about this kind of thing. Union people think that this kind of insurance in the health field has made the doctors rich or will make the lawyers rich. What I'm proposing doesn't make the lawyers rich. If confined to costs there won't be a penny going into the pockets of the lawyers.

And now, I would suggest to you another corollary aspect I've been talking about, and that is this: it's tough to get this thing started--largely because of selling it to the public, but also because of the difficulties of writing a program of insurance with all the unknowns that Mr. Kilbourn talked about, and maybe a lot more he'd think about but that he didn't mention in the short time that he had. There are fewer unknowns with respect to costs; and furthermore, if anybody started this, we would begin to have a much more realistic concept for other acturarial determinations. At least that's what my imagination tells me. So, if I had a small amount of insurance premium, what I would do is think of just providing insurance for these extra costs. And I'll tell you what will button this up.

Some smart lawyer arguing a case to the United States Supreme Court is going to button this up, and I'll tell you how. We have had Supreme Court cases that tell us that unless the people have adequate legal services, the case can't stand. And I say and have believed for a long time that adequate legal services not only means the services of a lawyer, but it means access to these other services in order to represent his client adequately which means that he has to have the tools at hand to do that with, including whatever extra testimony or pre-trial discovery proceedings are appropriate in this situation. And if the client doesn't have the money, the client isn't getting justice. And I'm waiting for some smart lawyer to say that to some smart court like the California Supreme Court. And once the California Supreme Court or some court says that legal services are not only required for a lawyer, but he has to have the tools at hand of this sort or we don't have justice, it will be easier to sell this type of insurance. Imagine doctors practicing medicine without an X-ray machine. That's the way lawyers for the poor have to practice law by and large today, and that's the way lawyers have to practice law for middle-income people.

TRUST FUND IMPLICATIONS

James Denison

After Louis Brown's impassioned remarks earlier this afternoon and Charles Hackler's relaxed and persuasive presentation this morning, I feel that what I have to talk about is relatively prosaic.

To talk about the trust-fund implications of Group Legal Plans presupposes that you are going to select a trust-fund type of organization to run your group legal plan. This, it should be understood, is not necessary. There are other alternatives. For example, you can deal directly with an insurer, and seek to buy an insurance policy under a voluntary insurance program. You can have a corporation especially organized for this purpose, or for that matter, you can create a partnership by written agreement, whether it is made up of lawyers or somebody else. You can have a subscription plan for the members, (what I would call a "club" plan) or a craft plan based on the labor-management trust.

For the "club" situation, we start with the basic organization of a fraternity or a fraternal society like the Knights of Columbus or the Masons. This possibility has not often been discussed, but it can open to the members of the society a full range of legal services. It can be a club organized for any kind of purpose, whether it be an athletic club or the Society of Mayflower Descendants. The kind of society need not be unique; any society can organize a group legal plan for its members.

In any event, what you are going to need is <u>some</u> document that sets up the basic pattern of the structure of your plan; in the case of a trust, it is a Trust Agreement.

However, there are certain advantages to the trust form of organization which, I think, make it appropriate here. It provides a convenient way of separating the machinery for handling and paying money from the dispenser of the legal services. It also provides the machinery for handling the money under fiduciary standards. And, finally, it offers to the innovator a vast amount of administrative experience which is already available, particularly in the labor-management field, derived from 25 years of running jointly trusteed plans of various kinds. The trust is a device with which unions generally are familiar and are now comfortable.

Assuming that a trust is chosen as the format, what the trust instrument must accomplish here is the same thing it must accomplish in every other trust case, i.e., it must deal with the basic problems of trust law, plus all the special problems of this particular field.

The trust agreement, dealing with basic problems of trust law, must specify broad, adequate powers for the trustees. It must also spell out how the attorneys are to be selected and how a fee scale is to be developed.

The trust agreement certainly won't specify who the attorneys will be, nor what the fees actually will be. But it certainly will have to spell out the machinery for selecting the attorneys, and for fixing fees. And by machinery I mean how to deal with disputes, with a lawyer's incompetence, with dissatisfaction among some members. I am sure that any group legal plan, no matter how well conceived and administered, will have gripes. There will have to be provisions made to deal with them.

Next, the trust instrument will have to clearly specify the rights of the beneficiaries, and the benefits to be provided, not so much naming the benefits as defining the structure of the benefit program. Next, it has to provide for some limitation on the liability of the trustees, particularly in the area of malpractice. It will specify, of course, that the trustee is not going to engage in law practice, but since he is paying the lawyer, it must be anticipated that the trustee may be named as a party defendant in a malpractice suit, under a claim that the trustee selected an incompetent lawyer who botched up the job. The trust instrument, to protect the trustee adequately, must deal with this problem, for there is always the real danger that even the best trustees may devise a poor plan, or may in the administration of the plan select an attorney who turns out to be incompetent.

Every group legal plan must provide, of course, for adequate staff, must set up enough money in reserve to handle the administrative expenses, and must provide a framework for sound administration. And last, but certainly not least, the plan must specify fiduciary standards in handling the money. All of these points must be covered in the trust instrument.

Now let us consider what is required in the trust documents by reason of bar association fiats, for what will it profit a plan to be set up, only to have all its attorneys disbarred or disciplined? The Conference has already heard some discussion about California Rules 20 and 21, as proposed, now pending before the Supreme Court of California for approval. Having gone through the machinery of development in the State Bar Committee, these Rules are now up for final consideration, and either adoption, modification or rejection by the Supreme Court of the State of California. These new Rules will not become effective until adopted by the Supreme Court.[1] Judge Gray deals with these State Bar Rules in greater detail in his remarks, and Mr. Nahstoll gives the background to the ABA resolutions in his paper. I take a more practical approach and deal with what I think the general impact of these rules will be on the documents to be drafted. My concern as a practicing lawyer (who has already drafted one notable group legal plan, supervised its administration, saw it tested, watched it work and heard it analyzed back and forth ever since) is this: how do we make the plan work, first on paper and then in practice:

There are two problems that are new to the situation, factors that were not present at the time the Los Angeles Culinary Plan was drafted

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1. Editor's Note: Rules 20 and 21 were approved and adopted by the Supreme Court of California, effective January 21, 1970. The final text and approach is printed in State Bar Report for February, 1970.

back in 1957. First, there is the primary-purpose clause.[2] I don't think that there will be any difficulty about this factor unless you organize a special group for one purpose only, namely to pay legal fees. I assume that organizations like the Gavel Plan (which are primarily organized for dealing with legal fees) will not be the front organization, and will not be the basic group whose purposes are to be considered. I assume the Gavel Plan simply will be the conduit to provide the legal services; the contracting group with which it would make its contract will presumably have primary purposes other than the purchasing of legal services. However, this new factor which is present in both the Supreme Court of California Rule 20 and in the ABA rules, must be recognized and dealt with in the trust instrument.

The second newly raised problem created by the ABA (not the California Rule) is the phrase: "to the extent controlling constitutional interpretation requires allowing these services." I don't know what you are going to do about that ABA language except meet it head on in your program. I am sure you believe as I do that there is a basic constitutional right to decent legal representation at a cost that every man can afford. This ought to be as much a right of the middle class as it has always been a fact of life for the rich and, thank heaven, has become a fact of life for the poor. If a person is entitled to legal representation in court, the amount of money he has should be unimportant. Therefore, if the constitutional right to attorneys exists for the poor, I submit that it should exist as much for the middle class, to the extent that there is any inability to pay fully for adequate legal services. If this is questioned, I think you are going to have to fight it out, all the way up in the courts. In any event, it must be dealt with in the trust instrument.

I know that it is easy to say "Barge ahead boldly in your planned direction; to hell with the icebergs, let the icebreaker plow right through them." This may be fine for the theoretician, but for the practical lawyer with a client to protect, a little more caution is required. The answers to questions, the advocacy, has to be a little bit different than if he is presenting an abstract new proposal in a classroom. And I submit to those who are attorneys, that to the extent that you represent an existing client in this new field you're going to have to protect him like every other client and safeguard his case against the known hazards. It may be fine to steer right over a coral reef, but its safer and smarter if you can find a channel into the lagoon without having to risk taking the bottom out of your ship in doing it. But if the application of the "controlling constitutional interpretation" is denied to your plan, you will have to fight in court.

You may wish to wait for a judicial okay, but my guess is that you are going to have to be ready, willing and able to proceed with your program once started, in spite of all attacks and over any opposition

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2. State Bar Rule 20 provides: "As used in this rule a group means 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."

that may develop. If you do so, the first thing I suggest is that your trust instrument announce boldly your plan's hearty endorsement of all those aspects of the legal profession's principles with which you have no quarrel. I see no reason why every plan cannot guarantee the preservation of the confidentiality of the attorney-client relationship and the privacy of the secrets told the attorney by his client. It's none of the fund's business what the client tells the lawyer, so make no bones about it. Lay it on the line. "The trust fund in its administration is not concerned with the confidential matters in any file." With statistics, fine; with types of cases, yes; with lawyers' fees and that kind of thing, yes; but with the contents of the file, no! Spell it out in your trust fund instrument.

Make sure also that the lawyers' judgments are proclaimed as being independent, untrammeled, and free from any control by trustees or creators of the trust, whether they be union or employers. Let nobody second-guess the lawyer. If he does a sloppy job, set up machinery for having the bar itself review his conduct. But don't let anybody within your organization have that right, and make that clear from the start. And in selling your program to the members, advertise this point well. It's a real advantage to them, and they are entitled to know of this advantage at the time the program is sold.

There is another point which you must be very careful to cover explicitly in your trust instrument. The plan cannot exploit the lawyers nor share in their fees.[3] Someone said this morning, "It would be wonderful if the plan had all the attorneys on salary and the plan collected all the fees, including the contingent fees in personal injury cases." Be very careful in this point. I believe that it is ethically permissible for the plan to retain a lawyer on a salary which exceeds any reimbursement which the fund might receive from contingent or other fees collected. But it is absolutely improper and unethical to collect one cent of profit for the fund over and above the court costs of your cases and the salary of the lawyers. Such profit to a lay intermediary is paying a layman to do legal services. It is absolutely prohibited and quite properly so. If you do it you will make nothing but trouble for your lawyer staff, and clearly violate the provisions of new Rule 20. The legal profession cannot permit lawyers to be exploited, nor can it permit an unqualified layman to make any profit from their fees.

Looking back over the years to 1956 and 1957 when the Los Angeles Culinary Group Legal Plan was set up, most of the objections that were raised at that time have been answered by the intervening cases--the Brotherhood of Railway Trainmen case[4] and Button vs. NAACP.[5] These cases have now established the right of unions to channel cases to their own particularly competent attorneys. The right to do this was one of the challenges made against the closed panel approach used in the Los

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3. See Rule 20, State Bar of California

4. 377 U.S. 1; 84 S. Ct. 1113 (1964)

5. 371 U.S. 415; 83 S. Ct. 328; 9 L. Ed. (2) 405 (1963)

Angeles Culinary Plan.[6] However, that Los Angeles Culinary Plan had an additional feature which I would recommend to you, and that is, let the member of the group who has an attorney of his own have the right to consult that attorney. If you want to issue to the member a warning that a particular kind of case calls for a highly qualified specialist, that is permissible. You may also state that the Plan has a working arrangement with experts (no names can be mentioned, of course) competent in the field that this particular case comes under, but if the group member wishes to take his divorce case to his own attorney who is a corporate specialist or a tax expert, that's the member's mistake. Let him make it. Let him pay the fee, or, to the extent that your fee is payable to any lawyer, you pay the fee.

It is a real advantage, if you can do this, because you eliminate one attack against the Plan by not trying to take existing law business away from one attorney and place it with another. I will guarantee that one of the surest ways to arouse opposition to your plan will be to jeopardize a lawyer's existing relationship with his client. When you think about it a moment, you may realize that such Bar opposition is quite justified. Hence do not incur such opposition. It is unnecessary to the success of your plan. In California, of course, under Rule 20 as finally drafted, the right to one's own attorney is a mandatory part of every plan now.

Finally, make sure in your trust agreement that you state unequivocally that the lawyer, and only the lawyer, gives the legal advice. Doctors who receive their fees from group or insured medical plans have been able to preserve the independence of their medical judgments. Why should not the legal judgments of lawyers be equally independent? This point is as important to lawyers as independence of medical judgment is important to doctors. There is no valid reason why a group legal plan cannot protect the independence of the lawyer's judgments. It is important that the trust instrument state just that. All that the group administration is going to do is police the plan, make sure that it is honestly and efficiently run, and pay its bills. Those are the functions of the group administration. The lawyer and the lawyer alone renders the legal service.

Another factor which must be considered, may not have to be spelled out as such in the trust agreement, but it must be made clear to everyone involved from the very start. Everyone, trustee, administrators, creators and backers, must realize that the attorney doing his job must receive the 100 percent support of the group. If the attorney tackles an unpopular job, the group is going to get pressure. The group must be prepared to resist that pressure.

Let me give you two illustrations. The first that comes to mind, of course, is "Don't embarrass the government." The lawyer that proves

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6. See Hildebrand v. State Bar, 36 Calif. (2d) 504, (1950) which was one of the cases most frequently cited as prohibiting group legal plans.

a popular law to be invalid or unconstitutional is going to be attacked. The lawyer who succeeds in overthrowing a legal procedure which everyone has taken for granted is going to be denounced. In both cases the group must be prepared to back up the lawyer.

A second illustration comes to mind from my own experience with the Los Angeles Culinary Group Legal Plan. One trustee told me, "You must guarantee me that this Plan will never defend a guilty man." This may sound laughable, but it is amazing how many people think that the lawyer representing the defendant is the one to decide whether the defendant is guilty or not. Many people forget that that is the court's job.

By and large, this is not so unusual. The average man always thinks that he and his family are entitled to full legal representation no matter what the charge may be. But that same average man is impatient with legal maneuvers directed toward protecting the rights of the defendants in the highly publicized cases. "Give 'em a fast trail and no fancy legal maneuvers," is always as prevalent a reaction today as it was in the pioneer community. Anyone organizing a group legal plan must be prepared to recognize this situation and be prepared to deal with it.

Turning now to the legal problems inherent in labor-management trusts, let's start with Taft-Hartley.[7] I don't think that one of these group legal plans can be qualified as a jointly trusteed Taft-Hartley trust. They do not have the requisite "purpose." The lawyers will understand why I say this, but for a minute let me take a moment to spell out why this is so. Section 302 of the Taft-Hartley Act says it is a crime for an employer to pay and a crime for the union representative to receive, any money or thing of value from an employer. And then Section 302c sets up the specific exceptions to this broad criminal statute. These exceptions are five: the payment of wages; purchase of a commodity at fair market value; the payment of union dues under a checkoff agreement; the satisfaction of a judgment; and payment to a trust fund that has been established for certain named purposes. Group legal services is not one of the named purposes. Therefore, payments for such a purpose to a pre-existing Taft-Hartley trust would be wrongful.

I would like to see the statute amended. It may very well be amended, but it hasn't been amended yet. The language of Section 302 has to be respected. That means that group legal plans can't qualify as a Taft-Hartley Trust, at least at present.

But that doesn't mean that you have no alternatives. Since it is a crime for the union representative to receive payment for such purposes, the first obvious answer is, don't have any union personnel get the money. Thus, a bank can be co-trustee with the employers, or there could be a trust fund with employers being the only trustees, the only ones receiving the money. This may seem a shocking proposition at first, but this was the system that was used with the Los Angeles Culinary Plan.

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7. LMRA, as amended 29 USCA 151, 61 Stats. 141 (1947)

If the collective bargaining agreement set forth the basic policies, establishes certain limits and specifies the benefits, the actual administration of the money can be trusted to any honest person. Besides, that person can always be bonded. Or you can use a corporate, rather than a personal trustee.

If the trustee being the employer alone isn't acceptable, there is one other supplemental device which was tried in two Southern California industries, in cases where employers alone served as the trustees. It was to use a joint advisory committee (jointly structured, with half of the members coming from the union side and half from the employers' side) which had a veto power on any policy decision of the employer-trustees, and over any instance when money went to the employer-trustees. When a policy decision was to be made by the trustees, the joint advisory committee was notified; if that committee didn't object within ten days, the decision of the trustees became final and was carried into effect. This machinery enabled the union to have a sort of veto power, if you will, but subject to reasonable interpretation and ultimately, to arbitration in the event of irreconcilable disputes between the parties sitting as equal members on the committee.

In one industry, the joint advisory committee had a public member. There were three members from the union side, three from the employers' side, with a seventh public member. Thus, arbitration was built right into the procedure at the committee level.

The next thing your trust agreement is going to have to deal with, of course, is the tax laws. Exempt-organization problems are covered by Mr. Bernstein. I won't go into those, but there are certain advantages if you can bring your trust within an exempt organization classification. (Parenthetically, remember that you don't have to have a valid Taft-Hartley trust to be tax exempt. Similarly, you don't have to be tax exempt to have a valid Taft-Hartley trust. Most trusts will fall into both categories, but you don't have to have both of them.) One of the advantages of having a tax exempt trust, particularly if it is an "employee benefit association" type of trust,[8] is that small employers can presently participate in the benefits to the extent that their membership in the group is not more than 10 percent of the total group membership.[9] Under this arrangement, you have the opportunity to extend the benefits of this group legal plan to the small "mamma and poppa" employer in your industries, if that becomes an advantage.

Some comments on the Los Angeles Culinary Plan I think might be helpful to you now. The benefit structure of that group legal plan was an addition to the welfare and retirement benefits that were provided already. That industry already had a welfare fund and a retirement fund. Recognizing that there were certain areas within which poor people were not being properly serviced, an Emergency Relief Fund was set up, to help only those who suffered from special or severe financial hardships. The

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8. Section 501(c)(a) I.R.C.

9. Rev. Proc. 66-30

qualifying definition used by the trustees was "family income of $3,000 a year or less." This was the economic bracket wherein the trustees felt that the need for legal services existed at that time. Most of the Bar Association attacks on group legal plans cited Canon 35. But there was an exception in favor of charitable ventures in Canon 35. So, putting this particular plan on the basis of a charitable venture, enabled us to avoid the prohibitions of Canon 35. If you will read Canon 35 and Rule 3 of the State Bar as it existed in those days, you will notice a difference. The former contains the charitable exception; the latter does not.

The present new Rule 21[10] appears to expand the whole concept of the "charitable" exception formerly contained in Canon 35 into a detailed and alternative program as distinguished from its programs set up under Rule 20, which do not need to invoke charitable concepts.

Utilizing the exception in favor of charitable activities in Canon 35, the Culinary Plan dealt only with those who were in desperate financial straits. If they needed prescribed medication, it was paid for by the trust. Home nursing care and all prosthetic devices, wheelchairs, crutches and such things were provided by this Emergency Relief Trust. These were benefits offered outside the group legal plan, and in addition to it. In order to qualify for any of these benefits, one had to show extreme financial need. Similarly, to prove eligibility for the group legal aid, one had to show extreme financial need. This requirement, of course, was expensive to administer. As it turned out, subsequent surveys showed that in order to screen a candidate for legal aid, the trustees spent more money in administrative costs per case, than on actual legal fees for servicing the client.

This was a ridiculous but necessary thing. It was not the reason that that plan was abandoned, but it was one of the criticisms that arose at that time. One doesn't need to do it that way now, thanks to the decisions of the U.S. Supreme Court that have intervened, and since new Rule 21, as an alternative method to Rule 20 for qualifying your plan, is far broader and better than the old Canon 35.

The benefits that were provided in the group legal spectrum were free to the person aided. The benefits provided were:

1. The Plan paid bail-bond premiums on bail up to $500 per case.

2. The Plan paid defense legal fees in felony cases in an amount approved by the trustees, in cases approved by the trustees. The group did not have many of those cases, but each felony case was brought before the trustees with a brief resume of the facts. Approval was granted on a case-by-case basis. In each case, the defendant had a right to pick his own attorney, and the fee was paid to his attorney if he wished. If he didn't have an attorney, and didn't wish to go to the Public Defender's office, the Fund picked an experienced attorney for him and made a fee arrangement with that attorney.

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10. Adopted January, 1970 upon approval by the Supreme Court of California.

3. With respect to misdemeanors, the case was picked up and defended automatically with the same procedures as to selection of counsel.

4. In the field of civil law, the eligible member was provided with one hour of legal service by the attorney, exclusive of whatever time it took the attorney's office to ascertain the facts of the case. The machinery used was to pay a secretary in the attorney's office up to $10 for an hour's time, if necessary, to interview the client and elicit the bare facts from the client.

When one writes a Will, the lawyer wants to know what the assets are, who the relatives are, what the wishes of the testator are. All these are factual data that do not require any legal judgment. To secure these facts is just a quizzing process. A secretary trained to do it can do it just as well as a law student or anybody else. It's a waste of the experienced attorney's time to have to dig out these facts. His job is to advise the client on the facts unearthed, and draft the Will. So it was done under the Los Angeles Culinary Plan.

In a divorce case in California, there is now required to be filled out an elaborate questionnaire that elicits most of the essential facts. It has to be delivered to the clerk at the time the case is filed in court. The interview to secure these facts can be conducted by a secretary. Many of the preliminary facts in other types of cases can be similarly elicited by para-legal workers. Again, this was the way the Los Angeles Culinary Plan operated. The secretary then opened the file, typed out the report of what she had learned and presented it to the attorney, either at that time, or at a subsequent appointment depending upon the convenience of the client. The attorney then was able to spend the first five minutes reviewing this set of facts. That didn't mean that he was satisfied with the summary of facts; that he didn't go back over it; that he didn't ask a lot of additional questions. But he had a lot of his time saved for the exercise of his special talent, giving legal advice. Hence, this method of providing an hour's time of screening or an hour's time of interviewing by a secretary followed by an hour's time of actual legal advisory work by the attorney, proved to be very satisfactory. It met with almost universal acceptance and approval from the beneficiaries of the Plan, the clients who were serviced.

In closing, I want to suggest to you that if any group is going to try to start a group legal plan, you had better be prepared for interruption, for opposition. The Bar Association will not sit by and permit poorly planned, inefficient or unethical programs to be tolerated. The public interest requires that the Bar demand fairness to the client and professional responsibility by the lawyer. I am genuinely hopeful that a skillfully drafted, financially realistic plan which recognizes the ethical objections of the lawyers and is designed to serve a specific portion of the public with good pre-paid legal representation, will be able to be recognized and can function. But it is certainly reasonable to suppose that objections will arise until the efficiency, financial soundness and, above all, the ethical propriety of the plan has been convincingly established. Realistically, therefore, such a group must be ready, willing and able to pursue the project even in the face of opposition.

I would further suggest that it would be very helpful, if not absolutely necessary, to arrange in advance for the steady flow of financing to cover all contingencies of operation during the period of such initial opposition.

From my experience, I know that successful group legal plans can be established. I am convinced that such plans are badly needed. I am confident that once they are set up they can be made to function successfully.

GROUP LEGAL SERVICES: ADMINISTRATIVE PROBLEMS

Martin Zimring

Now that we have explored the ethical considerations involved in providing prepaid legal services, the needs and desires of the workers, the feasibility of establishing such a program and the means of financing it, and the basic provisions for a trust instrument, all that remains to be done is to have your administrator set the wheels in motion. He will collect the contributions, implement the eligibility rules that have been established, and see that the members of the group receive the services that have been contracted for.

I note with some interest that my topic here today is not concerned with administrative techniques or procedures, but with administrative problems. In other words, it has been assumed that we will have problems. But before we venture into this area, I think it might be helpful briefly to review what is actually expected from an administrator. And since we have nothing to fall back on here, no blueprint as it were, all I can do is try to project how such a program would be administered and the potential problems that may come up.

Based on my experience as administrator of funds providing health and welfare benefits--funds which are jointly controlled and governed by an equal number of union and management trustees and cover a multi-employer group over a large geographical area--it is obvious that were this plan to be confined to a single employer unit, operating out of one plant, many of the questions and problems that will be discussed today would not occur. But regardless of the size of the unit, whether it involves one employer or many, whether the geographical area is large or small, the administrator would have certain basic duties to perform. First, he would be required to establish procedures resulting in the expeditious collection of monies needed to finance the program. Second, he would be responsible for the implementation of eligibility rules that have been established. And, finally, he is expected to see that the workers receive the services called for in the group legal contract.

However, today he is also expected to keep detailed records geared to our electronic age so that, at a moment's notice, he may not only ascertain the eligibility status of an employee and the benefits to which he is entitled, but he is also expected to see that various reports and studies can be prepared determining the value of the service, the frequency of its use, the types of assistance provided by the attorneys, and other detailed statistical data which, I am sure, your legal group as well as various bar associations would like to obtain. These, then, are basically the housekeeping chores that union and management officials expect from their administrator today.

One aspect that is often overlooked, and which I feel is extremely important, pertains to education and communication, a matter that was touched upon by Mr. Kilbourne. I have found all too often that when employers and unions have established a new program, little thought, if any, is given to communicating to the members the benefits to which they are entitled and at the same time educating them how to use the facilities that have been provided. It has been my experience that when such a program is being put into effect, only a very small percentage of the participants knows anything about it and an even smaller percentage avails itself of the service. And even if members do know something about it, they usually are completely in the dark with respect to its use. But here we may profit from the experience other administrative agencies have gained over the past twenty years in initiating new programs. You will find that in most cases machinery has already been established not only to provide the added service in the health, welfare and pension area, but also to inform and educate the members involved. May I urge you to avail yourself of these existing facilities.

But let's come back to the day-by-day administrative chores and the problems that might be encountered. In setting up procedures that must be followed by employers, workers, and the lawyers themselves, I cannot emphasize too much the need for simplicity of forms as well as the elimination of as much red tape as possible. In briefly going over some of the administrative aspects of a group plan, I see no great problem in collecting contributions assuming, of course, that it would be patterned after other existing plans. In other words, if the parties already are contributing, on an hourly basis, to health and welfare programs, the amount of contributions needed to finance the new program should be converted to an hourly rate of $2\frac{1}{2}$ cents, or 5 cents, or whatever the case may be. Most administrative offices today have established procedures, making it relatively easy to add another fund or program requiring additional contributions. Also, reporting forms now in use are readily adaptable to such revisions.

With respect to eligibility rules, I would like to suggest that here again we follow the same formula used by the health and welfare programs that a group has in operation and to which the members have become accustomed. However, there may be certain problems that do not exist with respect to medical plans. For instance, many plans today provide for a month-to-month eligibility rule: a worker may be eligible for benefits one month and then lose it the next. In the past, many funds have provided that when an employee fails to work the necessary hours he may, for a limited time at least, pay his own premium, thus extending his eligibility and avoiding a break in coverage. But in attempting to provide a prepaid group legal service, we may run into unexpected difficulties. When a worker most desperately needs the services of an attorney and finds that he is not eligible for the group plan in collection suits or bankruptcy cases, for example, should we then permit him to continue his eligibility in some way, either by self-payment of premiums or by having the group assume the cost? Or take a situation when a law suit has been instituted while a worker is eligible, and the case is still pending when he loses his

coverage? Would you permit a continuation of his eligibility and provide for the extension of legal services once a suit has been started? I am not suggesting that these are insurmountable problems, but certainly there will be areas that should be explored before a plan such as this is finally formulated and put into operation.

Coming now to the actual dispensing of legal service and to the attorney-client relationship, it is here that we probably will face the most serious problems. Workers today have become rather sophisticated in knowing that a substantial portion of their medical, hospital, and surgical bills will be covered by their group plan. Therefore, it would seem to me extremely important not to "oversell" the benefits of a newly adopted program. Disillusionment will set in very quickly if details of the plan are not clearly explained to the members in layman's language, preferrably in a booklet. A worker will want to know exactly to what benefits he is entitled. What are the specific exclusions? Are there certain types of cases that will not be covered? Will the lawyer take a case against his employer, his union, or one of the other trust funds? Can he go to his own attorney or must he go to the one selected from a closed-panel roster? Can he get legal advice over the telephone? Under what circumstances must he pay a minimum fee, and what are the maximum benefits under the plan?

In pinpointing some of these problem areas, I come back to the need of communicating and educating all persons involved in the plan, whether they are union officials, company personnel managers, the attorneys themselves or, and most important, the workers and their families.

Although I have relied here on my experience as administrator of health and welfare programs in discussing possible problem areas, we should not lose sight of the fact that there are distinctions between a medical and a legal plan. Indeed, this is even more the case when the emphasis is placed on the preventive aspect of legal assistance. Only in recent years have medical plans provided diagnostic and preventive care along with the customary hospital, surgical, and emergency medical benefits. It should be of some concern to us that though preventive medical care has been made available to members, it has not received their wholehearted participation. You usually go to the doctor only when you are ill or have sustained an injury, but in the proposed legal services plan it is stressed that an individual see the lawyer before he is confronted with a problem, not only when he is already in legal difficulties, has had a subpoena served on him, or has been thrown in jail. I am pointing this out because I think there may be some difficulty in getting workers, at least in the beginning, to accept the preventive aspect of the program.

There are other distinctions that come to mind when comparing the legal and medical professions. A worker is more inclined to second-guess an attorney than he is a doctor. After major surgery and on the road to recovery, he rarely questions the surgeon's fee or the hospital

bill; he is happy to be alive and well. On the other hand, when a worker initiates a lawsuit involving a possible award of damages, he may consider himself a "Philadelphia lawyer" and question not only the manner in which his attorney handled the case, but often the results that were achieved. Or, when the proposed plan provides for covering at least a portion of the expenses involved in initiating a civil action, we may run into situations when certain individuals are "litigation or sue happy"; they would want to file a lawsuit at the drop of a hat. You don't have this kind of situation in a medical plan. Nobody initiates an appendicitis attack or a heart attack in order to obtain benefits under a health and welfare program. Thus, because there may be individuals who over use or monopolize the time and efforts of the attorneys, certain restrictions and safeguards should be established to eliminate the frivolous lawsuits that many of you may have been confronted with in the past.

To sum up: obviously there will be administrative problems, and undoubtedly some that we cannot foresee at this time. But, frankly, I do not envision any that would become insurmountable as long as we try to establish procedures that are easily understood, clearly define eligibility rules, and precisely describe benefits in non-technical language. And finally, as long as we make sure that we do not become too legalistic in our overall approach, we should be able to come up with a meaningful group legal plan that would be of tremendous value to the worker and his family.

CO-PAYMENT BY EMPLOYEES

Ralph Woolpert

I was sitting at lunch next to Bob Leventhal, and having spent most of the last three months negotiating a contract with pharmacists and hearing about his frustrations with the engineers--and knowing some of the frustrations I have had with pharmacists over the last three months--I was perfectly willing to make a trade of pharmacists for engineers on a one-to-one basis. However, when I came back after lunch and picked up the survey and looked at the salaries these engineers get--I think the average is somewhere between $10,000 and $15,000 a year--and knowing that we just finished negotiating an annual rate for pharmacists which will top the top engineer figure, I don't think that would be a very fair trade, and I'm not going to make that offer.

I agree completely with Jim Denison that under the existing Taft-Hartley law a jointly trusteed labor-management prepaid legal plan is not possible at the present time. But my remarks are going to be put into the context of the federal law being amended to permit jointly trusteed labor-management prepaid legal services. It seems to me that that development is inevitable. It probably won't come in this session of Congress, nor probably in the next, but I think legal permissiveness is inevitable. Probably within the next five years and certainly within the next ten years as the prepaid legal concept grows, and as it continues to grow, obviously there is going to be more and more pressure put on the legislators. So my remarks, as I say, will be put in that context.

Co-payment, I really believe, is a misnomer. Psychologically, insofar as the employee is concerned, there should be some form of deduction, co-insurance, or surcharge so that the employee feels he is contributing. But, as a matter of fact, I think the employee, whether it be pensions or health and welfare, or any of the other numerous fringe benefits which the current labor-management relationship provides, is really paying one hundred percent of the cost.

Now, it wasn't always thought that this was true, and there may be some people here today who disagree with me. In the early days of negotiation of medical and hospital benefits, the unions told their members that the employer was paying for the cost of such benefits. So why should the members worry, it is nothing out of "your" pockets, "your" employer is paying for them. Both the unions and the medical profession, in my opinion, gained by this pretext, if you want to call it that. In some cases I think it was an honest statement; in other cases it was definitely pure propaganda by the union leadership, because it made it much easier to sell such programs to the employees. If the employees thought they weren't paying for them, they were willing to accept them much more readily. The medical profession

accepted the prepaid concept because it meant there would be a very healthy impact on their fee structure. Both doctors and hospitals could charge more and more all the time--and this has been the consistent history since the early fifties.

However, I would submit that the concept of the employer ultimately bearing the cost of fringe benefits, and I think this would be equally true of prepaid legal services, is no longer held by many unions. Most unions believe today, and I think most employers will agree, that actually the money the employee gets in the form of fringe benefits he would otherwise receive in wages or other form of compensation. Whatever prepaid legal services would cost in terms of cents per hour, in the absence of such legal services he would undoubtedly get that in the form of wages or perhaps in better medical care or some other benefit. The unions are saying, therefore, that because this is the employee's money they have the right to decide what those benefits are going to be. The unions are very active, as most of us know who have been involved for any length of time in the administration of Taft-Hartley trusts, in the determination of the kinds of benefits provided. As Jim Denison pointed out, once the benefits have been negotiated or the trustees have decided upon the benefits, the administration becomes more of a routine matter. But in the formulation of the benefit package, unions almost always lead the way because the monies which are financing these benefits are really employee compensation. Thus unions, or union trustees, generally feel they should have a major voice in what kind of fringe benefits are going to be provided, the formulation of the program, who is going to get the benefits, the eligibility rules and other matters which relate directly to the employee's welfare.

I think today most employers concede the soundness of the unions' position. Most employers are not so much concerned--I know we in the retail drug industry in Southern California negotiate on this basis--with the contents of the economic package that is negotiated as they are with the size of it. As Mr. Leventhal said this morning, if two or three years from now his employers will give his members a 10¢ per hour increase, those employers will in effect say to the union leaders the 10¢ can be used in any way the union sees fit. Because there has been this vast change in terms of the unions' approach to the money that is being put into fringe benefits, and because union members today are much more sophisticated in terms of the relationship of fringe benefits to wages, I believe it is going to be much more difficult for unions to sell a prepaid legal program to their members than it was to sell them health and welfare or pension programs 10 to 20 years ago.

I am inclined to agree with the speakers preceding me, who stressed there is a tremendous unfilled need for legal services, particularly among the middle income groups. But until these groups are made aware of their unfulfilled needs they are not going to seek out prepaid legal services in the collective bargaining setting, and union representatives will have to awaken them to this need. If the union wants to put 2¢, 5¢ or 10¢, or whatever it may be, per hour into a prepaid legal program instead of some other benefit, the employees will buy such a program

only if they are convinced they will see some tangible, ascertainable results. I think I agree with the speaker who said that some common denominator would have to be found, if union memberships, in great numbers, are expected to accept prepaid legal programs. Union leaders are not going to be able to sell their membership on the value of prepaid legal services on the off chance that a minority of unknown members might receive some benefits when the total membership recognizes that the cost of the prepaid legal program will diminish their wage check by substantially similar amounts.

In the initial stage I think the prepaid legal service, in order to be attractive to the bulk of the union membership, will have to be something that affects the great majority of them. It may and probably will be a relatively simple thing, but its attractiveness must appeal to the mass membership. Then, later on, if the simple legal benefits prove workable and attractive, perhaps the more esoteric and less foreseeable items can be added to the overall program. It seems to me the initial program, in order to be salable, must be at minimal cost. If the initial program proves worthwhile and the average member is convinced of its usefulness, the task of diverting additional monies into the program in order to improve it will then be much easier.

But in any case, the job of convincing union members that they need prepaid legal services is not going to be nearly as simple a task as it was convincing them they needed prepaid medical and hospital benefits or even pension benefits a decade or two ago.

GROUP LEGAL SERVICES AND THE COLLECTIVE BARGAINING PROCESS: PROSPECTS AND PROBLEMS

Jules Bernstein

In the negotiations which were concluded in September, 1969, between the Shreveport Chapter of the Associated General Contractors and the Shreveport, Louisiana, Local of the Laborers' International Union of North America, AFL-CIO, covering a unit of approximately 1,000 construction laborers, the union was successful in obtaining employer agreement to a contract provision which establishes a legal services fringe benefit program for employees and their families and requires a 2-cent-per-man-hour employer contribution to the program to begin on August 1, 1970. That Shreveport was the locus for the negotiation of a legal service fringe benefit program was not accidental. In actuality, the program grew out of the fact that the Shreveport Bar Association recently became the recipient of a $25,000 grant from the American Bar Association to establish an experimental legal insurance plan. Thus, the Shreveport Bar was looking for a group on which to experiment, and the Laborers' Union was prepared to be its guinea pig.

One of the benefits of the fact that the employers will not begin to make contributions to the plan until August, 1970, is that this will provide the parties to the collective bargaining agreement with some time in which to resolve many of the practical and legal problems presented.

A program proposal has been prepared for the Shreveport Bar Association by Ralph Jackson, Esq., of Southwest Administrators, Inc., actuaries and fund consultants of New Orleans. And to assist the local bar in developing its program, the ABA plans to send a team of researchers into Shreveport in early 1970 to study the "law market" as well as the legal needs of the beneficiaries of the program.

In the Shreveport negotiations, the union had no immediate need to consider whether group legal services constitutes a mandatory bargaining subject under Sections 8(a)(5)[1] and 8(d)[2] of the Taft-Hartley Act since the employers were not averse to the proposal. But at a later time, in all likelihood the question of whether group legal services is a mandatory or a permissive bargaining subject will need to be resolved.

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1. 29 U.S.C. § 158 (a)(5)

2. 29 U.S.C. § 158 (d)

Sections 8(a)(5) and 8(d) of Taft-Hartley define collective bargaining as requiring an employer to meet at reasonable times with the union representing its employees and confer in good faith "with respect to wages, hours, and other terms and conditions of employment...." Accordingly, bargaining subjects which constitute "wages, hours, and other terms and conditions of employment" have been identified as "mandatory" subjects of bargaining, while those items which fall outside of these categories have been defined as "permissive" bargaining subjects. The practical and legal ramifications of whether a bargaining subject is mandatory or permissive were considered by the Supreme Court in NLRB v. Borg-Warner Corp.,[3] in which the Court held that a party could not insist upon inclusion of a permissive or non-mandatory bargaining subject in a contract as a precondition to overall agreement, and that such insistence constituted bad faith bargaining in violation of the Act. Thus, under Borg-Warner, mandatory bargaining subjects may be negotiated to impasse and become the subject of a strike or lockout, but neither party may condition agreement upon, or engage in a strike or a lockout in support of, a permissive bargaining subject.

Both before and since Borg-Warner, the National Labor Relations Board, on a case-by-case basis, has compiled an inventory of mandatory versus permissive bargaining subjects.[4] Within this inventory, employee compensation--although it may take a wide variety of forms--has been held to constitute "wages" or "other conditions of employment," and thus a mandatory bargaining subject. Such forms of compensation as pensions,[5] stock purchase plans,[6] Christmas bonuses,[7] employee discounts,[8] and even hunting privileges[9] have been held to come within the scope of mandatory bargaining.

Hence, it would appear that so long as a proposed fringe benefit program is lawful, the employer undoubtedly will be required to bargain regarding the establishment of such a program. Therefore, it would

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3. 356 U.S. 342 (1958)

4. The following cases, for example, have found employer-proposed bargaining subjects to be non-mandatory: McCloskey & Co., 137 NLRB 1583 (1962) (industry advancement program); Arlington Asphalt Co., 136 NLRB 742 (1962) (indemnity bond); Bethlehem Steel Co., 136 NLRB 1500 (1962) (requirement of signature of individual employee on grievances)

5. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949)

6. Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir. 1956), cert. denied, 351 U.S. 909 (1956)

7. NLRB v. Niles-Bement-Pond Company, 199 F.2d 713 (2nd Cir. 1952)

8. Central Illinois Public Service Company, 139 NLRB 1407 (1962), enforced, 324 F.2d 916 (7th Cir. 1963)

9. Southland Paper Mills, Inc., 161 NLRB 1077 (1967)

seem that a union demand for a group legal services contribution may be pressed to impasse by the union and also be the subject of a strike without violating the unfair labor practice provisions of the Taft-Hartley Act.

A more formidable legal hurdle for the establishment of a group legal services program is presented by Section 302 of Taft-Hartley.[10] That provision was enacted in 1947 to prevent labor-management bribery and extortion as well as the establishment of what Senator Taft considered to be union "war chests." But since its passage, Section 302 has also become a straight-jacket upon flexibility and innovation in the development of new fringe benefits.

Section 302 flatly prohibits payments of money or other things of value by an employer to a union or a union representative as well as the acceptance of such payments. At the same time, the statute provides for several express exceptions to these prohibitions, including "money deducted from the wages of employees in payment of membership dues in a labor organization" and employer contributions to a joint employer-union trust fund established for the purpose of paying for medical care, pensions, unemployment benefits, and life, disability, sick and accident insurance for employees and their dependents. But a contribution by an employer to a jointly-administered group legal services trust fund would not appear to come within any of the existing statutory exceptions. Indeed, the sole exception which even arguably might be relied upon to accommodate a group legal services program is Section 302(c)(6), which was added in 1959 to permit payments to a jointly-administered trust fund established "for the purpose of pooled vacation, holiday, severance, or similar benefits, or defraying costs of an apprenticeship or other training programs."[11] But achieving such a result would require a reading of "similar benefits" to indicate the unlikely congressional intent of removing all limitations upon permissible fringe benefits established under a Section 302 trust fund.

Further, the likelihood of success in establishing a group legal services program as a permissible benefit under the 1959 amendment is made even slimmer in the light of the enactment by Congress of another amendment to Section 302 which became law on October 14, 1969.[12] That provision, which was primarily the result of the skillful lobbying efforts of the Amalgamated Clothing Workers Union of America, AFL-CIO, establishes a new exception to Section 302 which permits payments by an employer to a pooled or individual trust fund established for the purpose of "scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or child care

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10. 29 U.S.C. § 185

11. 29 U.S.C. § 185(c)(6)

12. Public Law 91-86, 83 Stat. 133

centers for pre-school and school-age dependents of employees."[13] Thus, it can be argued that the recent amendment would have been unnecessary if "similar benefits" under Section 302(c)(6) was intended to authorize benefit programs of an unlimited scope, and that the phrase must instead be read narrowly to include benefits which are in some way reasonably related to "pooled vacation, holiday or severance benefits."

That the Labor Department recognizes the inhibitions imposed by Section 302 upon newly-developing concepts of employee compensation was indicated recently by Assistant Secretary of Labor Willie J. Usery in testimony before the Senate Labor Subcommittee on September 17, 1969. The Subcommittee was conducting hearings on proposed amendments to Section 302 which would authorize employer contributions to collectively-bargained product promotion funds as well as the financing of employer-union joint grievance committees through collective bargaining.

In his testimony--in which he opposed the enactment of such piecemeal amendments to Section 302--Usery declared that "there are today many different kinds of funds prohibited by Section 302 which would be beneficial to both labor and management, and the public in general, and to which contributions should be permitted." Usery suggested that

> Congress may wish to avoid the need to predict the direction of future changes in fringe benefits by passing general legislation which would (1) give broad approval to the establishment of jointly-administered funds for desirable purposes only generally identified; (2) provide for fiduciary safeguards on the operation of such funds; and (3) establish a meaningful reporting system for these kinds of funds separate from that provided for welfare and pension funds by the Welfare and Pension Plan Disclosure Act.[14]

Despite the restrictions of Section 302, resourceful unions and employers have created trust funds for purposes other than those permitted under the statute. Hence, for example, in Shapiro v. Rosenbaum,[15] the United States District Court for the Southern District of New York upheld the legality of a trust fund established by the American Federation of Musicians and the recording industry which provides for free, public musical performances by unemployed musicians. While recognizing that the purpose of the trust was not permissible under Section 302, the court nevertheless upheld the program on the

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13. The amendment also contains a proviso which declares that "no labor organization or employer shall be required to bargain on the establishment of any such trust fund and refusal to do so shall not constitute an unfair labor practice."

14. Daily Labor Report, Sept. 17, 1969, pp. A-6-A-9.

15. 171 F.Supp. 875 (1958)

ground that its administration was delegated to a single "neutral" trustee who had been designated by the employers, with the approval of the union, and that successor trustees were to be appointed by the Secretary of Labor. Since the trustee was not a "representative of employees" within the meaning of Section 302, payments of employer contributions to the fund were held not to be prohibited by the statute.

The application of the Shapiro v. Rosenbaum formula to a group legal services program presents intriguing possibilities. One of the main areas of criticism with which the notion of collectively-bargained group legal services programs has been confronted concerns the presumed control by employers and unions over lawyers involved in such programs, and the supposed interference with the lawyer-client relationship which would result therefrom. Therefore, the appointment of a neutral trustee or board of trustees which would be independent of employer and union, but which would be bound to oversee the administration of the program in accordance with the provisions of a trust instrument drafted jointly by the parties to the collective bargaining agreement, might insulate the plan from such problems and criticisms.

A variation on the Shaprio v. Rosenbaum theme was recently performed by the Second Circuit in Mutuel Employees v. New York Racing Association.16/ Mutuel Employees involved a collectively-bargained pension fund which was administered by a committee consisting of three employer members, three union members, and a chairman selected by the employers with the approval of a majority of the union designees. Under the trust agreement, the employer chairman was empowered to cast the deciding vote in the event the committee deadlocked. The union sued for reformation of the trust agreement, seeking to have it guarantee the union an equal right to participate in the fund's administration on the theory that such equality was required by Section 302.

The district court granted the plaintiff-union's motion for summary judgment, but the Second Circuit reversed. The court of appeals reasoned that the congressional objective in enacting Section 302 was to guarantee employers an equal place in the administration of collectively-bargained welfare and pension funds but that the Act did not require an employer to give a union an equal voice in the administration of such funds. The Second Circuit declared that when a "plan specifies the conditions under which funds may be disbursed and makes it impossible for the representatives of the employees to use any funds as they see fit, or to authorize use of funds without the employer's consent, the dangers which Section 302 was designed to combat are not present and there is no need to invoke the specific safeguards of Section 302(c)(5)."17/ Thus, Mutuel Employees suggests that a board of trustees made up of an equal number of union and employer representatives which is chaired by an impartial third party might also avoid the strictures of Section 302.

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16. 398 F.2d 587 (1968)

17. 398 F.2d 587, 591

Finally, additional loopholes around Section 302 would seem to be available through such programs as have been established by the Preventive Law Bar Association of Los Angeles,[18] and the National Plan Administrators, Inc., of Sacramento,[19] both of which would permit direct payments of negotiated employer contributions to an independently administered legal service plan without the need for the establishment of a jointly-administered trust.

Another area of concern in establishing a group legal services trust would be assuring its tax-exempt status. Presumably, the relevant Internal Revenue Code provision would be Section 501(c)(9)[20] which establishes the tax-exempt status of voluntary employee beneficiary associations which provide "for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries...." Thus, the question presented is whether a group legal services trust fund would qualify as an "other benefit" under Section 501(c)(9). The statute itself does not define "other benefits"; but on January 23, 1969, the Internal Revenue Service published proposed regulations in the Federal Register[21] which elaborate upon and define the provisions of Section 501(c)(9). As to the definition of "other benefits," the proposed regulations declare in pertinent part as follows:

> The term 'other benefits' includes only benefits... which are similar to life, sick, and accident benefits. A benefit is similar to a life, sick, or accident benefit if it is intended to safeguard or improve the health of the employee or to protect against a contingency which interrupts earning power. Thus, paying vacation benefits, subsidizing recreational activities such as athletic leagues and providing vacation facilities are considered other benefits since such benefits protect against physical or mental fatigue and accidents or illness which may result therefrom. Severance payments or supplemental unemployment compensation benefits paid because of a reduction in force or temporary layoff are 'other benefits' since they protect the employee in the event of interruption of earning power.... The term 'other benefits' does not include the furnishing of automobile or fire insurance or the furnishing of scholarships to the members' dependents.

While it is understandable that the proposed regulations do not expressly treat with the status of almost non-existent group legal services fringe benefit plans, the proposed regulations nevertheless

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18. See 23 Changing Times 3-4 (August, 1969)

19. 2255 Watt Avenue, Sacramento, California 95825

20. 26 U.S.C. § 501(c)(9)

21. 34 Federal Register 1028-30

do provide an extremely narrow construction of the "other benefits" provision of Section 501(c)(9) which would appear to exclude from tax-exempt status certain well-established fringe benefit programs as well as group legal services. Hence, the proposed regulations have provoked a strong reaction from the AFL-CIO which has filed detailed comments with the Commissioner of Internal Revenue on behalf of its affiliates. While not making specific reference to group legal services, the AFL-CIO briefs point out that there presently exist scholarship and training funds, distress grants and loans, automobile and fire insurance benefits, day care centers, savings and thrift plans, as well as other newly-evolving fringe benefit programs which would be inhibited by the proposed regulations. Further, the AFL-CIO persuasively argues that the statute and its legislative history do not warrant such a narrow construction of "other benefits" as is proposed by the IRS.[22]

A substantial broadening of the definition of "other benefits" under the proposed regulations and a subsequent favorable IRS ruling regarding the tax exempt status of a specific group legal services fringe benefit program would help in resolving the question. But even if the regulations were adopted as proposed, it still may be possible to obtain an exemption for such plans under Sections 501(c)(4) or (15) of the Internal Revenue Code which provide, respectively, for exemptions for non-profit organizations dedicated to social welfare and for certain mutual insurance companies.

Moreover, even without obtaining tax-exempt status, a group legal services fund might still avoid taxation on its contributions. First, it has been suggested that such programs may not be taxable at all since they do not meet the description of any taxable entity under the

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22. The foregoing conclusion is supported by the decision of the Ninth Circuit in Grange Insurance Association of California v. Commissioner, 317 F.2d 222 (1963), in which the court was required to interpret the provisions of Section 501(c)(8) of the Internal Revenue Code which grants tax-exempt status to fraternal beneficiary societies, orders, or associations operating under the lodge system providing for the payment of life, sick, accident, or other benefits to the members of such associations or their dependents. In the Grange case, the benefit involved was compensation for property loss by fire. The Commissioner and the Tax Court both had interpreted the provisions of § 501(c)(8) to limit its application to associations which pay benefits for injuries to person, as distinguished from injuries to property. The Ninth Circuit reversed, holding that the statutory phrase, "accident or other benefits," was sufficiently broad to include payments for injuries to property. The court declared that "[n]owhere have we found any indication that Congress intended the exemption to depend upon the type of benefits paid." 317 F.2d 222, 225.

Internal Revenue Code. And there is also a rule to the effect that a trust is taxable only upon income received from property held in trust rather than on the corpus of the trust itself. Thus, a group legal services trust may be seen as a mere conduit through which trust funds are channeled so that such funds would not be taxable to the intermediary trust.

Consideration of the conduit principle raises another taxation issue--namely, the taxability of a group legal services benefit to its recipient. Unlike medical benefits, which are excluded from gross income under Section 105 of the Code,[23] a group legal services fringe benefit undoubtedly would be taxable to its beneficiary. As stated in the proposed IRS regulations, such a benefit--if it were provided in cash--would be included as part of the recipient's gross income. And in the case of a non-cash benefit--as would be the situation where a group legal services program operated through a salaried legal staff which did not charge clients a fee on a case-by-case basis--the amount to be included as gross income to the recipient would be the fair market value of the benefit on the date of its receipt.

An additional question which is bound to arise is whether a group legal services program is covered under the Welfare and Pension Plans Disclosure Act.[24] That statute was enacted in 1958 to provide for reporting and disclosure regarding the operations of employee benefit plans, and was amended in 1962 to provide criminal sanctions against bribery and embezzlement in connection with the operation of such plans. The Act defines an "employee welfare benefit plan" as "any plan, fund or program which is communicated or its benefits described in writing to the employees and which...is...established by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment."[25]

The possibility of a group legal services fringe benefit program being declared an "employee welfare benefit plan" would arise if the program were to provide legal benefits "in the event of sickness, accident, disability, death, or unemployment," such as the defense or prosecution of a personal injury or wrongful death action, or representation in an unemployment compensation case.

Having attempted to provide a brief survey of the labor law implications of group legal services, I would like to offer a few comments regarding the reasons which may impel union leaders to view group legal services as a fruitful area of fringe benefit negotiations.

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23. 26 U.S.C. § 105

24. 29 U.S.C. § 301 et seq.

25. 29 U.S.C. § 302 (1)

Increasingly, union leaders are coming to see union members as not merely employees but also as a vast army of consumers of medical services, automobiles and auto insurance, food, housing, and the like; and that while collective bargaining has had an impact upon the quantity of consumer goods and services utilized by union members and their families, the quality of these items has suffered in the course of the mass production-consumption revolution of the last 25 years. I know, for example, that on the West Coast, Einar Mohn and the Western Conference of Teamsters have been quite active in the field of promoting quality health care, and so has the Teamsters Joint Council in New York City. As a matter of fact, a couple of years ago the New York City Teamsters Joint Council commissioned a study by the Columbia University School of Public Health and Administrative Medicine which found that in some instances, 50% of the operations on Teamsters members and their families in New York City under union-provided health and welfare programs were being performed unnecessarily.[26] In recognition of such startling disclosures, unions are beginning to take advantage of the tremendous mass purchasing power which their members possess to bring about improvements in the quality of consumer goods and services. And this concern has not been limited to the medical field. Teamsters International Vice President Harold Gibbons, who pioneered the Teamsters' Labor Health Institute in St. Louis over twenty-five years ago is presently looking into the feasibility of a group legal services benefit program for union members. The American labor movement thus appears to be standing Marx on his head by moving toward the collectivization of the means of consumption rather than production.

Similarly, we have a growing recognition on the part of unions that the collective bargaining process represents a significant lever through which labor can have an impact upon the allocation of community resources. For, to the extent that unions can participate in deciding whether employee compensation is channeled into workers' pay envelopes for random spending in the open market or is aggregated into trust funds for group purchases of health care, automobile insurance, education, training, group legal services, and the like, unions can influence the movement of private sector resources toward what are presumably more socially desirable goals. And as you have heard at this conference, providing high quality legal services at a cost which working people can afford through the use of prepaid group legal services programs is just such a desirable objective.

So much for the reasons why many unions will be attracted to group legal services. On the other hand, however, a certain amount of indigenous populist skepticism about group legal services can be anticipated from some trade unionists who are bound to feel that placing union members in closer contact with the legal profession can serve no socially desirable purpose whatsoever. Indeed, the feelings of some union leaders undoubtedly will be that this is one of those all too frequent cases where the cure is worse than the ailment.

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26. Columbia University School of Public Health and Administrative Medicine, The Quantity, Quality and Costs of Medical and Hospital Care Secured by a Sample of Teamster Families in the New York Area (1964)

Certainly, every student of American labor history knows that historically, the relationship of American unions to the law and lawyers has been a most frustrating and unhappy one. As for the legal profession, it need only be remembered that the Knights of Labor barred politicians, saloon keepers, and lawyers from membership. And as for the law itself, the history of the conspiracy doctrine, the labor injunctions, the yellow dog contracts, and the prosecutions of trade unionists on trumped-up charges are ready reminders that the labor movement's feelings toward our legal institutions are far from hospitable.

Another anticipated basis for possible reluctance on the part of the parties to a collective bargaining agreement to establish group legal services fringe benefit programs may arise from a concern that such programs will result in fomenting litigation against either the union or the employer, or both. Indeed, it seems reasonable to predict that a limitation on actions against the employer and union parties to an agreement will be a quid pro quo for union and employer participation in a proposed group legal services program. For to expect an employer or a union to help finance employee or member litigation against themselves through the negotiation and maintenance of a legal service fringe benefit program would be most unrealistic. Further, such a limitation may actually serve a useful purpose since to provide otherwise would create a potential conflict of interest by reason of the position of the employer and the union at the bargaining table which gives them the power to determine the amount of the group legal services contribution as well as the continued life of a program.

Finally, let me say that I hope my effort to outline some of the problems which may be anticipated in the establishment of group legal services fringe benefit programs has been useful. It is my firm belief that while we appear to have raised more questions about group legal services at this conference than we have provided answers, ultimately group legal services will emerge as an institution of enormous social utility which will have been well worth the effort of all who participated in its establishment.

THE LEGAL STATUS OF GROUP LEGAL SERVICES

George E. Bodle

Group legal services involves the relationship between those who provide legal services and those who receive them. The lawyers who provide the services are subject to the control of their Bar Associations and the Courts. Indeed, until the decision of the United States Supreme Court in the Button[1] and BRT[2] cases, it was generally believed that the control of the legal profession was the exclusive province of the Bar and the Courts.

No attorney can provide legal services to the individual members of a group pursuant to referral, recommendation or employment by the group, unless the Rules of Professional Conduct or Canons of Ethics, under which he practices, so permit. Thus, the basic question with which those who have sought group legal services have always had to deal was whether lawyers could legally provide them. The need for such services has existed at all times; it is only with the possibility of providing them that there has been change.

Lawyers in this country, generally, are covered by the prevailing rules of conduct adopted in the jurisdiction in which they have been admitted to practice. For most lawyers, the applicable rules are the Canons of Ethics (now denominated the Code of Professional Responsibility) of the ABA; for lawyers in California, they are the Rules of Professional Conduct, which constitute a part of our statutory law. Under both of these, as interpreted by both the various Bar Associations and the Courts, insuperable barriers had been erected to the representation by an attorney of the members of a group upon referral by the group. Under the Canons, lawyers were forbidden to solicit professional employment by advertisement, direct or indirect, or to volunteer advice to bring a lawsuit, or to permit their services to be controlled by any law agency which intervenes between client and lawyer. Specifically, under Canon 35, a lawyer was permitted to accept employment from an organization or an association, but was prohibited in such event from rendering legal services to the members of such an organization with respect to their individual affairs. The California Rules, while not so explicit, were interpreted to accomplish a similar result.[3]

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1. NAACP v. Button, 371 U.S. 415 (1963)

2. BRT v. Virginia, 377 U.S. 1 (1964)

3. Cf. Hildebrand v. State Bar, 36 Cal.2d 504 (1950)

Over the years, the Canons were interpreted to prohibit a group from referring its members to an attorney selected by it. The referral was claimed to be a solicitation on the part of the lawyer through the association which, for these purposes, was considered his agent. It was this channeling of business, as a result of referrals by the association, which, unquestionably, aroused the antipathy of the organized Bar. Many lawyers saw such referral schemes as a threat to their own livelihood. The legal basis for prohibiting such referral schemes, however, was generally on different grounds. It was more closely related to some avowed public interest, such as the protection of the client against the intervention of a third party intermediary in the lawyer-client relationship.

One of the oldest of these group legal aid plans, and the one which has been responsible for most of the law on the subject, is that of the Brotherhood of Railroad Trainmen (now the United Transportation Union). Because it illuminates this entire area, I want to deal at some length with the history of the BRT legal aid plan. Before I do so, however, I should point out that the situation in which railroad workers find themselves differs in certain material respects from that of most employees. First, their work is extraordinarily hazardous--next to mining, the most hazardous in the country. Secondly, railroad workers, at least those involved in the operation of trains, work in small groups, are away from home much of the time, and by and large live in small towns along the railroad right of way. As a result of these factors, their community contacts are limited and their access to railroad lawyers, most of whom are found in large communities, is likewise restricted. Third, they are the only class of employees, except for seamen, who may sue their employers for damages for work-connected injuries, provided that such injuries are the result, in whole or in part, of the employer's negligence. For railroad workers, this right is provided by the Federal Employers' Liability Act and for seamen by the Jones Act. All other employees are covered by Workmen's Compensation. The fourth and last factor, and one which may well account for the virulence of the attacks on the BRT legal aid plan--a plan which Dean Murray Schwartz of the UCLA Law School termed a rather modest plan in view of the problems which confronted railroad workers--is that the railroads are, by and large, self-insured.

The legal aid program of the Brotherhood was established in 1930, pursuant to the recommendation of its General Counsel and President. The President, in proposing the move, stated that, in his experience,

> "settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility of the employers had been made with members of the Brotherhood who were either entirely devoid of any knowledge of their rights in such matters, or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements. In still other cases, attorneys had either suffered defeat

in lawsuits because of their inexperience or lack of ability to properly prosecute railroad damage claims."[4]

The basic plan of the Brotherhood's legal aid program has remained unchanged down to the present date. The Brotherhood selects attorneys who are, in its opinion, honest and competent to represent its members in FELA suits. Officers and members of the Brotherhood are instructed to refer injured members and the survivors of deceased members to the Regional Counsel, in whose area they reside, for advice and to recommend them for employment in the event a damage claim is to be prosecuted against their employer.

The plan was not long in coming under attack. Both the Brotherhood and its Regional Counsel were the targets of the attacks. While the proceedings were generally brought in the name of a bar association, they were usually initiated by the interested railroads or their trade association, the Association of American Railroads, which in large part, financed the prosecutions.[5]

A leading case during this period was that of Hildebrand v. State Bar (Supra) decided by the California Supreme Court in 1950. In this proceeding, initiated by the State Bar of California against the Regional Counsel for the BRT, the Regional Counsel's participation in the BRT legal aid plan was found to violate Rules 2A and 3 of the Rules of Professional Conduct. Rule 2A, which prohibits solicitation of professional employment by advertisement, or otherwise, was held to be violated by the Regional Counsel on the assumption that the Brotherhood and its members, in referring prospective clients to him, were acting as his agent. Rule 3 provides that a lawyer shall not knowingly accept professional employment from any association or corporation that, for compensation, controls, directs or influences such employment. The Court held in this regard that, while the Brotherhood received no pecuniary advantage from the referral of cases to the Regional Counsel, the fact that the services rendered by Regional Counsel would reasonably attract members to the Brotherhood, such services constituted, in fact, compensation to the Brotherhood so as to bring the activity within the prohibition of Rule 3.

It is significant that Justices Traynor and Carter dissented from the holding of the Supreme Court in the Hildebrand case. Their dissents were cited, with approval, by the United States Supreme Court in both the Button and BRT cases.

The carriers took heart from the Hildebrand decision and, in the following decade, hastened to press the advantage. Through the agency of its Claims Research Bureau, the Association of American Railroads, in the 1950's, succeeded in having Bar proceedings instituted against Regional Counsel of the Brotherhood in Iowa, Nebraska, Oklahoma, Montana, Michigan, Ohio and Virginia.

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4. Proceedings of the 1930 Convention of the Brotherhood of Railroad Trainmen

5. In re Heirich, 10 Ill.2d 357, 140 N.D.2d 825 (1957)

A momentary setback was suffered by the railroads in 1958 when the Illinois Supreme Court, in the case of In re BRT[6] held, in the exercise of its general supervision over the practice of law, that the Brotherhood could legally make known to its members generally and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement and second, the names of attorneys, who, in its opinion, have the capacity to handle such claims successfully.

The Illinois decision did not, however, bring a halt to the attacks on the BRT plan. The processing of complaints already filed and the filing of subsequent proceedings did not abate. In some cases, however, the railroads changed their tactics. In California, for example, instead of seeking to proceed against the BRT and its Regional Counsel through the State Bar, a step which they, apparently, deemed impossible, two of the major transcontinental railroads brought suit to enjoin the BRT and its Regional Counsel from the violation of the Rules of Professional Conduct.[7]

In the meantime, on quite a different and unexpected front, the solicitation issue was receiving attention. In 1956, the Virginia State Legislature amended the provisions of Chapter 33 of its Code which forbade solicitation of legal business. The definition of a "runner" or "capper" was enlarged to include an agent for any individual or organization which is not a party or which has no pecuniary right or liability in the particular litigation.

The National Association for the Advancement of Colored People (NAACP) believed, with more than a little justification, that the statute was part "of the general plan of massive resistance to the integration of schools" which had been decried by the Supreme Court in Brown v. Board of Educ.[8] It brought suit in 1957 to enjoin the state attorney general from enforcing against it this and other provisions of the Virginia law. The NAACP was engaged then, as now, in a campaign to eliminate all legal barriers to integration through the courts. Pursuant to this objective, it actively solicited potential plaintiffs within and without its organization to designate NAACP staff attorneys to represent them in legal proceedings to achieve desegregation. The costs of the litigation were borne by the NAACP, which compensated its staff attorneys on a per diem basis. Under this state of facts, Virginia's highest court held that the NAACP was guilty of "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control" in violation of Chapter 33 of the Virginia Code and Canons 35 and 47 of the ABA.

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6. 13 Ill.2d 391, 150 N.E.2d 163 (1958)

7. Atchison, Topeka and Santa Fe v. Hildebrand, No. 727273, Cal. Superior Court, Los Angeles County

8. 347 U.S. 483 (1954)

The United States Supreme Court interpreted the state decree "as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." Under that decree, the Court said:

> "a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has commited a crime, as has the attorney who knowingly renders assistance under such circumstances."

As so construed, Chapter 33 of the Virginia Code, in the Court's opinion, violated the first and fourteenth amendments "by unduly inhibiting protected freedoms of expression and association."

The state had argued that it had an overriding interest in the regulation of the legal profession which justified limiting the NAACP's right of association. Specifically, it urged that its interest in preventing the traditionally illegal practices of barratry, champerty, and maintenance were demonstrative of such an overriding interest. The Court disagreed, concluding after careful analysis, that state interest in the regulation of legal practice was insufficient to proscribe the organization's lawful endeavors.

Although the implications of the Button decision were certainly broader, many read it, as did Justice Clark in BRT, as legalizing solicitation of legal business for lawyers only where it "was a form of 'political expression' to secure, through court action, constitutionally protected civil rights." It remained for the BRT case to make clear that the constitutional protection was not limited to the "civil rights" area.

In the BRT case, the Virginia State Bar charged specifically that the activities of the defendants violated the state statutes relating to the unauthorized practice of the law which had been revised in 1956, and Canons 28, 35 and 47 of the ABA Canons of Professional Ethics. These Canons prohibited "respectively, stirring up of litigation, control or exploitation by a lay agency of professional services of a lawyer, and aiding the unauthorized practice of law."

The filing of the action against the Brotherhood was not, however, an isolated incident. It was intertwined with both the AAR's assault upon the legal aid plan of the Brotherhood and Virginia's attack upon the activities of the NAACP. The principal testimony upon which the State Bar Committee relied in concluding that the Brotherhood, its regional counsel and its regional investigator had violated the laws of Virginia was that of Julian A. Sherman, Eastern Representative of the Claims Research Bureau of the AAR.[9] That the relationship between the prosecution of the Brotherhood and the NAACP was more than coincidental

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9. Testimony given on Oct. 28, 1957, before the Committee of the Virginia Bar Association, Committee Report 19.

is borne out by the testimony which Carney, the head of the Bureau, had proffered in 1961 in Atchison, Topeka and Santa Fe v. Hildebrand (supra). Carney testified substantially that the State Bar of Virginia called upon the Claims Research Bureau to undertake the investigation of solicitation of FELA cases in Virginia in order to show that the 1956 amendments to the Virginia Code relating to solicitation were not aimed solely at the NAACP.

The injunction issued by the Chancery Court of Richmond and affirmed by the Virginia Court of Appeals prohibited the Brotherhood:

> "from holding out lawyers selected by it as the only approved lawyers to aid the members of their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers. . . ."10

It was this portion of the injunction which was appealed and which was struck down. In so acting, the Supreme Court approved not only the specific activities of recommendation and referral of selected counsel in which the Brotherhood was engaging, but the plan or program pursuant to which such activities were carried out. The Court's decision is grounded upon the first amendment.

> "[T]he First Amendment's guarantees of free speech, petition, and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance--and, most importantly, what lawyer a member could confidently rely on--is an inseparable part of this constitutionally guaranteed right to assist and advise each other.
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> Virginia, undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a State cannot ignore the rights of individuals secured

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10. BRT v. Virginia, 377 U. S. 1 (1964)

by the Constitution. For as we said in N.A.A.C.P. v. Button . . . 'a State cannot foreclose the exercise of constitutional rights by mere labels.'"

The Court was not content, however, to confine its decision to broad generalities. It answered the oft repeated charge that the Brotherhood's Legal Aid Program constituted a scheme of solicitation to which both the Brotherhood and its regional counsel were "guilty" parties, and the contention that the Brotherhood was engaged in the unlawful practice of the law, by stating:

> "Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not 'ambulance chasing'. The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of business. . . .
>
> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in law suits authorized by Congress to effectuate a basic public interest. . . .
>
> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. . . . And, of course, lawyers accepting employment under the constitutionally protected plan have a like protection which the State cannot abridge."

The final case in the trilogy is United Mine Workers v. Illinois State Bar Association,[11] decided by the United States Supreme Court in 1967. In that case, the United Mine Workers, since 1913, had employed a salaried attorney to process the Workmen's Compensation claims of its members. One would have thought that, under the circumstances, the mine workers had a prescriptive right to continue their practice. Nevertheless, in the 60's, the Illinois State Bar Association attacked the program. The Illinois Supreme Court distinguished the Mine Workers situation from that in BRT v. Virginia on the ground that the latter legalized plans under which workers were advised to consult specific attorneys, but did not protect plans involving an explicit hiring of such attorneys by the Union. The United States Supreme Court did not agree. It said:

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11. 389 U.S. 217

> "We do not think our decisions in Trainmen and Button can be so narrowly limited. 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."

It is interesting to note, in connection with the Mine Workers decision, that the Progress Report of the Committee on Group Legal Services of the State Bar, which was prepared before that decision, recommended changes in the Rules of Professional Conduct to permit the employment by groups of salaried attorneys.[12]

In holding that the Brotherhood's and Mine Workers' plans and activities are within the protected area of free speech and free association, the Court has accorded to such plans the broadest possible protection against infringement or limitation by the Bar or the Courts. The exercise of inherent judicial power to control the legal profession, a power exercised by the Illinois Supreme Court in its BRT case to uphold the Brotherhood's program, and employed in other cases to disable the program, is now drastically curtailed by the constitutional immunity granted legal aid programs similar to that of the Brotherhood and the United Mine Workers.

It is apparent that the decisions in Button, BRT and United Mine Workers have a broader significance than the legalization of the specific legal aid programs considered by the Court in those cases. Thus, while the opinion in the BRT case speaks in terms of the necessity of protecting workers in their efforts to preserve their rights under federal laws, the United Mine Workers case makes it clear that the protection of the First Amendment cannot be confined to consultation about federal laws, but also extends to state laws and rights and liabilities generally.

Moreover, while the BRT and United Mine Workers opinions recognize the right of workers to obtain legal assistance, it is clear from the Button case that the associational right to designate counsel and to recommend individuals to such counsel, is not limited just to those denominated "workers." At one point, the Court, in BRT, speaks of "the right of members to consult with each other in a fraternal organization." Such constitutional rights as those of referral and recommendation and employment cannot be delimited by appellations.

The basis for the Button, BRT, and United Mine Workers decisions is the recognition of the need for competent and reliable attorneys; a need which, by and large, the Bar has either ignored or not satisfactorily fulfilled. Neither the hatpin-method of selecting an attorney from the classified pages of a telephone book, nor the referral system

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12. Group Legal Services, Progress Report, 39 Cal. A. B. J. 639 (1964)

provided by the Lawyers' Referral Services, meet the exigency of those in need of a lawyer in whose integrity, interest, and competence they can have trust and confidence. No corporation would select an attorney by either of these devices and there is no reason to believe that ordinary citizens are willing to do so. The Bar's preoccupation with the problems of solicitation and channeling from a purely intraprofessional viewpoint has served in many instances to obfuscate the real needs of people for adequate legal representation. Nor can the Bar's indifference to the inequality in bargaining power between the claims adjuster or claims agent of the self-insured railroad or the insurance carrier and the injured claimant be glossed over. There can be no equality before the law unless there is an equality of access to skilled, competent advice by all who are in need of legal assistance.

The question may properly be asked, "What has happened since the trilogy?" The answer is, "very little." The Special Committee on Group Legal Services of the State Bar of California recommended to the Board of Bar Governors that it revise the Rules of Professional Ethics to make them coincide with the enlarged rights accorded attorneys and groups under the Button and BRT decisions. The Board of Governors rejected this recommendation with the assertion that adequate guidance was given both the profession and those who sought its services if they were assured that the Rules of Professional Conduct would be interpreted in light of the BRT and Button decisions. Thereafter, the existence of the Group Legal Services Committee was terminated.

It soon became apparent, however, that the problems posed by the trilogy could not be indefinitely ignored. The State Bar Committee on Legal Ethics was, therefore, enjoined to prepare new Rules. The new rule was embodied in a proposed Rule 20. The first draft was propounded to the Bar in 1968. It met with considerable objection and the Board of Governors thereupon held public hearings to hear argument on it. Although it is apparent that any rule limiting the access of groups to lawyers is of concern to the groups as well as the lawyers, appearances at these public hearings were limited to members of the State Bar.

The principal objection to the rule initially promulgated was that it would limit the services provided by the attorney to the individual members of the group, to those matters which were of common or general interest to the group. It was pointed out to the Board that, with respect to such matters, attorneys were presently representing members of groups without objection from the Bar, or without any contention on the part of the Bar that such representation was unethical. It was also made clear, in the course of the public hearings, that it is not in connection with those matters which are related to the common principal purposes of the association that we need a broadening of the availability of group legal services. The average working person needs legal assistance today, not in his capacity as a union member or as an employee, but in his capacity as debtor when his car is repossessed, in his or her capacity as husband or wife when the need for divorce arises; in his capacity as tenant of a landlord and in his capacity as buyer of

a used car. These are the respects in which the average person needs legal services and these are clearly not related to the common principal purposes of the usual association.

Following the hearings, Rule 20 was amended and circulated again to the Bar in the May-June, 1969, issue of the State Bar Journal. The Rule removed the requirement that the services rendered be related to the principal or common purposes of the association and it permitted the group to identify both the nature and extent of the legal services to be performed and the members of the State Bar to render them. It limited, however, the term "group" to organizations or associations "whose primary purposes and activities are other than the rendering of legal services." While not establishing any licensing provisions, it required a member of the State Bar, furnishing legal services pursuant to an arrangement with a group, to report to the State Bar, on forms provided by it, the name and address of the group, its primary purposes and activities, the number of its members, and a general description of the types of legal services offered, and annually thereafter, to report on any changes in such matters and the number of members of the group to whom legal services were rendered in the preceding year.

While there was some uncertainty in my mind as to the coverage of the May-June draft of Rule 20, it was, by and large, unobjectionable and represented, in my opinion, a substantial step forward. On September 5, 1969, however, the Board further amended Rule 20 and, as so amended and without prior notice to or consultation with the Bar, submitted the amended Rule to the Supreme Court. This Rule, which has now been approved by the Supreme Court effective January 21, 1970, contains the following provisions: It provides that the furnishing of legal services by a member of the State Bar, pursuant to an arrangement for the provision of such services, to the individual members of a group, at the request of the group, is not of itself a violation of Rules 2 or 3 of the Rules of Professional Conduct, if the arrangement

1) permits any member of the group to obtain legal services independently from any attorney of his choice; and

2) is so administered and operated as to prevent (a) the group from interfering with or controlling the performance of the duties of the attorney, (b) the group from deriving a profit or receiving any part of the consideration paid to the attorney, (c) unlicensed persons to practice law under the arrangement.

The Rule prohibits all publicizing and soliciting activities concerning the arrangement, except the issuance of a simple, dignified announcement setting forth the purposes of the group and the nature and extent of the legal services provided by it without, however, any identification of the member or members of the State Bar rendering the services. To the latter, there is a proviso to the effect that nothing in the Rule shall

prohibit a statement, in respect to individual inquiries, as to identity of the attorneys rendering the services.

A group, as in the prior drafts of the Rule, is defined as an association, labor union, or other non-profit organization, whose primary purposes and activities are other than the rendering of legal services. The same requirements as in the prior Rule with regard to the reporting of activities by the attorney are retained. It is provided that each report required by the Rule shall be kept confidential by the State Bar, except the name and address of the group and the names of the attorneys providing the group services.

Group legal services has fared less well at the hands of the ABA, in spite of the valiant efforts of its Committee on Availability of Legal Services under the chairmanship of F. William McCalpin, to bring the Canons of the ABA in line with modern developments. The McCalpin Committee proposed the adoption of a Rule which would permit any organization to provide legal services to its members, subject to those general conditions which are set forth in the California Rule 20. The ABA Rule, however, would have permitted the group to advise its members of the attorneys representing them. In addition, it would have required that the arrangement be pursuant to a written agreement to be filed with the appropriate Bar Association and, in the case of an organization created primarily for the purpose of providing legal services, would have provided that it obtain a certificate from the State Bar before the attorney could perform services for it. The recommendations of the McCalpin Committee were overwhelmingly rejected by the House of Delegates at the Bar's annual convention in Dallas in August, 1969, and, in its place, a rule proposed by the Special Committee on Ethical Standards, which had been charged with revising the Canons of Ethics, was adopted.

> "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."

One of the organizations with which he may cooperate is:

> "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 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."

To sum up, the present status of the law with respect to group legal services is as follows: Rules 2 and 3 of the Rules of Professional Conduct of the State Bar of California have now been modified by the adoption of Rule 20. The ABA Canons allow group legal services only to the extent that controlling constitutional interpretation at the time of rendition of the services requires the Bar to permit them. Clearly, the Button, BRT and United Mine Workers decisions have had an impact, but recognition by the Bar of the principles enunciated in them has been slow and grudging, at best. A number of questions still remain to be answered.

Under the BRT and other decisions, what power remains in the State to regulate group legal services? It is apparent from a reading of the decisions that the constitutional immunity from restriction accorded the BRT in the operation of its legal aid program extends also to the attorneys who serve the group. This does not mean, of course, that attorneys in the practice of group legal services can ignore conflicts of interest, subject themselves to the direction of a third party, engage in fee-splitting, fail to place their client's money in a trust account, or fail or refuse to conduct themselves in accordance with the general standards prescribed for lawyers. It does mean, however, in my opinion, that a plan on all fours with the Brotherhood plan is not, as a plan, subject to further restriction. This is a position which is not held, I know, by some other lawyers. For example, Dean Murray Schwartz, in his article on Group Legal Services in the UCLA Law Review,[13] had this to say about the licensing of group legal service plans:

"If BRT is read as an 'absolute' first amendment decision, then a licensing system such as proposed. . . . would be unconstitutional, at least for BRT-like plans. However, BRT need not be read in 'absolutist' terms. The Court, in language perhaps atypical for Mr. Justice Black, the author of the majority opinion, takes pains to point out that: '[T]he 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.' (377 U.S. at p. 8.) A

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13. 12 UCLA L. Rev. 279, 298 (1965)

> licensing scheme, carefully tailored to protect legitimate professional interests in a discriminating way, could readily reflect an 'appreciable public interest.'"

I would conclude, however, from the fact that both the ABA and the State Bar, after early consideration of licensing systems abandoned such proposals, that they had decided that such systems were of doubtful validity. The requirement under Rule 20, that attorneys make reports concerning their group legal service connections, may fall in a somewhat different category, though, I must confess, that it is hard to justify a reporting system applicable to group legal service attorneys, and not to attorneys engaged in other types of practice.

How far does the constitutional immunity afforded by BRT protect the individual member of the group? In this connection, it is important to note that the First and Fourteenth Amendments protect only against state action, not against individual action. Thus, while the trilogy carves out an area which the State, or its State Bar Association, cannot invade, the same restrictions do not apply to private action. You may ask why or how an individual should suffer by reason of his participation in a group legal services program. The one case which has been handed down since the trilogy which deals with this problem is the California case of Wise v. Southern Pacific.[14]

In that case, the carmens' union was signatory to a collective bargaining agreement with the S. P. which, among other things, provided that the S. P. could adopt reasonable rules and regulations for its employees. One of these rules, Rule 803, which had been in effect for many years, provided that an employee should not engage in acts disloyal to the company. The local chairman of the carmens' union in Sacramento, upon request, referred several injured members to attorneys. This was pursuant to a somewhat informal arrangement between the Union and such attorneys. He was charged with disloyalty and discharged. Under the Railway Labor Act, after having exhausted his internal remedies under the collective bargaining agreement, an employee who is discharged may waive reinstatement and sue his employer for damages for breach of the collective bargaining agreement. This Wise did, alleging that his discharge for disloyalty violated the provisions of the collective bargaining agreement which provided that discharges could only be for just cause. The trial court found a breach of the agreement and awarded damages. On appeal, the District Court of Appeals reversed on the ground that to refer an injured employee to an attorney was per se disloyalty. Since the preparation of this paper, the Supreme Court, on appeal, has affirmed the judgment of the trial court in an opinion notable chiefly for its narrowness. The Supreme Court, however, did make this significant comment:

> "Plaintiff's testimony was to the effect that injured members of his union had sought his advice, as their union representative, with respect to injuries sustained on the job, and that on occasion he had recommended certain

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14. 1 Cal. 3d 600 (1970)

> specific attorneys whom he considered especially competent in the field. Such activity in assistance of his fellow employees not only did not constitute solicitation of such employees as charged by defendant, but was an activity protected under the rationale of Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar (1964) 377 U.S. 1, 5-6 [12 L.Ed.2d 89, 93, 84 S.Ct. 1625, 11 A.L.R.3d 1196]."

What is a group? The dispute here is centered around the question whether the group, within the meaning of the group legal service rules, should be confined to one which has for its principal purpose some activity other than the providing of legal services. The McCalpin Committee did not approve of such a rule. Such a limitation, however, is written into the new Canons of Ethics and also into Rule 20. Certainly, an insurance company could undertake a program of insurance directed exclusively at insuring against legal costs. I can see no reason why any organization should not be allowed to provide for its members legal services, even though that is its primary reason for existence.

Must the services provided by the group relate to matters of common interest to the group? The Standing Committee on Group Legal Services of the State Bar was of the opinion that there should be no such limitation and the State Bar, in Rule 20, has discarded such a restriction. The revised Canons of Ethics in this connection have a somewhat ambiguous provision. The recommending, furnishing or paying for legal services by a group to its members must be incidental and reasonably related to the primary purpose of such organization. As I have pointed out above, any such limitation of common interest would effectively destroy many of the benefits to be derived from group legal service programs.

Can the group fix the fees which its attorney will charge? In re BRT, decided by the Illinois Supreme Court prior to BRT v. Virginia, held that the group could not fix the fees charged by the attorney designated to represent its members. The rationale of the Rule was that for the group to do so constituted the practice of law and the intercession of a third party intermediary in the attorney-client relationship. Obviously, if the group can employ house counsel on such terms as it is able to negotiate, it should be able to negotiate the terms of representation by an outside attorney. The newly revised Canons of the ABA provide only that an attorney shall not charge an illegal or excessive fee. In the case of the group legal service plan established by the Joint Board of Culinary Workers in 1957, a fee schedule was adopted based upon the minimum fees promulgated by some of the outlying Bar Associations in Los Angeles County. I would think that the group could negotiate for any fee schedule which was not clearly unreasonable.

Can a Taft-Hartley trust be established to defray the expenses of group legal services? Section 302 of the LMRA prohibits an employer or an association of employers from paying to any labor organization any money, except to a trust fund established for the purpose of paying for the benefit of the employees of the employer medical or hospital costs,

pensions, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness or accident insurance. Thus, under Section 302, a Taft-Hartley trust fund cannot be established to receive contributions made by an employer to a group legal service program. We were aware of this, of course, at the time that the Joint Culinary Board plan was established and we provided that the trust fund should be established and administered solely by the employers.

These are only a few of the questions that have arisen since the Supreme Court decision in BRT was handed down. Others will arise; but, the existence of group legal services is now safe from attack. Hopefully, the future will see their rapid extension.

REFERRALS UNDER GROUP PROGRAMS: HOW SHOULD REFERRALS BE MADE? WHAT AREAS SHOULD BE RESERVED FOR PRIVATE PRACTITIONERS?

Barlow F. Christensen

My position here this morning puts me in mind of a story told about Justice Hugo Black. You will perhaps remember that Justice Black, in his very early days, had been a member of the Ku Klux Klan. He rose from those rather doubtful beginnings, however, to become first a United States Senator, and ultimately a justice of the nation's highest judicial tribunal, the Supreme Court. For many years, he has been one of the truly dominant forces on the Court, and thus a dominant force in shaping our national history.

It seems that Mr. Justice Black was to speak at a convention of the Florida State Bar, and his son, Hugo, Jr., who is a member of the Florida Bar, was asked to make the introduction. He did so in the following way. He said: "My father has had an extraordinary career. He started out wearing white robes and scaring black people; he ended up wearing black robes and scaring white people."

I might add that Justice Black is reported to have enjoyed the introduction immensely.

I find myself in much the same kind of position. I first became involved with the subject matter of this conference as a member of the staff of the American Bar Association, working to promote the lawyer referral service program. Consequently, my posture was one of almost complete professional orthodoxy. Somehow--I like to think that it was through reason, although there are some who would probably disagree--somehow I came eventually to be a supporter of group legal services, and thus, in the eyes of many in the bar, a heretic or worse. One of my purposes here this morning, then, is to give you something of the view from both sides of the bridge, and perhaps to do something toward bringing orthodoxy and heresy together.

Maybe I should begin by pointing out what does not come within the topic I plan to discuss. In talking about referrals under group programs, I do not mean group legal services that are themselves referral type arrangements. The basic form of the Brotherhood of Railroad Trainmen program, for example, was a referral system, by which prospective claimants under the Federal Employers Liability Act were sent to preselected private counsel. This sort of referral arrangement, as an integral part of a formal group legal service program, is not the kind of thing I will be talking about here this morning. Instead, my remarks will be directed to the situation where the person needing legal services cannot be taken care of through the established formal group program--be it a referral system, a house counsel arrangement, or some other plan--but must, for some reason or other, be sent outside the formal group program to a private practitioner.

Let me start with the second of the two subtopics listed in the printed program: What areas should be reserved for private practitioners? In some way this question is a kind of straw man, set up to be knocked down. It wasn't selected wholly for that purpose, however. In addition, and perhaps more importantly, the rhetorical question, "What areas should be reserved for private practitioners?" serves to emphasize what I take to be a vital point with respect to group legal services--a point that will be articulated and discussed more fully later.

But first, let's take a look at some of the approaches that might be taken to reserve areas of legal service for private practitioners. All are presently being talked about as possible restrictions on group legal services. One such approach is the obvious one of carving out one or more specific fields of practice--on the basis of the substantive law involved, the nature of the service, or both--such fields to be prohibited to group legal service programs and reserved to private lawyers. An example is expressed in the "scare" question often raised by those opposed to group legal services. They ask: "Do we want automobile clubs writing wills?"

This kind of question seems to imply that some areas of law practice must be reserved for private practitioners because the legal services involved are inherently or traditionally "private lawyers' work." Of course, the question might be taken to imply only that some kinds of legal service may, under some circumstances, be unsuitable for some kinds of group programs. In this context, however, I fear that the term "unsuitable" may have less to do with the protection of important values in particular circumstances where those values are genuinely threatened than it has to do with traditional notions about what is or should be "lawyers' work," and thus about what is or should be reserved for lawyers.

Another approach often suggested as a restrictive measure is to limit the kinds of groups or organizations that are permitted to offer group legal services. Typical of such restrictions are those that would allow only non-profit organizations, or organizations having some primary purpose other than the rendition of legal services, to operate group legal service programs. Restrictions of this type reserve for private practitioners the privilege of providing legal services of every kind to all persons except those who happen to be members of such non-profit organizations or of groups with primary purposes other than the rendition of legal services. Attempts are often made to justify such restrictions on public interest grounds, of course; the argument is usually that these restrictions will in some unexplained way protect the public or the prospective recipients of the service against generally ill-defined evils. But despite the arguments, one gets the feeling that protection of private practice against competition is the real objective.

A similar approach is the attempt further to limit group legal service programs to those legal services "reasonably related" to the group's primary activity. The fact that a legal service to be offered

by a group program is "reasonably related" to the group's primary activity may, of course, be in some ways pertinent to the question of the group's capacity to provide quality service and its incentive to do so. Presumably, a labor union will have a special interest in seeing that its members get capable counsel in workmen's compensation cases, for example. But capacity and incentive to provide quality service are not inevitable, even though the legal services being provided are related to the group's primary activity, nor is it necessarily so that capacity and incentive will be absent where there is no such relationship. Moreover, in some situations the existence of a relationship between the legal service to be offered and the group's primary activity may, in fact, produce a greater chance for conflict of interest than would exist if there were no such relationship.

Part of the effect of limitations requiring a "reasonable relationship" between the legal services to be offered and the group's primary activity will depend, of course, upon how broadly or narrowly the term "primary activity" is defined. In the case of a labor union, for instance, if the "primary activity" is construed narrowly, as embracing only collective bargaining, then a fairly narrow range of legal services would be permissible as "reasonably related" to the group's primary activity, and a correspondingly large area of law practice would thus be reserved for private practitioners. Conversely, if a union's "primary activity" were defined broadly, as embracing the general responsibility to work for the welfare of union members, the kinds of legal services "reasonably related" to the group's primary activity would be virtually unlimited, and those reserved for private practitioners would be correspondingly small. Those who propose such restrictions generally tend toward the narrower construction. The dominant motive thus seems to be a desire to retain as much of the legal service business as possible within the exclusive domain of the private practitioner.

Perhaps these proposals for regulation are best evaluated against the background of the legal profession's history in dealing with group legal services. This history shows a consistent pattern of hostility and opposition, a pattern only now beginning to change, incidentally. Much of the bar's long-standing antagonism toward group legal service programs has been expressed in public interest terms. The ostensible objectives have been to protect the public against inept or unscrupulous lawyers practicing through group legal service programs, and to protect the profession against "commercialization."

Even if these objectives are genuine, they would seem to be of doubtful merit. It has never been demonstrated to my satisfaction that the lawyer whose services have been obtained on a group basis may not be every bit as honorable and capable as his brother in private practice. Indeed, where the group furnishes a specialist to handle specialized problems common to members of the group, he may well be more competent than the private practitioners to whom members of the group would otherwise go. And frankly, I have never been quite sure just what is meant by "commercializing" the legal profession. At least I fail to see how the supplying of legal services on a collective

basis is inherently any more "commercial" than doing it on an individual basis. After all, private lawyers do charge fees.

Be that as it may, these ostensible objectives of bar opposition to group legal services seem always to have been at best only secondary to another less defensible objective. To put it bluntly, while the rhetoric has been of honor and duty, the real objective, in most instances, seems to have been the preservation of law business as the monopolistic domain of private legal practitioners.

Am I being too harsh in my evaluation of the profession's motives in fighting the group legal service idea? I think not. I have had the privilege--perhaps misfortune is the better word--of being at the center of much of the debate that has raged in the legal profession for the past five years over group legal services. It is my observation that while the debate usually starts on the high plane of honor and duty, it almost invariably comes ultimately to the matter of economics, and it is on this plane that the discussion usually becomes most bitter. Thus, the bar really indicts itself on the question of its motivation for opposing group legal services.

And here perhaps I should deviate from the line of discussion I have been pursuing for a comment about the work of the California Bar in the field of group legal services--and particularly that of your committees on group legal services, which have contributed so much over the past few years. The names that come most readily to mind are Burnham Enersen, Bill Gray, Murray Schwartz, George Bodle, and John Lonergan--although I know that there are many others who deserve recognition but whose names elude me at the moment. You, in the California Bar, have set for the legal profession of the entire nation an example of honest, responsible professionalism, of which you may well be proud.

But back to the point I was pursuing. It was a simple one: the primary object of much of the profession's opposition to group legal services and of many present proposals to regulate them has been to reserve for private practitioners as much legal business as possible, that is, to preserve as much as possible of the private lawyer's monopoly of the privilege of providing legal services to the public.

Is preservation of the private lawyer's monopoly a legitimate objective for the legal profession? I submit that it may be legitimate if such monopoly in a given area of law practice can be demonstrated to be clearly necessary in the public interest. Monopoly is not legitimate, however, when it is rooted solely in the private economic interests of lawyers. You may be able to convince me that, under some circumstances, people must be prevented from taking group action to obtain legal services for individual matters, when the objective is to protect such people--or the public generally--against some actual and serious evil. But I doubt that you will ever convince me that such group action must be prohibited solely to preserve some private practitioner's law business.

This brings us back to the original question: What areas should be reserved for private practitioners? My answer has to be: None!

Do I advocate, then, that any and all group legal service programs should offer any and all legal services, or that no cases should ever be sent to private practitioners? Not at all. The point--and this is the point alluded to at the beginning of my remarks as "vital"--is simply that reservation of an area of legal service to private practitioners may be a legitimate result of otherwise justifiable restrictions on group legal services, or may be a proper result of the group's own decision about how comprehensive a legal service program it can or wishes to offer; but the reservation of legal business to private practitioners can never be a legitimate reason for such restrictions.

Let me repeat: the reserving of an area of legal services to private practitioners may be a legitimate result of restrictions on group legal services; it should not be the reason for such restrictions.

How, then, shall we determine which legal services may properly be rendered by group legal service programs and which must be performed by private practitioners? The situations in which cases must be handled by private lawyers rather than by group legal service programs appear to fall into two general categories. First, there are those situations in which the legal services involved are outside the scope of the legal service program undertaken by the group. Obviously, where the group has chosen to offer only a limited legal service--one handling only workmen's compensation cases, for example--other kinds of cases must be sent to private lawyers. The second category is made up of those situations in which the public interest may require services to be rendered by private lawyers rather than by the group legal service program. And here the decisions are likely to be difficult. For a long time, the profession avoided the difficulty by simply prohibiting all group legal services. That solution is no longer available, however, and we must now look for criteria upon which to base our decisions about the kinds of legal service that in the public interest must be performed by private lawyers.

The literature on the subject contains a good deal of talk about the quality of the services rendered by lawyers under group programs. But I have some trouble with quality as a ground of decision. To begin with, I have seen no satisfactory documentation of differences in quality between the services rendered by private lawyers and those rendered by lawyers in group programs, the most recent notable failure by the bar to demonstrate the existence of such differences being the mineworkers' case. But even if such differences did exist, quality would still seem to be at best a peripheral issue.

It can be argued that a state may legitimately require a minimum level of competence of those it permits to practice law. And the profession would seem to be acting legitimately in providing lawyer referral services to assist clients in selecting better lawyers.

Indeed, it might even be argued that a state could legitimately set up special classes of law practice, with higher qualifications required for the performance of particular kinds of legal functions. But could it be argued that one person or class of people could legitimately be required to obtain a given legal service from one particular class of lawyers while other people were permitted to obtain the same service from any lawyer? For example, under the present system, where only a minimum level of competence is required of those who wish to practice law and where people generally are free to obtain legal services from any lawyer, could either the profession or the state justifiably require one class of people to obtain the legal services they need from Wall Street law firms or prohibit that class of people from obtaining services from general practitioners, on the ground that the large firms can provide better service?

The point is that where the profession and the state undertake only to require of lawyers a minimum level of proficiency, the client himself should be the one to decide what level of quality he will purchase above that minimum. One might argue that the minimum level is too low, or that the provisions for maintaining it are inappropriate or imperfectly applied. But one could hardly argue that measures to remedy such deficiencies should be applied to some lawyers or prospective clients and not to others. Restrictions that would seek to improve the quality of the legal service obtained by members of groups by limiting the manner in which such people may secure lawyers do just that. They say, in effect, "You cannot act collectively to purchase a level of quality that others are completely free to purchase individually."

I submit that the person who acts in concert with others to obtain individual legal services should have the same alternatives, with respect to the quality of the services to be purchased, as the person who acts individually. If so, then the quality of the services rendered through group programs is largely irrelevant as a ground for prohibition or restrictive regulation.

What, then, is the appropriate criterion for deciding whether an area of legal service can be entrusted to group legal services, or whether it should be left to private practice? I have become convinced that the key to the whole matter is the independence of professional judgment and action of the lawyer participating in a group program. So long as the services are to be rendered by a lawyer (with all that this honored designation implies), and so long as the lawyer's independence of professional judgment and action is unimpaired, I find it hard to see any compelling reason to refuse to permit him to render any legal service needed by the individual client--provided, of course, that the group is willing to pay him to do so. The essential issue, then, is the lawyer's independence of professional judgment and action.

Two factors appear relevant to this issue. One is the power or opportunity of the group to exercise influence or control over the lawyer. The other is the possibility of conflict of interest.

Power and opportunity to exercise influence or control over the lawyer exist to some degree in all group legal service programs. It is doubtful, however, that the variation in this factor is as great as is sometimes thought. Perhaps power and opportunity for control are fairly great where the lawyer is a full-time salaried employee of the group; but it is difficult to see how that situation is significantly different from the one in which a private lawyer is on what amounts to a full-time retainer from the group. And even when only a portion of a private lawyer's practice is devoted to service to members of a group under a group legal service program, if the lawyer's group service activities make up any substantial portion of his practice, there will be some possibility of influence or control by the group. Moreover, the arrangements presenting the greatest opportunity for influence or control--most notably, the salaried lawyer arrangement--are also the most useful in terms of expertise, efficiency, and economy. Thus, while the nature of the arrangement between the group and the lawyer may, in some instances, have some bearing upon the question of the lawyer's independence of professional judgment and action, it should probably not be regarded as the main factor.

This leaves the question of conflict of interest. And here, it seems to me, is the point upon which the issue of restrictions on group legal services should turn. Granted that there may be power or opportunity for the group to exercise influence or control over the lawyer in almost any group legal service program, there would be no incentive--and thus, presumably, no attempt--so long as the interests of the group and the individual receiving services were substantially the same. Put the other way, the group's power or opportunity to exercise influence or control over the lawyer will be of concern only where there is a conflict of interest between the group and the individual recipient of legal services.

There may be some question about whether even a conflict of interest should preclude a group lawyer from handling a matter. Canon 6 of the old ABA Canons of Ethics (the substance of which seems generally to be covered by Canon 5 of the new Code of Professional Responsibility) declares it to be unprofessional for a lawyer to represent conflicting interests, "except by express consent of all concerned given after a full disclosure of the facts." Apparently, the Canon also presumes that a lawyer will not represent conflicting interests, even with the consent of all concerned, unless he believes that he can do so fairly.

A reasonably good argument might be made in favor of applying the same principles to the group legal service situation, permitting a group lawyer to handle a matter involving a conflict of interest between the group and the individual, provided he believes that he can do so fairly and that he secures the consent of the individual client. Groups or organizations operating group legal service programs might be wise, however, to adopt, as a matter of policy, the rule that group lawyers are not to handle matters involving serious conflicts of interest, but are to send such matters to private practitioners. Such

a rule would not only relieve the group lawyer of a pressure that can just as well be avoided, but also at the same time eliminate even the appearance of impropriety.

And this brings us to the second main part of my topic this morning: where a group legal service program must decline to handle a matter, either because it involves a conflict of interest or because it is outside the scope of the legal service program the group has undertaken to provide, how should it be taken care of? How should referrals be made?

You would be correct in assuming, from what I said at the outset, that my answer will be "the bar-sponsored lawyer referral service." The lawyer referral service, a system by which local bar associations refer prospective clients to practicing lawyers, does indeed seem to be the most promising method by which group legal services might deal with cases they themselves cannot handle. Unfortunately, however, the lawyer referral program has a number of shortcomings that impair its usefulness for this purpose. A discussion of some of these deficiencies may be of some value in giving you an idea of what to expect from the lawyer referral system--and, perhaps, enabling you to prod the bar into improving it.

To begin with, there may be localities in which lawyer referral services are not available. While the program is fairly widespread, especially here in California, many communities are still without such services. For example, thirteen cities with populations of over 100,000 do not yet have any kind of lawyer referral service. Five of these cities have populations of over 200,000, and one has nearly half a million people. Moreover, although the lawyer referral service has been found useful in smaller communities as well, it has not yet been adopted extensively in cities with populations of less than 100,000, even in California.

There is another side to the matter of accessibility. All too often, the lawyer referral effort in a large city consists of a single office--usually the local bar association office--in a downtown location, to which all applicants for referral must come in person. Obviously, this kind of arrangement is not well suited to the task of finding private lawyers for group members whose problems cannot be handled by the group legal service program. The ideal arrangement would probably be one in which the referral could be made by telephone, the group lawyer calling the local bar's lawyer referral service to secure an appointment with a private lawyer, to whom the client could be sent directly from the group legal service office. In some places, arrangements of this kind have been set up between lawyer referral and legal aid offices, and they seem to work well. Unhappily, too few local bar associations have shown any initiative in developing such arrangements. Again, however, the local bar groups in California, under the leadership and with the help of the state bar, are somewhat ahead of those in the rest of the country in developing convenient lawyer referral arrangements.

Another shortcoming of lawyer referral services that would tend to impair their effectiveness for this purpose is their inability to offer any real assurance of the quality of the lawyers on their panels. Most referral services do not discriminate in admitting members of the bar to referral panels. Some refuse to accept a new lawyer until he has had a year or so of experience, but other requirements beyond simple membership in the bar are not customary. In the past, the policy has generally been to refuse to go behind a lawyer's license in considering his qualifications. The policy was at one time articulated by the American Bar Association's Committee on Lawyer Referral Service as follows: "When the courts of a state have admitted a lawyer to practice at the bar, a committee composed of his fellow members should be hesitant indeed before pronouncing him incompetent to serve on a legal panel."

Under this policy, many bar associations admit to their lawyer referral lists anyone who is licensed and in good standing. Some have attempted to avoid some of the potential consequences of this practice, however, by resorting to exculpatory clauses in applications potential clients are required to sign in order to obtain the service. Thus, the bar seeks to avoid at least legal responsibility for injury to referral clients due to the mistakes of unqualified lawyers on their rosters. Others, acknowledging a higher obligation to the public but unwilling to meet the issue directly, have found various informal ways of discouraging those lawyers deemed unqualified from seeking panel membership.

This problem is, of course, a product of the inadequacies of the legal profession's admission and disciplinary practices. If the legal profession were fully to discharge its obligation of seeing that all licensed lawyers are actually honest and competent, there would be no such problem--or at least a very minor one--with respect to lawyer referral panels.

But just how good are the panels of lawyers offered by most referral services? The American Bar Association's Committee on Lawyer Referral Service became interested in this question a few years ago and undertook a modest study to see what could be learned about the qualifications of lawyers serving on lawyer referral panels. They selected six referral services that appeared to be fairly representative with respect to such matters as geographic location, city size, size of the bar, number of lawyers serving on referral panels, and the number of referrals handled. Rosters of their panel members were obtained, and relevant information about the lawyers listed was taken from the Martindale-Hubbell Law Directory. The factors examined included age, years in practice, education, and Martindale-Hubbell "rating." For purposes of comparison, a random sample was selected from the bar as a whole in the same communities.

This study indicated that the lawyers on lawyer referral panels tended to be concentrated in the 30 to 50 age group, with slightly fewer of the younger and older men than the bar as a whole. As might

be expected, much the same pattern prevailed with respect to years in practice. Slightly fewer lawyers with under 5 years of experience are found on lawyer referral panels than in the bar as a whole. A client using a referral service would have a greater chance of getting a lawyer with from 5 to 20 years of experience than if his selection were made from the entire bar. But if he wanted a lawyer with more than 20 years of experience, he would do better by going to the "Yellow Pages" than to a lawyer referral service. It also appeared that the educational level of the lawyers on referral panels was slightly higher than it is in the bar as a whole, probably because the older lawyers are the ones likely to have had law office training rather than formal training. The findings with respect to ratings are generally consistent with the other findings. A prospective client would have a somewhat smaller chance of getting an "A" rated lawyer from the referral service than from the Yellow Pages. He would have a better chance of getting a "B" rated man, however, and a fairly small chance of getting a "C" rated lawyer from either source. He would also be slightly less likely to get an unrated lawyer from a referral service than from the Yellow Pages.

To sum up, lawyer referral panels appear generally to contain a fairly good cross-section of the practicing bar--at least with respect to age, experience, education, and rating of ability--concentrating a bit more in the middle of the bar than in either the top or the bottom.

This study leaves many questions unanswered, of course, particularly with regard to qualifications that may not be shown in the Martindale-Hubbell ratings. This is especially true of those lawyers who are unrated in Martindale-Hubbell (and these make up two-thirds of the lawyers on referral panels and nearly three-fourths of the bar as a whole). There is also the question of the reliability of the Martindale-Hubbell ratings. Moreover, the study shows nothing at all about how many lawyers may <u>actually</u> be <u>unqualified</u>.

Fortunately, the leaders of the lawyer referral movement have recently reassessed their position on the question of qualifications. The fact that the profession indulgently allows incompetent or dishonest people to become lawyers or to retain their licenses once they have become licensed, is no longer regarded as a compelling reason for the profession actively to help them find victims through the facilities of a bar-operated lawyer referral service. Thus, in August of 1968, the ABA's Committee on Lawyer Referral Service sought and received the approval of the ABA House of Delegates for a new statement of standards and practices, which included the following: "In accepting the registration of any lawyer, the service assumes responsibility for assuring that every registrant, either of the general panel or of a special panel, is a member of the bar in good standing, qualified to practice in the area in which he seeks to register, and that he adheres to recognized ethical standards of the profession. Mere membership in the Bar Association should not be deemed sufficient to qualify the applicant for enrollment, but each applicant shall be judged by the Committee on the basis of his personal qualifications.

The service shall make such investigation as it may consider necessary to establish to its satisfaction the responsibility, capability, and character of each lawyer registrant. The standard to be applied in general shall be that the lawyer referral service is willing to vouch for the legal ability and the personal reliability and integrity of each member of each of its panels." That's pretty plain talk, and it puts the responsibility directly where it belongs.

As this principle is adopted and implemented by the local bar associations operating lawyer referral services, people using the services can have some assurance that the lawyers to whom they are sent are capable and honest.

Still another shortcoming of the lawyer referral program lies in the failure of many referral services to make any effort to select the right lawyer for a particular case. The person seeking a lawyer through a referral service is not looking for just any lawyer; he wants one who is qualified to handle his particular case. This problem will no doubt be especially acute in referrals from group legal services. In many instances, the cases to be referred will involve specialized problems, outside the scope of the group program, and it will therefore be of great importance that they be sent to someone who is qualified to handle them.

This problem is but one facet of the profession's general problem of recognizing and certifying specialties in law practice. Because the legal profession has been reluctant to acknowledge and deal with the problem of specialization, the lawyer referral services operated by bar associations have tended to resist any kind of system involving acknowledgement of special skills or ability. This too is changing, however; in 1967, 51 of the 191 referral services replying to the ABA annual questionnaire reported using one or more specialist panels. Again, many of these are here in California, and it is to be expected that the efforts of the California Bar to institute a system for certifying legal specialists on an experimental basis will accelerate the movement towards the adoption and use of special panels by lawyer referral services in this state.

Now, after having spoken so negatively of the lawyer referral program, let me reverse myself and put in a positive plug for it. Despite its shortcomings, the lawyer referral service is a viable legal service device--one that may be a very helpful supplement to a group legal service program. Thus, where an acceptable lawyer referral service is available, a group legal service might help its beneficiaries significantly by using this facility of the bar for the referral to private lawyers of cases that cannot be handled through the group program.

Where there is no satisfactory bar-operated lawyer referral service, the group legal service must, of course, find some other way of sending such cases to private practitioners. The group lawyer

might simply tell the client to find a private lawyer, without any attempt to direct him to one. But the same reasons that prompt the establishment of a group legal service program should also be at least an incentive for the group to assist the client as much as possible in finding a suitable private attorney where the group program cannot give him the needed help. For practical purposes, this means either a bar-operated lawyer referral service or a list of acceptable lawyers developed and maintained by the group program itself.

This latter alternative may have to be adopted of necessity in some instances. It does, however, offer some difficulties. The first is the not inconsiderable problem of developing such a list and maintaining it. Doing so with any degree of assurance may be a more burdensome task than the group wishes to assume. In addition, the administration of such a referral list presents a good deal of opportunity and perhaps some pressure for giving preferences or otherwise making referrals on some basis other than the needs of the client. Adopting this approach thus also means assuming the burden of guarding against this kind of misuse. And when you have set up a formal system for making such referrals and accepted the burden of guarding against abuses, you have really just extended the scope of your group legal service program. This is, I guess, just another way of saying that if the scope of your program is to be anything less than full and complete service, the point must eventually come where some part of the process is left to others. And the appropriate others seem to be the bar associations.

I wish I had a good story with which to conclude my remarks. As I don't have one, perhaps the best I can do is simply to sum up what I have said. I think that I would like to make just two points: First, no area of law practice should be reserved for private practitioners for that reason; rather, if cases must be referred from group legal services to private practitioners, it should be either because they are outside the scope of the group program or because they involve some conflict of interest that threatens to impair the independence of professional judgment and action of the lawyer. Second, the bar-operated lawyer referral service, despite its shortcomings, is probably the most promising way of handling cases that must be referred to private lawyers.

APPENDIX

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