STATE OF MINNESOTA

IN SUPREME COURT

~~[illegible]~~ 45895

HEARING ON RECOMMENDATIONS OF SUPREME COURT STUDY COMMITTEE ON PREPAID LEGAL SERVICES

IT IS HEREBY ORDERED, that a hearing on the Recommendations of the Supreme Court Study Committee on Prepaid Legal Services, recommending changes in the Minnesota Code of Professional Responsibility, be held before this Court in the Supreme Court, State Capitol Building, Saint Paul, Minnesota, on Friday, September 12, 1975, at 10 a.m.

IT IS FURTHER ORDERED, that true and correct copies of the Recommendations be made available upon request to persons who have registered their names with the Clerk of the Supreme Court for the purpose of receiving such copies and who have paid a fee of $.90 to defray the expense of providing the copies.

IT IS FURTHER ORDERED, that true and correct copies of the Report of the Supreme Court Study Committee on Prepaid Legal Services be made available upon request to persons who have registered their names with the Clerk of the Supreme Court for the purpose of receiving such copies and who have paid a fee of $4.80 to defray the expense of providing the copies.

IT IS FURTHER ORDERED, that advance notice of the hearing be given by the publication of this Order once in the Supreme Court Edition of FINANCE & COMMERCE and THE ST. PAUL LEGAL LEDGER.

IT IS FURTHER ORDERED, that interested persons show cause, if any they have, why the Recommendations should or should not be adopted. All persons desiring to be heard shall file briefs or petitions setting forth their views and shall also notify the Clerk of the Supreme Court in writing on or before September 2, 1975, of their desire to be heard on the Recommendations.

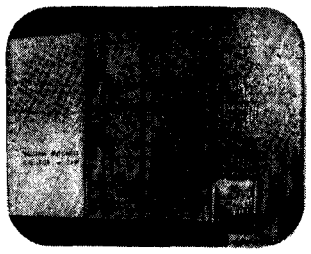
DATED: April 30, 1975

BY THE COURT

Robert J. Sheran
Chief Justice

WILLIAM MITCHELL
College of Law

2100 SUMMIT AVENUE □ ST. PAUL, MINNESOTA 55105
TELEPHONE: 612-698-3885



DOUGLAS R. HEIDENREICH
Dean

Mr. John McCarthy, Clerk
Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

Re: Prepaid Legal Services Committee

Dear John:

Enclosed please find form of order for hearing on Recommendations of Supreme Court Study Committee on Prepaid Legal Services. I have discussed its contents with the Chief Justice.

Would you please present it to the Chief Justice. If he signs it in its present form, would you please telephone and so advise the Minnesota State Bar Association, 335-1183, as they desire to include the order in Bench and Bar, which they are readying for publication.

Thank you very much.

Best wishes.

Sincerely,

Kenneth F. Kirwin

cc: (with form of order) Gerald Regnier, State Bar Association

DOHERTY, RUMBLE & BUTLER
ATTORNEYS AT LAW
1500 FIRST NATIONAL BANK BUILDING
SAINT PAUL, MINNESOTA 55101
TELEPHONE (612) 291-9333

MINNEAPOLIS OFFICE
3750 IDS TOWER
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (312) 340-5555

291-9333
WRITER'S DIRECT DIAL NUMBER

September 3, 1975

Mr. John McCarthy, Clerk
Minnesota Supreme Court
State Capitol
Saint Paul, Minnesota 55155

Re: Prepaid Legal Services

Dear Mr. McCarthy:

I am enclosing an original and nine copies of the comments on recommendations of the Supreme Court Study Committee on prepaid legal services from the lawyers of this law firm.

I believe that our written comments are self-explanatory, and we are not asking for time to be heard orally at the hearing on September 12, 1975.

We appreciate the opportunity to submit these written comments because prepaid legal services has the potential to become an important development in the delivery of legal services to all Americans.

Sincerely,

Bruce E. Hanson

Bruce E. Hanson

BEH:mt
Enclosures

45895

STATE OF MINNESOTA
IN SUPREME COURT

In re Prepaid Legal Services

COMMENTS ON RECOMMENDATIONS OF SUPREME COURT
STUDY COMMITTEE ON PREPAID LEGAL SERVICES

We fully endorse the recommendations of the Supreme Court Study Committee on Prepaid Legal Services, dated April 28, 1975, as supplemented by the recommendations of the Minnesota State Bar Association, with two exceptions.

First, the Study Committee recommends in the second paragraph on Page 1 of its report that:

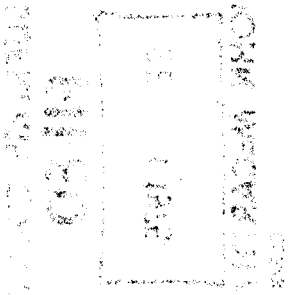
> ". . . in any order that may be adopted to implement these recommended amendments it should be made clear that the Court does not intend to assume the responsibility which it believes belongs to the legislature, for regulating the rates that may be charged by prepaid legal service plans or the security of the funds collected under such plans."

This statement is unclear. If it is meant that the Court should not become involved in regulating the amount of premium charged by an insurance company writing a prepaid plan, or should not become involved in determining what safeguards must be imposed to insure that funds held for legal services are preserved for that purpose, it may well be that the Committee is correct. However, we can see no reason why this direction must, or should, be made now. We suggest that the matter be reserved until more experience is gained, and the Court has a greater knowledge of the implications of such direction.

Second, under the proposed amendments to the Code, lawyers who are active in the formation of a legal services organization are foreclosed from being participating lawyers. The result is that lay organizations such as labor unions and consumer groups may establish and promote prepaid legal services plans but lawyers may not, without affecting their right thereafter to act as a participating lawyer. We understand the dangers of permitting lawyers to take an active role in establishing organizations in which they also are the providers of services. However, a consequence of the proposed rule is that very few prepaid legal services plans will have the guidance of lawyers, and this seems to us to be not only unfortunate but dangerous. As an example, we foresee such lay organizations attempting to dictate to the participating lawyers the manner in which legal services are performed for individual members, and to require reports and review of decisions in the rendering of legal services that will be harmful to the lawyer-client relationship. We wonder whether there is not less danger in allowing lawyers to be participating members of the organizations they establish than in a delivery structure which discourages lawyer participation in formation and management. If no change in the proposed amendment to DR2-104(B)(3) is made at the present time, we suggest that lay administration of organizations be closely monitored and that a change of the kind we suggest be adopted if the availability and quality of legal services should suffer because of lay control.

In summary, we are concerned that the Study Committee's approach is a very limited response to the concept of prepaid legal services, rather than viewing the concept as an opportunity to meet the objective of providing professional legal services to all Americans. We would suggest that permitting

lawyers to operate "closed panel" prepaid legal services plans on an equal basis with lay organizations would be in the best interests of the Bar, and in the interest of the public.



Respectfully submitted,

DOHERTY, RUMBLE & BUTLER

By _____
Bruce E. Hanson

By _____
Timothy J. Halloran

By _____
Ralph K. Morris

FOR THE FIRM

247

45895

LAW OFFICE

BRIGGS AND MORGAN

PROFESSIONAL ASSOCIATION

2200 FIRST NATIONAL BANK BUILDING

SAINT PAUL, MINNESOTA 55101

291-1215

AREA CODE 612

August 27, 1975

Clerk, Minnesota Supreme Court
State Capitol
Saint Paul, Minnesota 55155

Re: Supreme Court Study Committee
on Prepaid Legal Services
File No. 45895

Dear Sir:

Pursuant to the Order of the Court, dated April 30, 1975, this is to notify you that the Minnesota State Bar Association desires to appear and be heard at the hearing scheduled for September 12, 1975. The Minnesota State Bar Association, at its June 1975 Annual Convention, adopted the following resolutions:

That the Recommendations of the Supreme Court Study Committee on Prepaid Legal Services, dated April 29, 1975, with the exception of the following provision in (DR 2-104(F)) be endorsed:

"A lawyer selected by an organization to render legal services to a member or beneficiary thereof shall not accept employment from the member or beneficiary to render legal services other than those for which the organization selected him if he knows or it is obvious that it results from unsolicited advice by him or any lawyer associated with him that the member or beneficiary should obtain counsel or take legal action." APPROVED

That the Association endorse the adoption of the Ethical Consideration of the amendments to the Code of Professional Responsibility (EC2-33), which is not contained in the Supreme Court Study Committee on Prepaid Legal Services. APPROVED

It is the desire of the Minnesota State Bar Association to appear at said hearing and present the above resolutions to the Court for its consideration.

I am presently scheduled to argue an appeal in the United States Court of Appeals for the Eighth Circuit on September 12 and will not be able to attend the hearing. George Mastor, President of the Minnesota State Bar Association, will attend and present the views of the Association to the Court.

Respectfully yours,

Richard H. Kyle

RHK:ss
cc: Mr. George Mastor
Mr. Gerald Regnier
Mr. Robert Henson
Mr. Kenneth Kirwin
Justice MacLaughlin

HARSTAD & RAINBOW
ATTORNEYS AT LAW
MIDLAND BANK BUILDING
MINNEAPOLIS, MINNESOTA 55401

C. BLAINE HARSTAD
DOUGLAS R. RAINBOW
JOHN R. STOLLER

September 8, 1975

AREA CODE 612
TELEPHONE 338-7811

Mr. John C. McCarthy
Clerk of Court
Minnesota Supreme Court
State Capitol
St. Paul, Minnesota

45895
~~45004~~

Re: Hearing on Recommendations of Supreme Court Study Committee on Prepaid Legal Services

Request to Appear

Subject: Request that the ABA Approved "Reimbursement Provision" be Inserted into the Study Committee's Proposed Disciplinary Rules

Dear Mr. McCarthy:

Enclosed herewith please find eight copies of my letter dated September 6, 1975, to Chief Justice Robert J. Sheran and the accompanying brief concerning the above subject.

Please provide each of the Associate Justices with one of these copies for their review.

Thank you.

Sincerely,

C. Blaine Harstad

C. BLAINE HARSTAD

CBH/sm
Encl.

9-9 - Copies distributed.

Justice MacLaughlin

HARSTAD & RAINBOW
ATTORNEYS AT LAW
MIDLAND BANK BUILDING
MINNEAPOLIS, MINNESOTA 55401

C. BLAINE HARSTAD
DOUGLAS R. RAINBOW
JOHN R. STOLLER

AREA CODE 612
TELEPHONE 338-7811

September 6, 1975

The Honorable Robert J. Sheran
Chief Justice
Minnesota Supreme Court
State Capitol
St. Paul, Minnesota

Re: Hearing on Recommendations of Supreme Court Study Committee on Prepaid Legal Services

Request to Appear

Subject: Request that the ABA Approved "Reimbursement Provision" be Inserted Into the Study Committee's Proposed Disciplinary Rules

Dear Justice Sheran:

The undersigned requests that he be granted permission to appear before the Court at 10:00 A.M. on Friday, September 12, 1975, to submit his views on the above report.

I apologize for the delay in submitting this request, but hope that in your deliberations you will consider this letter, the attached brief, and my comments on oral argument.

The purpose of this letter and brief is to request that the ABA approved Reimbursement Provision be inserted in the Disciplinary Rules proposed by your Study Committee.

It bothers me that the Study Committee has proposed rules which, in essence, mean that a client cannot have the lawyer of his choice unless he pays for him twice--once through the plan, and once out of his own pocket. It bothers me to think that a client's right to select his own lawyer is being economically restricted. It is a simple truth that the relationship between a client and his counsel is one of confidence and trust. This relationship is severely and unnecessarily interfered with by the Study Committee's failure to include a Reimbursement Provision in its proposed Disciplinary Rules. The ABA has studied this problem at considerable length and arrived at a conclusion exactly opposite from the Study Committee's conclusion on the reimbursement question. I am puzzled by the Study Committee's refusal to follow the ABA's recommended plan.

I am writing this letter on my own behalf, and I think on behalf of hundreds of lawyers who have not made their voices heard, who would be disturbed by the plan proposed. I do not represent any client or any financial interest in presenting these views to you.

The Minnesota Bar Association did consider the Study Committee's report at their last annual meeting. A voice vote was taken at the Bar Association meeting on the Study Committee's report. A resolution in favor of the report passed. I think it is fair to say, and I feel sure that others will agree with me, that the vote was extremely close. No division of the house was called for, however.

I request that the ABA approved Reimbursement Provision be inserted into the Disciplinary Rules.

The Reimbursement Provision -- What is it?

The Reimbursement Provision states that a closed plan must open if the client does not want a plan attorney to represent him. In other words, the Reimbursement Provision requires the plan to reimburse the private non-plan attorney if the client states that he does not want to be represented by the closed plan attorneys.

The reimbursement language reads as follows:

> "Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief."

What was the ABA's Position Regarding the Reimbursement Provision?

1. They described it.

> "The plan must provide appropriate relief for a plan member who wishes to select counsel other than that furnished, selected or approved by the plan -- in cases where representation by plan counsel would be inadequate, inappropriate or unethical." (See the American Bar News, Volume 20, Number 3, April 1975, Page 4 -- copy attached).

2. They liked it.

> "In contrast to the sharp debate a year earlier, no amendments were suggested and no voice raised in opposition as the questions was called and the recommendation approved." (See the American Bar News, Volume 20, Number 3, April 1975, Page 5 -- copy attached.)

3. They said it passed constitutional muster.

> "Fellers reported that counsel retained by the ABA to advise the Association on the Code question said the new rules are constitutional and not in violation of antitrust laws. He urged their passage, declaring: 'If we don't show states they way, they will find their own way at the cost of unity in the bar and loss of legal services to many Americans.' " (See the American Bar News, Volume 20, Number 3, April 1975, Pages 4 and 5 -- copy attached.) I do not have a copy of the ABA's legal opinion.

What was the Minnesota Study Committee's Position Regarding the Reimbursement Provision?

1. They described it.

> "Although this ABA provision is extremely vague, it seems to bar a lawyer's serving under a plan which does not provide in certain situations for reimbursement of those who obtain counsel other than that selected by the organization." (See Bench & Bar of Minnesota, April 1975, Volume 31, No. 10, Page 14 -- copy attached.)

Thus the Study Committee described the Reimbursement Provision in the same manner as the ABA described it. There seems to be no disagreement between the ABA and the Minnesota Study Committee as to what the Reimbursement Provision means.

2. They liked it.

> "Had the Committee been writing on a clean slate, its strong belief in the free choice of an individual would have led it to support including some requirement of this type (Reimbursement Provision)." (See Bench & Bar of Minnesota, April 1975, Volume 31, No. 10, Page 14 -- copy attached.)

> "The Committee nevertheless feels that organizations would do well to consider the fact that allowing

individual selection (at least through reimbursement) may promote a closer attorney-client relationship than a completely closed panel plan." (See Bench & Bar of Minnesota, April 1975, Volume 31, No. 10, Pages 14 and 15 -- copy attached.)

It is clear from a review of the above that the Study Committee favored the Reimbursement Provision; but that they thought it would be illegal for them to require a Reimbursement Provision.

3. They said the Reimbursement Provision does not pass constitutional muster, and that it violates the preemption doctrine set forth in ERISA.

On Page 14 of the Bench & Bar report above referred to, a copy of which is attached, the Study Committee sets forth its views regarding the constitutional requirement, and sets forth its views regarding federal preemption.

The Study Committee also sets forth its views on these two questions in its report as follows:

(a) The last paragraph of Pg. 1 of the report;

(b) Paragraph 6 on Pg. 2 of the report;

(c) Pg. 3 of the report;

(d) Pgs. 4, 5, and 6 of the report, where the federal preemption doctrine is discussed.

My Position Regarding Constitutionality and Preemption

1. There are four U.S. Supreme Court cases on the delivery of legal services. These cases do not forbid a Reimbursement Provision. The attached brief discusses these four cases.

2. I do not believe that ERISA attempts to interfere with the Judiciary and its relationship with lawyers. The federal preemption doctrine refers to federal preemption vis-a-vis state agencies, legislatures, and professional bar associations. The United States Congress would not and, of course, could not, under well-known and understood "separation of powers" principles, seek to restrict or interfere with the Minnesota Supreme Court's Judicial functions. The Minnesota Supreme Court's responsibility for the control of lawyers and the establishment of ethical rules is well understood

in a series of cases, as recent as Sharood v. Hatfield, 210 NW2d 275 (Minn 1973).

This principle applies as well to federal congressional action. The separation of powers argument is not dealt with in the Study Committee's report. Please see the attached brief for a full discussion of this issue.

3. The Supreme Court should establish disciplinary rules which enhance public confidence in the fair administration of justice. A legal system which gives a client the unfettered economic right to have the lawyer of his choice is, in my judgment, superior to a legal system which economically compels a client to accept the lawyers employed by the plan. The client may not like the plan's lawyers; he may not have any confidence in the plan's lawyers; the plan and its lawyers may have taken positions exactly opposite from the position that the client wishes to take. The following quotation from Page 10 of the attached brief on this issue is relevant:

> "The unfettered right to the selection of counsel of one's own choosing is an essential feature of our legal system, and interference by the courts with the choice made is justified only when necessary to maintain the integrity of the rule of law and public confidence in the fair administration of justice."

CONCLUSION

I request that the ABA approved Reimbursement Provision be inserted in the Disciplinary Rules.

Respectfully submitted,

C. Blaine Harstad

C. BLAINE HARSTAD

CBH/sm
Encls.

cc: Associate Justices of the Minnesota Supreme Court

House action...

Continued from page 3

Consumer credit — The National Conference of Commissioners on Uniform State Laws gained ABA endorsement of the Uniform Consumer Credit Code Amendments — covering approximately 40 subjects, including cosigner agreements, door-to-door sales, and buyers' claims and defenses in credit-card and other consumer-credit transactions. The amendments are based on experience in states that have enacted the 1968 Uniform Consumer Credit Code, on changes in consumer credit practices, and on the report of the National Commission on Consumer Finance.

Criminal justice planning — The Special Committee on Administration of Criminal Justice won Association OK of its appeal for ABA members, state and local bars, and others to participate actively in state and local criminal justice planning groups; to urge consideration of the ABA Standards for Criminal Justice, the National Advisory Commission Standards and Goals, and other ABA codes; and to

House passes revised prepaid Code amendments—ending a year-long debate

The great debate over disciplinary rules affecting the operation of prepaid legal services plans is over.

During the February midyear meeting in Chicago, the House of Delegates unanimously adopted amendments to the Code of Professional Responsibility offered by the *Ad Hoc* Study Group on Legal Services — a panel formed at last August's annual meeting in Honolulu to resolve the continuing conflict over Code changes that began a year ago in Houston.

Basically, the disagreement had not been over the necessity for some change in the Code — everyone agreed that there was a need for alteration if attorneys were to be able to operate under prepaid legal services plans and not violate Code tenets — but over the issue of placing special restrictions on lawyers in closed-panel plans.

Amendments adopted at the Houston midyear meeting admittedly were more restrictive of closed-panel than of open-panel operations.

But the new amendments do not differentiate between open- and closed-panel plans. Under them:

- Qualified legal assistance organizations may engage in dignified commercial publicity about their services, but information about individual lawyers may be communicated only to panel members or beneficiaries.
- Legal assistance plans may not interfere with the independent professional judgment of the lawyer on behalf of his client — nor may such plans in any way subject the conduct of lawyers to the regulation of nonlawyers.
- An organization set up to provide legal services may be for profit, but may not profit from rendering legal services.
- Such profit-making organizations may not provide legal services through lawyers employed by them, but can recommend attorneys as long as they are not supervised or directed by the organization (except when such an organization bears ultimate liability of its members or beneficiaries).
- No legal assistance organization may operate to procure legal work for any lawyer as a private practitioner outside the program of the organization.
- Attorneys may not operate or promote group practice organizations for the purpose of self-benefit.
- The plan must provide appropriate relief for a plan member who wishes to select counsel other than that furnished, selected or approved by the plan — in cases where representation by plan counsel would be inadequate, inappropriate or unethical.

The amendments also provide that the prepaid plan meet applicable laws, rules of court and other requirements governing its operations and that it file a report at least annually with the appropriate lawyer disciplinary agency.

Two versions of amendments to the Code had been proposed in Houston. Following heated debate, Code changes submitted by the Section of General Practice were adopted by the House over those recommended by the Standing Committee on Ethics and Professional Responsibility. The committee-proposed changes tended to treat open- and closed-panel plans even-handedly, while the GP changes did not.

Under the Houston-adopted rules, no requirements were set forth exclusively for open-panel plans, while closed-panel operations were subjected to a number of rules they had to comply with to operate ethically.

This failure to treat both types of plans equally brought criticism and warnings from some Justice Department officials that the bar, in seeking to restrict the type of plans commonly operated by unions and other groups, while leaving the type of plan preferred by many bar associations unfettered, could be subject to antitrust scrutiny on price-fixing and restraint-of-competition grounds. And, even before Houston, certain court decisions affirmed the right of unions to conduct closed panels for their members.

Addressing the delegates during the Chicago House session, President James D. Fellers said that, for a year, problems raised by uncertainty and confusion over the Houston amendments have slowed the implementation of prepaid legal services plans, depriving many persons of legal services they might have obtained through these programs.

Fellers reported that counsel retained by the ABA to advise the

encourage citizen participation in criminal justice planning.

Criminal procedure rules — After extensive debate and several amendments from the floor, the House authorized the Section of Criminal Justice to back a series of proposed amendments to the Federal Rules of Criminal Procedure (with changes suggested by the section), which were promulgated by the U.S. Supreme Court last April, and which are now before Congress. Under the resolution, the section must make it clear that its views have not been approved by the House or the Board of Governors.

Customs law reform — Anticipating early introduction in Congress of a Customs Modernization Act, the Standing Committee on Customs Law obtained House endorsement of principles to, in the words of the committee report, "ensure that such legislation provides due process safeguards often neglected in customs laws and procedures established in the 18th and 19th centuries." The principles include:

- Fair procedures in administrative

Continued on page 6

Association on the Code question said the new rules are constitutional and not in violation of antitrust laws. He urged their passage, declaring: "If we don't show states the way, they will find their own way at the cost of unity in the bar and loss of legal services to many Americans."

Lyman M. Tondel, Jr., of New York, vice-chairman of the *Ad Hoc* Study Group (which Fellers chaired), explained to the House why the 1969 Code of Professional Responsibility had to be amended in the first place: because certain provisions on advertising and recommendations on the need for legal services simply did not apply in group legal services practice. Under the old rules, he said, virtually no group plans could be operated ethically.

Cullen Smith of Waco, Tex., former chairman of the Section of General Practice — who led the fight for adoption of the Houston amendments a year ago as part of the section's opposition to closed panels on ethical grounds — also addressed the House before its vote. He endorsed the new amendments, terming them "balanced" and "a step forward".

"In contrast to the sharp debate a year earlier, no amendments were suggested and no voice raised in opposition as the question was called and the recommendation approved."

5

The new Ethical Consideration

The following Ethical Consideration 2-33 was one of the amendments to the Code of Professional Responsibility adopted in Chicago:

"As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services.

"Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients.

"An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interests of the individual client.

"An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service.

"An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence."

The Committee's draft includes much language from the ABA amendments, and those amendments are consistent in principle with most of the Committee's provisions. The following discussion focuses upon why the Committee decided it should not follow the ABA amendments to an even greater extent.

REIMBURSEMENT

The ABA amendments include as a condition for a lawyer's being authorized to serve under an organization's plan:

> Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member of beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

Although this ABA provision is extremely vague, it seems to bar a lawyer's serving under a plan which does not provide in certain situations for reimbursement of those who obtain counsel other than that selected by the organization.

Had the Committee been writing on a clean slate, its strong belief in the free choice of an individual would have led it to support including some requirement of this type.

But the Committee did not write on a clean slate. Its draft reflects what it thinks is required in light of current U.S. Supreme Court First Amendment interpretations and the federal preemption specified in the Employment Retirement Income Security Act of 1974 ("ERISA").

ERISA supersedes "rules" of any state agency "which purports to regulate, directly or indirectly" prepaid legal service plans, "insofar as they . . . relate to" a plan maintained by an employer whose activities affect commerce or a union whose members' work affects commerce.

When the Committee first considered including a reimbursement requirement, ERISA had not yet been enacted. Even then the Committee had question whether any such requirement could be drafted as to withstand constitutional attack. But the Committee recognized that such a requirement's most appropriate application would be to an employer or union plan, where the person is not as free as he would be with other organizations to merely quit if the plan provides no reimbursement.

When ERISA came into the picture and precluded requiring reimbursement in this, the most appropriate situation, the Committee decided against recommending any reimbursement requirement.

The Committee nevertheless feels that organizations would do well to consider the fact that allowing individual selection (at least through reimbursement) may promote a closer attorney-client relationship than a completely closed panel plan.

FURNISHING INFORMATION

The ABA amendments include as another condition for a lawyer's being authorized to serve under an organization's plan:

> Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

This operates directly upon the organization, which seems inappropriate in a Code regulating lawyers' conduct, and appears invalid as to plans covered by ERISA. Further, its requirements seem excessive and their administration might unduly burden the disciplinary authority.

A majority of the Committee instead favored draft DR 2-104(E), which it saw as desirable in allowing the Board of Professional Responsibility flexibility in the area of requiring information, so that it can tailor its approach to this matter in the light of developing experience.

It should be noted that this was the only area in which there was any substantial division on the Committee. Some members favored a more extensive filing requirement than draft DR 2-104(E).

The Committee believes that in any order that may be adopted to implement its Recommendations, it should be made clear that the Court does not intend to assume the responsibility which it believes belongs to the legislature, for regulating the rates that may be charged by prepaid legal service plans or the security of the funds collected under such plans.

SERVICES NOT COVERED BY ARRANGEMENT

Draft DR 2-104(F) is aimed at preventing a lawyer from using his connection with an organization's legal services arrangement as a feeder. It is in effect an exception from the provision of draft DR 2-103(F)(1) permitting a lawyer to accept employment notwithstanding it results from unsolicited advice to a layman, if the advice was to a client.

Draft DR 2-104(F) seems far superior to the ABA amendments' provision in this area, which sets forth as a condition for a lawyer's being authorized to serve under an organization's plan:

> Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

The ABA provision is aimed at the organization's, rather than the lawyer's, conduct, and appears unworkable because whatever purpose the organization is "operated for" would be *inside* its legal services program.

BENCH + BAR / VOLUME 31, NO. 10

FACTS

In an effort to devise disciplinary rules affecting the operation of prepaid legal services plan, the American Bar Association adopted what became known as the "Houston Amendments" to the Code of Professional Responsibility. These Amendments effectively imposed more restrictive requirements on "closed panel" group legal service plans than on open panel plans. The Amendments were altered upon the recommendation of an Ad Hoc Study Group which was formed in 1974 and which included representatives of opposing viewpoints on prepaid and group legal service plans. A Minnesota Supreme Court Study Committee and the Legal Services Committee of the Minnesota State Bar Association generally endorsed the national A.B.A. amendments but failed to endorse the following reimbursement requirement as a condition for a lawyer's being authorized to serve under an organization's plan:

> "Any member of beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief."

This provision was passed unanimously by the American Bar Association.

LEGAL ISSUES

I. Does the first amendment, applied to the states through the fourteenth amendment, prohibit a Code of Professional Responsibility requirement that a closed panel prepaid legal services plan become an open panel plan in certain limited situations, and which guarantees the reimbursement of beneficiaries who obtain counsel other than that selected by the organization?

II. May Congress pre-empt state regulation of prepaid legal service plans, where such regulation takes the form of a Supreme Court ethical rule guaranteeing the right of plan beneficiaries to seek counsel other than that selected through the organization, in certain limited situations?

ARGUMENT

I. The first amendment guarantees of free speech, petition and assembly protect group legal activity, subject to judicial promulgation of ethical rules which require a closed panel plan to open if a member so desires and representation by counsel furnished would be unethical, improper or inadequate under the circumstances.

Four recent Supreme Court cases have established the right of groups to provide legal services to their members. In N.A.A.C.P. v. Button, 371 U.S. 415 (1963) plaintiff solicited potential litigants, employed attorneys and recommended the attorneys to the litigants. The activities of the N.A.A.C.P. were protected by the first amendment as forms of speech, petition and assembly.

Button was expanded in Brotherhood of R.R. Trainmen v. Virginia ex rel Virginia State Bar, 377 U.S. 1 (1964). Plaintiff union had established a Department of Legal Counsel to aid families of injured union members. If a member was injured, the Department would recommend a specific local attorney to handle the claim. But the injured party was never required to accept the recommended attorney.

In upholding this prepaid legal service plan the Court emphasized that the first amendment right of members to consult with each other in a fraternal organization includes "the right to select a spokesman from their number who could be expected to give the wisest counsel... And the right of the workers...to advice 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." Id., p.6.

That an organization has the "right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights" was made explicit in United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217, 221-22(1967). The prepaid legal services plan in this case provided that members could employ other counsel if they desired, and in fact the Union attorney frequently suggested to members that they could do so.

Respondent in United Transportation Union v. State Bar of Michigan charged that the Union had recommended to its members selected attorneys whose fees would not exceed 25% of the amount recovered. United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). There is no evidence that members were forced to accept the attorneys recommended. The Court held that the injunction directed against the Union's legal activities in this case denied a basic right to group legal action. Reference was made to the "First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable." This comment was presumably directed toward the 25% maximum fee commitment, as the Union was attempting to protect its members from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.

A careful examination of the language in these cases reveals that the Court was concerned with protecting the group as a vehicle for delivering legal services rather than protecting the group as a mode of delivering legal services. The Court established the right of groups to provide legal services to their members, not the right to provide group legal services. In all of the cases, the action taken

by the union was for the benefit of its members and not for the benefit of attorneys engaged by the union. Freedom of choice underlies the Courts' opinions. The confidence of the client in his attorney is highlighted.

A prepaid legal services plan would best conform with the letter and spirit of this case law if its members were allowed to employ counsel other than that chosen by the group. And it has been noted that the freedom to choose counsel outside a plan would be a hollow guarantee unless provision were made for reimbursement of the group member.

II. The judiciary has the inherent power to regulate attorneys through ethical rules which prohibit the practice of law on the behalf of a prepaid legal services organization which refuses to reimburse members who desire to retain outside counsel when representation by counsel furnished would be unethical, improper or inadequate.

It is universally recognized that a court has the general authority to control its attorneys, so far as their professional character and duties, their relations to suitors and to the administration of justice are concerned. 2 Dunnell's Attorney & Client s. 664. The legislature has acknowledged this inherent power in statutes such as Minn. Stat. 480.05 ("[The Supreme Court] shall prescribe...rules governing the examination and admission to practice of attorneys at law and the rules governing their conduct in the practice of their profession...") and Minn. Stat. 481.15(1) ("An attorney at law may be removed or suspended by the Supreme Court for any one of the following causes...")

It should be assumed that the Congress took cognizance of the sphere of exclusive judicial authority in enacting the Employee Retirement Income Security Act of 1974. Section 514 of the Act supersedes "any and all State laws insofar as they may now or hereafter relate to

any employee benefit plan described in section 4(a)..." 29 U.S.C. s. 514(a). A prepaid legal services plan is an employee benefit plan (Id., s. 1002(1)) and section 4(a) provides that the employee benefit plan must be maintained by an individual or group associated with interstate commerce. Id., s. 1003(a)

The legislative history of the federal act featured an exchange in which Sen. Javits suggested that "the State, directly or indirectly through the bar, is preempted from regulating the form and content of a legal service plan, for example, open versus closed panels, in the guise of disciplinary or ethical rules or proceedings." 120 Cong. Rec. S15758 (daily ed. Aug. 22, 1974) Javits emphasized, however, that "s.514 of the act does not preempt State bar associations from adopting and enforcing ethical rules or guidelines generally and/or from disciplining its members..." Id.

Amendments to the Code of Professional Responsibility which are adopted by the Supreme Court retain the character of bar ethical guidelines. At the local level, the bar can discipline attorneys whose conduct deviates from these rules. The sanctioning of Code amendments by the Supreme Court is a desirable formality only because the Court has the final authority to determine who may practice law. Minn. Stat. 481.15(1).

But if the Pension Reform Act were construed to foreclose Supreme Court adoption of bar association rules which would affect employee benefit plans, it would be the duty of the courts to strike down the Act as an encroachment upon the inherent power of the judiciary to control the conduct of attorneys. The breadth of the courts' power in this respect has been detailed in several state and federal cases.

In Re Petition for Integration of Bar of Minnesota provided one of the earliest definitions of judicial power to regulate the attorney's practice of law. In this case it was held that the court has the inherent power to order integration of the bar since such integration "directly relates to the condition of the legal profession generally" and the order would result in the "furtherance of the administration of justice." In Re Petition for Integration of Bar of Minnesota, 216 Minn. 195, 12 N.W. 2d 515(1943). Similar expansive terms were recently used in In Re Jerome Daly, 291 Minn. 488, 189 N.W. 2d 176(1971). Daly involved a disciplinary proceeding conducted in accordance with the rules of the Court governing professional responsibility of members of the Minnesota bar. The Court concluded that

> "The formulation of ethical principles and standards of professional conduct, as well as the procedures for enforcement, is, and must be, under our constitutional system, the responsibility of the judicial branch of government. The ultimate determination governing admission, supervision and discipline of attorneys in this state, including their removal from practice before our courts, is vested in this court." Id., at 490 (emphasis added)

The Minnesota Supreme Court has not hesitated to assert its inherent authority when the legislature has shown statutory disrespect for the separation of powers. In Re Disbarment of Tracy , 197 Minn. 35, 26 N.W. 88(1936) concerned 1 Mason Minn. Stat. 1927, s. 5697(2), providing a two year period of limitation for the bringing of disciplinary proceedings against an attorney. The statute was held unconstitutional as an attempted invasion by the legislature of the judicial field.

In Sharood v. Hatfield, the provisions of L. 1973, c. 638, insofar as they applied to the judicial branch of government, were declared un-

constitutional. The statute

(1) directed that lawyer registration fees no longer be paid into a special fund of the state treasurer but be paid into the general revenue fund (s.59)

(2) purported to regulate the members of the State Board of Professional Responsibility (s.60, s.63)

(3) required the use of standardized tests by the State Board of Law Examiners (s.62)

(4) gave the commissioner of administration authority over the amount of the lawyer registration fee to be paid (s.67)

The Court reasoned that the making of regulations and rules governing the legal profession is exclusively reserved to the judiciary. The power to regulate the practice of law is derived not from the legislature but from the people. Its exercise is an exercise in the effective administration and justice and protection of rights guarded by the constitution.

Federal law is fully in accord with state law in this matter. It is recognized that the courts have inherent power to regulate the bar (see In Re: Grand Jury Appearance of Alvin S. Michaelson, 511 F. 2d 882 (9th Cir. 1975)) and that the courts have a duty and the power to supervise the conduct of attorneys practicing before it. Emle Industries, Inc., v. Patentex, Inc., 478 F. 2d 562 (2d Cir. 1973)

Therefore Congress may not prohibit judicial regulation of the conditions under which an attorney may accept employment from a prepaid legal services organization. Such a regulation "directly relates to the condition of the legal profession generally," and is thus within the judiciary's province as defined in In Re Petition for Integration of Bar of Minnesota, supra. The rule is an ethical canon in name, fact

and substance. It is derived from several other standards of professional conduct, including the principle that an attorney shall not directly or indirectly encroach upon the business of another attorney, the principle that an attorney shall not acquire an interest or accept employment adverse to a client, and the principle against the solicitation of business. The reimbursement requirement in the instant case applies only when representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances. Since the requirement is an "ethical principle and standard of professional conduct" implemented through the "supervision" of attorneys, the language in Daly compels the conclusion that the Court alone may formulate such a rule.

The adoption of these amendments to the Code of Professional Responsibility is more a regulation of the practice of law than the regulatory powers asserted by the Court in Sharood, supra. In Sharood, the legislature attempted to control fees which had been placed in a special fund; the fees were used to regulate the practice of law. The legislature attempted to regulate two agencies that regulated the practice of law. The legislature's attempt to control the practice of law was at best indirect. It nevertheless broke into the judicial domain and the Court was compelled to declare its statute unconstitutional. There is much greater reason to prohibit congressional encroachment upon direct judicial supervision of the practice of law. And a requirement that a closed panel prepaid legal services plan become an open panel plan where it would be unethical to do otherwise is a valid prerequisite to service in a closed panel organization, a direct judicial regulation of the practice of law.

The approach mandated by case law is also the approach mandated by common sense. From the practitioner's viewpoint, an open panel option will create less disruption than a more restrictive system. A non-group practitioner should be able to maintain a professional relationship with a client who receives legal services as part of a package of fringe benefits. An open panel option can only reduce the inevitable and undesirable competition between attorneys who would be fighting for a contract with a completely closed panel.

Thus the Minnesota Supreme Court has the exclusive power to regulate the legal profession through an ethical rules such as the A.B.A.'s "reimbursement provision." The Court furthermore has the duty to adopt such a rule to protect the individual's freedom to choose his own counsel.

The right of a client to choose his own counsel has been recognized on the federal level in a variety of situations. It is most often discussed where counsel has been appointed in a criminal proceeding. See White v. Beto, 322 F. 2d 214 (5th Cir. 1963) ("client's right to be heard through his own counsel is unqualified," "appointed counsel must have reasonable opportunity to prepare for his task of defense; and that the lawyer so appointed must have no divergent interest."); Lofton v. Procunier, 487 F.2d.434 (9th Cir. 1973) ("Representation cannot be coerced in circumstances in which the designated defense counsel cannot serve competently")

The unqualified right of the individual to select his own counsel should carry across to the prepaid legal services situation. The language in the federal criminal cases makes the open panel option particularly essential and appropriate where"representation by counsel furnished, selected or approved would be unethical, improper or inadequate",

the situation which activates the option in the A.B.A.'s reimbursement requirement.

The federal courts have recognized the right to select one's own attorney in civil cases as well. The trustee in bankruptcy has the right to choose his attorney, except in rare instances. In Re National Discount Corp., 197 F. Supp. 505 (D.C.S.C. 1961) In City of New York v. General Motors Corp., 1973 Trade Cas. P74,683 (S.D.N.Y. 1973), plaintiff alleged that defendant violated the Sherman Act, 15 U.S.C. s.2 and the Clayton Act, 15 U.S.C. s.18. Defendant moved to have plaintiff's attorney disqualified from representing the City. The court commented that "The unfettered right to the selection of counsel of one's own choosing is an essential feature of our legal system, and interference by the courts with the choice made is justified only when necessary to maintain the integrity of the rule of law and public confidence in the fair administration of justice."

The Minnesota Supreme Court has recognized a similar right which governs attorney-client relations. The general rule was enunciated in Lawler v. Dunn, 145 Minn. 281, 176 N.W. 989: The employment of an attorney may be terminated by a client without cause, and the client has the right to make a change or substitution of attorneys at any stage of the proceedings without cause. The general rule was applied where a decedent directed the employment of a particular lawyer in probating the former's will. The lawyer specified was shown to be competent, qualified and willing to act. But the Court refused to force the executor in the case to employ the named attorney.

The client's right to discharge an attorney without cause has

been described as an implied condition of contract. Krippner v. Matz, 205 Minn. 497, 504, 287 N.W. 19. This does not negate the right to select one's own counsel in a prepaid legal services situation. It is possible that some prepaid legal service organizations contemplate a contractual stipulation that members will not be reimbursed if they choose to employ outside counsel. In this situation, the client has made no direct contractual arrangement with the group attorney. He is in the position of an indigent or a felon to whom counsel is assigned. But the group member has an even greater claim to the right to select his own attorney. For he has effectively paid for the legal services to be received through his work organization. Fringe benefits are as real a form of compensation as are wages. In this case, justice demands termination of group assistance if the client so desires, and the right to terminate implies the right to be reimbursed since the client has already paid for his services. In Lawler, supra, it was noted that a client can't be required to pay damages for exercising his right to terminate the relation of client and attorney without cause; denying reimbursement to a group member seeking outside counsel would be tantamount to penalizing that member, imposing damages on him, for seeking to enforce a right that is universally recognized.

A contract requiring an employee to make exclusive use of group attorneys in a prepaid legal services plan contravenes public policy. In Burno v. Carmichiel, 117 Minn. 211, 135 N.W. 386 (1912), the Court ruled that a contract of employment between an attorney and a client, whereby the client agrees not to employ any other attorney to present, prosecute or collect the claim and not to settle the claim except

through the attorney named in the contract, is an attempt to prohibit the client from settling without the consent of the attorney and this vitiates the entire contract. The contract was found to be objectionable because it attempts to vest exclusive control of the cause of action in the attorney who initially contracted with the client. The same motivation underlies the refusal of an open panel option by a closed panel group. And the result is even more egregious than that in Burho since there is an element of coercion in the prepaid legal services situation; a union employee, for example, would be unlikely to quit his job over the denial of one in a package of fringe benefits, however significant that one fringe benefit happened to be.

From the client's perspective, the requirement of some reimbursement to members of closed panels who wish to consult a private practitioner can only increase the availability of legal services and decrease their cost. An open panel option would prevent the development of conflicts of interest--if an attorney is hired under a closed panel plan it's logical that the lawyer is going to have some pressure by the employer that controls the plan, especially if the member soliciting the attorney's aid wants to sue the employer.

An open panel option would go far to enhance the quality of services offered to employees. Whenever a specialization is required, an individual covered by such a plan will be able to locate a lawyer with expertise in that area. And it should also be noted that if group membership is spread over a wide geographic area, an open panel option may be necessary to allow sufficient access to an attorney.

The Minnesota Supreme Court has emphasized that the relation between

the attorney and client is one of extreme personal trust and confidence. This was the reason that the Court refused to force an executor, against his will (so to speak) to employ an attorney that was not acceptable to him or upon whose judgment he did not wish to depend or whose advice he did not feel that he could follow with confidence. To force such a relation on the client would not be conducive to an atmosphere of reciprocal confidence. State ex rel Seifert, Johnson and Hand v. Ole E. Smith, 260 Minn. 405, 110 N.W. 2d 159 (1961).

Said the Supreme Court study committee: "Had the Committee been writing on a clean slate, its strong belief in the free choice of an individual would have led it to support including some requirement [providing for reimbursement of those who obtain counsel other than that selected by the organization.]" There is no reason for the study committee to moderate its enthusiasm for an open panel option. The A.B.A.'s reimbursement requirement, limited as it is, is undisputably reasonable. It borders on redundancy in prohibiting unethical, improper or inadequate counsel. An attorney should be loathe to render advice in such circumstances in any case. The most equitable reimbursement provision would provide an open panel option when the attorney furnished by the prepaid legal services group was (to use the concepts developed in Smith, supra,) unacceptable to the member, when the member did not wish to depend upon the assigned attorney's judgment, or when the member did not feel that he could follow assigned counsel's advice with confidence.