Prepaid Legal Services in Illinois

Fay Triffler

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol9/iss2/7
Prepaid Legal Services in Illinois

INTRODUCTION

In recent years, the legal profession has increasingly recognized the need to make its services more readily accessible to the large segment of the population comprised of middle- and moderate-income persons. An innovative method of addressing this need, currently commanding the attention of the legal community and consumers, is group or prepaid legal service plans. Four United States Supreme Court decisions and the recently amended American Bar Association (ABA) Code of Professional Responsibility have evoked experimentation with group legal service programs throughout the United States. In contrast, Illinois' statutes, cases, and outdated ethical code discourage the development of such arrangements. While other states have enacted legislation regarding prepaid legal services, Illinois has merely adopted a supreme court rule which requires group legal service programs to register with a judicially established agency.

This article will present the need for and the utility of group legal services. After reviewing the Supreme Court decisions and the ABA response thereto, this article will examine the law of Illinois cur-

1. See American Bar Association, Revised Handbook on Prepaid Legal Services: Papers and Documents Assembled by Special Committee on Prepaid Legal Services 2 (Rev. ed. 1972) [hereinafter cited as Revised Handbook].
2. It has been estimated that these persons constitute 70% of the total United States population. Id.
3. Moderate-income persons have been defined as those earning between $5,000-$15,000 annually. B. Christensen, Lawyers for People of Moderate Means 5 n.4 (1970) [hereinafter cited as Christensen].
4. There appears to be no uniformly accepted definition of group or prepaid legal services. Christensen, supra note 3, at 230. These terms are often used interchangeably. American Bar Association, A Primer of Prepaid Legal Services 4 (1976) [hereinafter cited as Primer]. A prepaid legal service plan has been defined as a “plan [or] system whereby a definable portion of the population pays in advance for legal services which are to be rendered to the subscribers in accordance with a definable schedule of benefits. . . .” Fisher & Gailey, Antitrust Implications of Prepaid Legal Services in Texas, 27 Baylor L. Rev. 451, 452 (1975) [hereinafter cited as Fisher & Gailey].
6. Christensen, supra note 3, at 250.
7. See notes 59 through 78 infra and accompanying text.
rently governing prepaid legal services. Finally, recommendations designed to facilitate the growth of prepaid legal plans in Illinois will be offered.

**GENERAL OVERVIEW OF PREPAID LEGAL SERVICES**

"Prepaid legal services" (PLS) is a generic term used to refer to the two primary forms of group plans—open and closed panels. An open panel permits members of the group to choose freely an attorney; a closed panel generally provides members with preselected attorneys, who are either direct employees of the group or members of a panel of lawyers whose services are available. There are four general categories of PLS plans: (1) charitable and public service programs; (2) membership programs; (3) programs conducted by profit-making corporations; and (4) insurance programs. Although most PLS plans have been initiated by organized or affiliated groups such as labor unions or trade organizations, PLS programs may become more prevalent among individuals lacking preexisting group relationships.

PLS are intended to lower the costs of legal services by spreading those costs over a large number of individuals, i.e., in a manner similar to the operation of insurance programs. PLS are usually funded by the collection of money prior to the rendition of services. These resources may be derived from the individual member, the group itself, or a third party, such as an employer.

The scope of legal services offered by PLS plans has traditionally been confined to job-related matters. For example, union groups have provided legal representation to members in litigating workmen's compensation claims. However, in recent years there has been a tendency to expand PLS coverage to encompass a wider range of legal problems.

11. Examples of the types of group legal service arrangements within each category include: (1) civil rights, legal aid, governmental and bar association plans; (2) labor unions, professional and trade organizations, automobile clubs, and membership groups formed for special purposes, such as taxpayer associations; (3) employer and commercial programs, such as those maintained by banks; and (4) auto club insurance benefits and liability insurance plans, such as those established by medical associations. Christensen, supra note 3, at 233-52.
13. Id. at 3.
15. Id.
16. Prepaid legal service programs often provide consultation, preparation of legal documents and representation in connection with various civil matters unrelated to the sponsoring organization's purpose. For example, a labor union may offer a PLS plan that provides legal
The Need for and Utility of Prepaid Legal Services

There is a consensus of opinion that people with middle and lower incomes do not use professional assistance appropriately in confronting the complex legal problems posed by society. Various explanations have been advanced for the underutilization of legal services by persons of moderate means. The most important reasons are the failure to recognize that some problems should be handled by an attorney, the lack of knowledge regarding one's legal rights, and the fear—real or imagined—of an inability to afford an attorney's fees, and the unfamiliarity with the manner of procuring legal services. Consumers and members of the legal profession have argued that PLS plans have the potential to alleviate the problem of inadequate use of legal services. Adoption of PLS can result in reduction of legal costs, education of persons regarding their legal rights, familiarization with the process of securing legal services, and prevention of future legal problems.
THE SUPREME COURT CASES: RECOGNITION OF THE RIGHT TO COLLECTIVE LEGAL ACTIVITY

In four major cases, the United States Supreme Court established that there is a fundamental right under the first amendment to engage in collective legal activity. These decisions have been acclaimed as legitimizing group legal arrangements, and providing an impetus for the growth and expansion of PLS.

In *NAACP v. Button*, the Supreme Court held that the NAACP’s rendition of legal representation to its members, a mode of expression and association protected by the first and fourteenth amendments of the Constitution, could not be prohibited under the state’s power to regulate the legal profession. The Court, in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* and *United Mine Workers, District 12 v. Illinois State Bar Association*, reiterated that the first amendment guarantees of free speech, petition, and assembly afford workers the right to act collectively in asserting statutory rights, and that a state could not infringe upon this constitutional right by invoking its power to regulate the professional conduct of attorneys. Finally, in *United Transportation Union v. State Bar of Michigan*, the Court gave even broader support to various group legal service arrangements by cautioning that the principle underlying collective legal activity could not be limited to the particular factual context under scrutiny.

who would probably not otherwise seek their help. By utilizing the purchasing advantage enjoyed by a group to obtain the services of lawyers particularly competent in the fields of law of concern to the group, the group device enhances the quality of legal services available to group members. And by lowering the cost of legal services—through reducing the cost of rendering services and spreading the cost among all members of the group—it is able to bring legal services to many people who would not otherwise be able to afford them.

CHRISTENSEN, *supra* note 3, at 229.

23. See note 5 *supra*.

24. 371 U.S. 415 (1963). In rebutting the State’s contention that the “traditional purview of state regulation of professional conduct” justified its restrictions upon the NAACP’s activities, the Court commented:

*the State’s attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment . . . upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms . . . [A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.*

*Id.* at 438-39.


At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers, Trainmen* and *NAACP*.28

In essence, these decisions provide that the first amendment safeguards an individual’s fundamental right to unite with others to secure effective and affordable legal representation. Absent a compelling state interest in suppressing some substantive evil within the state’s regulatory competence, the state may not impede the exercise of this associational right through the prohibition of a group legal service arrangement.29

The four Supreme Court cases are factually similar. In each instance, the group provided legal services that were related to the primary goal of the organization. In *Trainmen, UMW* and *United Transportation Union*, the unions provided assistance with labor-related matters, while in *Button*, the NAACP’s legal services pertained to civil rights issues. Each group aided its members in asserting rights granted by the Constitution or federal statutes. The organizations, although rendering legal services, were principally created and maintained to provide non-legal services, and furthermore, had been in existence for several years.30 Moreover, the groups did not provide legal services designed to yield pecuniary gain to their respective organizations.

Under these circumstances, the group plans did not violate legal professional ethics regarding solicitation, commercialization of the profession, or lay interference with the independence of the attorney.31 Each decision reflects a greater concern with furnishing to the

28. Id. at 585-86.

29. In *Button*, the Court stated that the state’s valid interest “in regulating the traditionally illegal practices of barratry, maintenance and champerty” was not sufficiently compelling to prohibit the NAACP’s legal activities. 371 U.S. 415, 439 (1963).

30. For example, the NAACP was organized in 1909, with the overall purpose of helping Blacks achieve equality under the law. The Brotherhood of Railroad Trainmen, founded in 1883, and the UMW Union, established in 1913, were designed to assist workmen in job-related matters including, but not limited to, workmen’s compensation claims.

public competent legal services at a reasonable cost, than with strict adherence to state rules against solicitation and the unauthorized practice of law.32

Nevertheless, the decisions are not dispositive of the group legal service issue because a state might be able to advance a compelling interest33 in regulating the practice of law, that might warrant intrusion upon the individual's right to group legal action. Since the Court did not specifically identify any such interest, the proper subjects for and extent of legitimate state restrictions on PLS remain unsettled.

The Supreme Court decisions also left unresolved the following important issues regarding the establishment and use of PLS: whether PLS may be created for the primary purpose of rendering legal services; whether PLS may provide services beyond organization-related matters; whether PLS can be organized primarily to generate work and/or financial benefit for attorneys; and whether PLS plans may actively solicit and advertise their services. Due to the absence of definitive Supreme Court pronouncements on these questions, a PLS planner should next turn to various bar association codes for guidance.

**ETHICAL CONSIDERATIONS AND THE ABA CODE OF PROFESSIONAL RESPONSIBILITY**

PLS have provoked intense criticism primarily because group plans challenge traditional principles of legal ethics. They have been attacked as promoting the ethical violations of: maintenance,34 champerty,35 barratry,36 solicitation, inciting litigation,37 advertisement38...
ing, channeling, and commercialization. The strongest argument against PLS focuses upon the potential destruction of the traditional attorney-client relationship. There is great concern that lay-controlled legal service plans might exercise direct or indirect influence over their attorneys where a financial connection exists between the attorney and the organization. The ultimate result of interference with an attorney's independent judgment might be to sacrifice the client's interests for the benefit of the sponsoring organization.

Despite the criticism launched against PLS from their inception, the ABA formally urged state and local bar associations to initiate and experiment with prepaid plans. The ABA stated that:

- it does not oppose, but on the contrary encourages, the development of any prepaid legal service plan designed to make legal services more truly available to individuals if it provides assurance of quality services at reasonable cost and is consonant with the highest professional standards and the best interest of the public.

shall be deemed guilty of the petty offense of common barratry; and if he be an attorney or counselor at law, he shall be suspended from the practice of his profession, for any time not exceeding 6 months.

37. It has been suggested that the prohibition against "stirring up litigation" rests upon 2 dubious premises: (1) that litigation is an evil in itself and that nothing should be done to encourage it; and (2) that the assertion of even legitimate claims must be discouraged in order to impede the bringing of fraudulent or frivolous actions. Such a passive system tends to serve the interests of prospective litigants who have sufficient knowledge and power to make use of the legal system. The assertion of legitimate claims has social value and should be encouraged. Thus, the "stirring up of legitimate claims that would otherwise go unasserted because of the prospective claimants' poverty, weakness, ignorance or naivete may in fact be a positive good." CHRISTENSEN, supra note 3, at 142-45.

38. Commercialization of the legal profession is said to involve the following: (1) lay organizations other than clients obtain benefit, especially economic, from an attorney's professional activities; (2) the profession is discredited through commercial forms of advertising and improper solicitation of business; and (3) an intermediary device is used by unscrupulous attorneys as a cover for improper solicitation schemes. Id. at 288.

39. Group Legal Services, supra note 17, at 529.
40. PRIMER, supra note 4, at 5-6.
41. Id. The ABA Code purports to encourage attorney involvement in PLS programs. 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.

AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 8C (1976) [hereinafter cited as ABA Code].
This commitment to PLS was translated into several ABA rules.

**Analysis of the ABA Code's PLS Rules**

The ABA rules relating to PLS generally have been regarded favorably by the legal community since they appear to encourage the formation of PLS while safeguarding the integrity of the legal profession. However, in its effort to balance an individual's constitutional right to engage in collective legal activity against a state's regulatory authority to protect the public from professional misconduct, the ABA has taken an overly cautious position. In direct contrast to the affirmative ABA commitment to the development of PLS plans, the disciplinary rules adopted tend to be ambiguous, inhibitory, and restrictive. Thus, while the ABA professes encouragement of PLS, it has imposed numerous restraints which may lack adequate justification. The conservative ABA position may be derived from the perceived threat PLS pose to private attorneys. However, it has been advanced that this threat may be more imaginary than real.

Although the Code's non-applicability to lay persons may seem obvious, this factor is nevertheless significant, since the rules relating to attorney participation in PLS ultimately impinge upon the right of lay organizations to establish such programs. An examination of the rules relating to PLS raise the question to what extent the ABA is actually directing how consumers may operate their PLS programs under the guise of regulating attorney conduct. Objections have been raised to the Code sections addressing publicity, profit-making organizations, creation of work for attorneys, and reporting requirements.

Although "dignified" publicity may describe the availability and nature of PLS plans, the participating attorneys' names may not be disclosed to prospective members or beneficiaries of the plan. This

---

42. *Group Legal Services*, supra note 17, at 541.
44. *See Address by A. Morrison* (May 9, 1975) reprinted in *American Bar Association, Fifth National Conference on Prepaid Legal Services* 139 (1975) [hereinafter cited as Morrison Address].
45. The relevant portions of Disciplinary Rule 2-101 (Publicity in General) provide:

[A] lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services. . . . This rule does not prohibit limited and dignified identification of a lawyer . . . by name.

(6) In communications by a qualified legal assistance organization, along with the biographical information . . . directed to a member or beneficiary of such organization.

*ABA Code*, *supra* note 41, at 9C.
ban makes it unnecessarily difficult for consumers to reach informed decisions regarding the quality of a PLS program, and thus impedes increased plan membership. In view of Bates and O'Steen v. State Bar of Arizona, this publicity rule would probably be unable to withstand constitutional challenge, and thus will undoubtedly be altered by the ABA.

Under another rule, both non-profit and profit-making organizations may offer PLS. However, only in connection with matters where a profit-making organization bears the ultimate liability of its members may it supply legal services through attorneys it employs, directs, supervises, or selects. This provision is intended to protect

---

46. 97 S. Ct. 2691 (1977). The Supreme Court stated that commercial speech tends to serve individual and societal interests by assuring more informed and reliable decision-making, and thus is entitled to some first amendment protection. In view of this case, it seems likely that the DR 2-101(B) prohibition on disclosing attorneys' names to prospective members will inevitably be altered, as this ban may interfere with individuals' abilities to make informed decisions as to whether to join particular PLS plans. See Comment, Bates and O'Steen v. State Bar of Arizona: From the Court to the Bar to the Consumer, 9 Loy. Chi. L.J. 477 (1978).

47. The full text of Disciplinary Rule 2-103(D)(4) is as follows:

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) 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.

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

(e) 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 benefici-
the public from lay interference with the attorney-client relationship. The requirement presumes that an organization bearing the liability of its member is less likely to influence or direct an attorney to disregard the client's best interests. Nevertheless, the different treatment of profit and non-profit organizations might also reflect a greater concern with economics than with regulation of ethics. This provision may unnecessarily deter profit-making organizations from participating in PLS plans. The result sought to be accomplished by the ABA might be achieved by a less restrictive requirement directed at situations posing threats to the attorney-client relationship, e.g., preventing the employed attorney from representing a member in a suit against the sponsoring organization.

In an effort to prevent solicitation of legal business and the "commercialization" of the legal profession, another provision prohibits the establishment of a PLS plan initiated or promoted primarily to provide benefit to the organizing attorney, partner, associate, or affiliated lawyer. The Code also proscribes the operation of a plan in order to secure benefits for an attorney in his role as a private practitioner outside the organization's legal service program. These provisions are ambiguous in that they do not delineate what specific attorney activity is prohibited. In effect, if these requirements are broadly construed, they may inhibit attorneys from organizing PLS programs because such plans may appear to be established for the primary purpose of yielding pecuniary gain to the initiating attorneys. Yet, widespread availability of PLS requires attorneys to assume more active roles in the creation and

ary 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.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) 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.

ABA Code, supra note 41, at 11C.

48. Group Legal Services, supra note 17, at 542. There is no data to support the presumption that profit-making organizations are more likely to interfere with the attorney-client relationship than non-profit organizations.

49. See disciplinary Rule 2-103(D)(4), supra note 47.

50. Id. This provision is apparently designed to prevent the organization from being used as a "feeder" for other legal practice. See Morrison Address, supra note 44, at 135.
operation of group legal services.51

The ABA directive that all PLS programs be reported52 has been characterized as unrelated to ethical or disciplinary considerations.53 Filing a report with a disciplinary authority does not in itself guarantee, or even encourage, greater compliance with the ethical conduct required of legal professionals. Furthermore, the ABA Code does not require other programs which employ attorneys to register with a state disciplinary commission. No clear explanation has been advanced for imposing this reporting burden upon PLS arrangements. In addition to its failure to safeguard against attorney misconduct, the reporting provision requires disclosure of information to a disciplinary authority rather than directly to consumers. If the rationale underlying this disclosure requirement is consumer protection, a question arises whether this purpose might be more effectively accomplished by a nonlegal entity. Yet, this proviso has apparently served as the impetus for the Illinois rule calling for the written registration of all group legal service programs.54

PLS proponents have commented that the Code is biased against PLS since it requires the programs and participating attorneys to follow specified rules in order to "qualify."55 The central issue confronting the legal profession is not whether group legal services are useful or even whether restrictions on PLS conflict with individual constitutional rights. Rather, it is whether the Code's regulations unnecessarily impair the ability of lawyers to discharge their primary obligation to make legal services available to all who want them.56 One commentator has noted that "the public is not obliged to prove its need; the legal profession is obliged to justify the restrictions."57 It is submitted that the rules governing professional conduct within PLS plans should be guided by the consumer's perspective.

[The] availability of lawyers' services should be an important factor in decisions about what lawyers are to be permitted to do in offering their services to the public. For too long those decisions have been made on the assumption that the profession's own interests and traditions were the only pertinent considerations. They may be appropriate considerations . . . provided they can be

51. Id. at 140.
52. See note 47 supra.
53. Morrison Address, supra note 44, at 138.
55. Morrison Address, supra note 44, at 139.
56. Christensen, supra note 3, at 230.
57. Id. at 256.
shown to have some direct and significant relationship to the interests of the public. But tradition is not, in itself, sufficient reason for professional restrictions that impair a lawyer's ability to fulfill his primary obligation of providing services to the public. 58

The disciplinary rules should be more liberal in order to stimulate more widespread and innovative experimentation with PLS programs. Only after attorneys and consumers gain greater familiarity with PLS plans will there be an informed and valid basis upon which to design regulations. In particular, the rules should facilitate and encourage a wider variety of PLS arrangements, including non-traditional plans initiated by attorneys, and programs offered to the general public.

PLS IN ILLINOIS

Since the United States Supreme Court left unresolved the question of the extent of the state’s power to regulate the legal profession without unwarranted infringement upon first amendment rights, one should examine the Illinois Supreme Court’s treatment of the PLS issue. Unfortunately, the Illinois Supreme Court has not addressed the PLS subject subsequent to the United States Supreme Court decisions. Consequently, the Illinois opinions relating to group legal services are of doubtful authority. 59 In light of this lack of guidance from the Illinois courts, one looks to the Illinois State Bar Association (ISBA) Code of Professional Responsibility and Illinois Supreme Court rules to ascertain the nature and degree to which Illinois has regulated PLS.

While the ABA has translated its purported commitment for PLS arrangements into relatively restrictive guidelines for their establishment, the ISBA, in contrast, has not even advanced that far. The ISBA Code contains provisions identical to the ABA’s original controversial group legal service rule. 60 The major criticism leveled

58. Id. at 172.
59. See In re Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958)(Legal service program whereby clients’ fees used to defray legal department’s litigation expenses invalidated); People ex rel. Chicago Bar Ass’n v. Chicago Motor Club, 382 Ill. 50, 199 N.E. 1 (1935) (An association “can [not] contract with its members to supply them with legal services, as if that service were a commodity which could be advertised, bought, sold and delivered.” Id. at 57, 199 N.E. at 4); People ex rel. Courtney v. Association of Real Estate Taxpayers of Ill., 354 Ill. 102, 187 N.E. 823 (1933) (Program in which the organization “directed the attorneys and determined all questions to be litigated” invalidated on the ground that it might interfere with the attorney-client relationship); People ex rel. State Bar Ass’n v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931)(Arrangement prohibited primarily because organization permitted to appropriate legal fees). See also People ex rel. Chicago Bar Ass’n v. Motorist Ass’n of Ill., 354 Ill. 595, 188 N.E. 927 (1934).
60. Disciplinary Rule 2-103(d) of the ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY 12-13 (1970) provides:
against this version concerned the requirement that group legal service plans comply with the "controlling constitutional interpretation at the time of rendition of the services." This rule reflected a narrow interpretation of the Supreme Court's first three decisions on the group legal service issue. After United Transportation Union was decided, this version of the rule was characterized as "unconstitutionally restrictive and too imprecise for safe and effective planning." Since the ISBA has not revised its vague, non-directive PLS rule, the ISBA Code provides virtually no guidance for PLS organizers. Since the ISBA Code's PLS rule was never integrated into the Illinois Supreme Court rules, an attorney will not be subject to disciplinary proceedings due to non-compliance with the requirements of the provision.

Only Illinois Supreme Court Rule 730 specifically pertains to PLS. Under this rule, Illinois requires group legal plans to register

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:

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal 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.

Amendment of the ISBA Code may be undertaken. One commentator has stated:

This Association will undoubtedly be giving prompt consideration to the ABA's new amendments to determine whether they are properly responsive to any valid criticisms and whether they or any other changes should be adopted by the CBA. In the meantime, however, it is the Committee's responsibility to administer the Code as approved by the CBA and ISBA . . . .

63. Id. at 227.
with the Attorney Registration and Disciplinary Commission. Presumably, the authority for Rule 730 is the state courts' traditional power to regulate the practice of law. Such a premise is clearly supported by the case law. The Commission was established by the supreme court in 1973 for the purpose of investigating conduct of attorneys tending to bring the legal profession into disrepute.

Since Rule 730 does not address either attorney misconduct or disciplinary procedures, the supreme court may have exceeded the state's regulatory interest by delegating the authority to register PLS to the Commission. Rule 730 is an implicit assertion by the Illinois Supreme Court that it, rather than another governmental body, is the proper entity to control group legal arrangements. By

---

No attorney shall participate in a plan which provides group legal services in this State unless the plan has been registered as hereinafter set forth:

(a) The plan shall be registered in the office of the Administrator of the Attorney Registration and Disciplinary Commission within 15 days of the effective date of the plan on forms supplied by the Administrator;
(b) Amendments to any plan for group legal services and to any other documents required to be filed upon registration of plan, made subsequent to the registration of the plan, shall be filed in the office of the Administrator no later than 30 days after the adoption of the amendment;
(c) The Administrator shall maintain an index of the plans registered pursuant to this rule. All documents filed in compliance with this rule shall be deemed public documents and shall be available for public inspection . . .
(d) Neither the Commission nor the Administrator shall approve or disapprove of any plan for group legal services or render any legal opinion regarding any plan. The registration of any plan under this rule shall not be construed to indicate approval or disapproval of the plan;
(e) Plans existing on the effective date of this order shall be registered on or before June 1, 1977;
(f) Subsequent to initial registration, all such plans shall be registered annually . . .
(g) The initial and annual registration fee for each plan for group legal services shall be $50.00.

65. In People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 349, 8 N.E.2d 941, 944 (1937), citing In re Day, 181 Ill. 73, 54 N.E. 646 (1899), the court stated that the power to regulate and define the practice of law is the prerogative of the judicial department. Also, while the legislature may pass acts declaring unauthorized practice of law illegal and punishable, such statutes are merely in aid of and do not supersede or detract from the power of the judicial department to control the practice of law.

66. Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois Brochure. Illinois Supreme Court Rule 751, entitled "Attorney Registration and Disciplinary Commission," states: "The registration of, and disciplinary proceedings affecting, members of the Illinois Bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission . . ." RULES OF THE SUPREME COURT OF ILLINOIS AND THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION 1 (1977). Rule 752(e), entitled "Administrator," states that, "[subject to the supervision of the Commission, the Administrator shall: (e) maintain such records, make such reports and perform such other duties as may be prescribed by the Commission. . . ." Id. at 2.

67. Letter from P. Dowd to Attorney Registration and Disciplinary Commission (June 1, 1977) [hereinafter cited as Dowd Letter], But see DR 2-103(D)(4)(g), supra note 47.

68. There is some question whether the state is preempted from requiring the reporting
contrast, other states regulate PLS through the state bar association  
70 or department of insurance 76.

There are several additional problems inherent in Rule 730. Most significantly, the supreme court failed to include specific standards for the establishment and operation of PLS plans in Illinois. At the present time, the rule only requires plans to be registered. The Attorney Registration and Disciplinary Commission has been specifically denied the authority to approve, disapprove, or render legal opinions regarding the PLS plans submitted for registration. 71 Without such power to review or evaluate programs, the Commission is clearly incapable of imposing sanctions, or providing useful guidance for the organization of future PLS arrangements.

The supreme court rule is also objectionable because it exercises control over the regulation of all PLS plans, including those developed solely by lay organizations. Since attorneys are forbidden to participate in group plans which have not been registered under the rule, 72 the court has, in effect, imposed regulations upon associations of laymen by restraining the activities of attorneys. 73 Lay organizations which choose not to register their plans with the Attorney Registration and Disciplinary Commission will be unable to secure attorney involvement. Although Rule 730 does not appear to have been adopted with the intent to restrict PLS, the registration requirement seems to abridge the first amendment rights of the organizers, members, and cooperating attorneys without demonstrating a compelling state interest. 74

Moreover, no forms of legal associations other than PLS programs are required to register with the Commission. Under Supreme Court Rule 721, professional service corporations and associations for the practice of law are required to file an application for registration with the clerk of the court, not the Attorney Registration and Disciplinary Commission 75. The Illinois Supreme Court has not advanced any justification for the different and more burdensome treatment of PLS programs regarding the registration requirement.


69. TEX. INS. CODE ANN. art. 5.13-1 & art. 23 (1975).


71. See note 64 supra.

72. Id.

73. Dowd Letter, supra note 67.

74. Id.

The Commission requires an organization sponsoring a PLS plan to submit documentation relating to the establishment and operation of the plan. This documentation may include trust agreements, articles of incorporation, by-laws, and the rules and regulations of the plan. Rule 730 provides that the documents filed in compliance with the Commission requirement are deemed to be "public" documents. Some of those documents are already matters of public record. However, the requirement may impede adoption of PLS since a lay organization may prefer to disclose information regarding its plan's operation only to its members. Disclosure of a program's mode of operation to outside planners may promote disruptive rather than productive competition between organizations, thus possibly impeding improved quality of future PLS plans. In contrast, other states having similar reporting requirements protect the confidentiality of much of the information received. Consequently, it is submitted that only those documents already public should be made available for inspection by non-members, apart from Commission personnel.

Essentially, by requiring the registration of group legal service plans, Rule 730 recognizes the propriety of PLS without providing any specific guidance for their creation. Absent such guidelines, PLS development and experimentation may be curtailed, since attorneys who are uncertain of the permissible scope of PLS may be reluctant to participate.

Despite the lack of authoritative standards for organizing PLS in Illinois, thirteen groups have registered legal service plans with the Commission. Of those plans, three are "reduced fee" arrangements rather than prepaid programs, three are affiliated with colleges or universities, and eight of the group plans are connected with union or trade organizations. Only one of the PLS programs involves an organization established for the primary purpose of rendering legal services.

To avoid intrusion into the attorney-client relationship, the existing programs preclude the organization from supervising the attor-

---

76. See note 64 supra.
77. Id.
78. For example, Wis. Stat. Ann. § 256.294 (5) (West Cum. Supp. 1977), states in relevant part: "All information filed pursuant to this section is confidential . . . except the name and address of its sponsoring organization, . . . and the names of the attorneys providing the services. All reports are available to authorized representatives of the Supreme Court and the State Bar for information purposes and for disciplinary and ethical investigations or proceedings."
79. The names of these plans are on record with the Illinois Attorney Registration and Disciplinary Commission.
ney. Moreover, they recognize the member as the client, not the sponsoring organization. Claims against other group members or the organization itself are excluded from benefit coverage to eliminate potential conflicts of interest. Several plans provide legal "check-up" services in an effort to deter the development of legal problems and to prevent legal problems from reaching the crisis stage. Although a PLS organizer might be tempted to rely upon these program descriptions as examples of acceptable plans, it should be noted that none of these programs received official approval.

RECOMMENDATIONS FOR THE FUTURE REGULATION OF PLS

If PLS are to be effectively utilized in Illinois, there is a need for definite guidelines concerning their operation. There are at least two procedures which can provide the necessary direction to attorneys and lay persons interested in organizing PLS. First, the courts, or some other designated agency, can undertake a case-by-case analysis of PLS plans. This approach would require the formulation of principles delineating the permissible limits of PLS. Those principles could then be applied to PLS plans subsequently called into question. In this manner, organizers of PLS could determine, in advance, whether a proposed plan's mode of operation would be acceptable, rather than develop a plan entirely based on speculation as to its validity.

Although a case-by-case application of principles may provide flexibility in determining the acceptability of particular group plans, more specific criteria would offer the benefits of predictability, consistency, and ease of application. This method of providing specificity would entail legislative enactments, similar to those adopted in Texas, California, and Wisconsin. Allocating the responsibility for formulating workable guidelines to the legislature rather than to the court system may also produce standards more responsive to the interests, needs, and desires of the ultimate consumer.

80. One commentator suggests that an evaluation of PLS programs should consider and weigh the following factors: 1) the extent to which the possibility exists for serious conflict of interest between the providing organization and the individuals receiving services; 2) the extent to which the organization may have the opportunity and power to exert control or influence over the attorney; and 3) the value of the program to society. CHRISTENSEN, supra note 3, at 270.
81. Id. at 277.
82. TEX. INS. CODE ANN. art. 5.13-1 & art. 23 (1975) (Vernon).
85. Consumers can exert pressure upon their legislators to act in compliance with the
It is imperative that consumers participate in the decisions concerning the proper regulation of PLS. The need for consumer input is especially acute since the power to impose restrictions upon PLS has thus far been assumed by attorneys, the very persons possessing the exclusive license to engage in the regulated enterprise. The legal profession, in fulfilling its obligation to make legal services more readily available to all segments of the population, should act to increase public awareness of the existence of and need for PLS programs.

Since the judicial branch may be more inclined to translate the vested interests of the legal profession into restrictive PLS guidelines, it is preferable to give regulatory authority to the legislature. Perhaps the most important function of a PLS regulatory measure is to ensure consumer protection by requiring adequate disclosure regarding a program’s operations. Between the judicial and legislative branches, the latter may be better qualified to formulate valid and flexible guidelines which adequately balance encouragement of PLS expansion as well as protection of consumers.

CONCLUSION

"The battle about the propriety of [prepaid legal] services is over, but the question of the extent of their use is not."

This comment accurately reflects the present situation of PLS in Illinois. In view of the United States Supreme Court cases and the recently adopted Illinois Supreme Court Rule 730, there is little doubt that PLS plans in Illinois are valid arrangements. However, the nature of the legitimate restrictions upon the establishment and operation of PLS is uncertain. This is primarily because of the lack of authoritative statements on the issue. Organizers are confined to outdated case law, the unamended ISBA Code, and a group legal service rule.

---

public’s desires; the court system is more insulated from such direct influence.  
86. CHRISTENSEN, supra note 3, at 255.  
87. Restrictions on solicitation and advertising would probably need to be relaxed in order to enable attorneys to engage in educational endeavors and to make PLS more fully available to the public.  
[T]he fundamental thing we at least have to do as a first step is, where we are dealing with organized groups, be they groups organized in the past as a trade union or consumer groups who are simply organizing and trying to solicit other members to come into their non-profit scheme to be able to get group legal services, those programs ought to be able to advertise. They ought to be able to receive solicitations from the members of the bar, saying, "We can do a better job and we can do it for less."

Morrison Address, supra note 44, at 141.  
with no operational guidelines.

In order to transform the ethical commitment "to assist in making legal services fully available"\textsuperscript{89} to the public into a reality, attorneys need to become active participants in delivering legal services to moderate-income persons through the mechanism of PLS. To enable attorneys to meet their obligation to the public, Illinois has a responsibility to do more than merely sanction the existence of group legal service plans through a court rule. Illinois must formulate specific, workable guidelines for the organization and operation of PLS in order to foster attorney involvement in these arrangements. Several viable alternatives exist for achieving this result. The Illinois State Bar Association Code and Disciplinary Rules should be revised and updated to reflect an attitude toward PLS which is more liberal than that of the American Bar Association. In addition, and most importantly, the Illinois legislature should enact specific statutory provisions both governing the operations of PLS, and delegating the responsibility for ongoing supervision and regulation to some governmental agency or commission.

Illinois has taken the initial step toward the recognition of PLS through Supreme Court Rule 730. However, much work remains to be done to ensure the necessary expansion and growth of PLS plans. The ISBA, the Illinois Supreme Court, the state legislature and consumer groups must cooperate in developing liberal guidelines for the establishment and operation of PLS. Only through such concerted action can the theoretical commitment to PLS be transformed into the tangible rendition of legal services in Illinois.

\textbf{Fay Triffler}

\textsuperscript{89} \textit{ABA Code, supra} note 41, \textit{Canon 2}. 