Prepaid Legal Service Plans in Indiana

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The recommendation was that the Delegates approved a recommendation of the Board of Managers concerning prepaid legal service plans. The recommendation was that the Indiana State Bar Association officially suggest that the Indiana Supreme Court adopt an interim order regarding such plans. The Board of Managers recommended such action because prepaid legal service plans are now operating in Indiana. The suggested order has not yet been adopted. Even if the order is not in force in the near future we will continue to hear more and more about this topic. Some answers to commonly asked questions about these plans may therefore be of interest to readers of Res Gestae.

Q. WHAT ARE PREPAID LEGAL SERVICE PLANS?

A. There are many different types and any simple definition runs the risk of being inaccurate. Basically, such plans provide for the payment of attorneys’ fees by someone other than the individual client obtaining the service. A commonly cited analogy in the medical field is Blue Cross and Blue Shield coverage. In most instances an employer bears all or part of the cost of an insurance policy providing stipulated medical benefits to enrolled employee members of a group. Such an arrangement is also possible in the legal field. Plans have been designed to provide members of a group with specified benefits if the members find it necessary to employ an attorney. For instance, an experimental plan operating in Shreveport, Louisiana pays up to $100 a year for consultations with an attorney, $250 for office work, $500 for lawyers’ fees and costs in court or an administrative proceeding and $800 reimbursement of the next $1,000 of legal litigation expenses where the covered party is a defendant. A plan now available to members of the Maryland Credit Union League approaches benefits in a different fashion. There is a detailed schedule of benefits, i.e., $200 for preparing a bankruptcy petition, $40 for an administrative agency appearance, $20 for drafting a simple will, etc., with a total maximum benefit payable during any twelve-month period of $2,500.

Q. WHO IS ELIGIBLE FOR COVERAGE UNDER SUCH PLANS?

A. It all depends on the plan. Voluntary enrollment of individuals may be authorized. It is more common to offer enrollment on a group basis, i.e., all employees of a company or members of a particular union. The preference for group enrollment is quite understandable. When all members of a group enroll it can be anticipated that only a certain percentage of enrollees will need legal services and the cost of the benefits can be spread over all participants thus assuring reasonable per person premiums. If enrollment is entirely voluntary we can assume that most people will not enroll until the need for legal services is apparent. Usage will approach 100% and the cost on a per person basis will be very high. There are ways of keeping the cost of individual enrollment plans under control such as waiting periods and limitations of benefits. Nevertheless, it can be anticipated that voluntary enrollment plans will develop much more slowly than group plans.

Q. WHY ALL THE CURRENT INTEREST IN PREPAID GROUP LEGAL SERVICES?

A. The past two decades have witnessed an ever increasing concern that all people in our society have access to counsel. Lawyers make the system go. People with money have always had lawyers, while people with no money now get at least some legal services through governmental agencies. Many blue collar workers with modest incomes, not eligible for governmental assistance and not wealthy enough to feel free to walk into a lawyer’s office, go without needed counsel. While we associate “a right to counsel” with criminal proceedings, the need for counsel is just as great in civil litigation. A lawyer is indispensable in both types of proceedings.

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Attempts have been made to determine why people do not go to lawyers. A 1972 survey of state, county and municipal employees in New York revealed that over 70% of those reporting that they had unmet legal needs cited cost as the reason for not consulting an attorney. The response of some of the participants in this survey are quite revealing.

"Lawyers come very high in salary. Civil service workers could use protection if they could afford it."

"If I could have afforded a lawyer and proper advice, I might not find myself in the unhappy position I'm in today."

"Some people have serious problems and can't afford a lawyer, and are embarrassed to use Legal Aid."

I do not mean to suggest that prepaid legal service plans are justified only as a program for the working class. All persons in society will benefit greatly if legal services can be financed through such plans. Lawyers concerned about the increasing number of students graduating from law school and the possible enactment of "no-fault" laws might also consider the impact of legal services plans. The widespread use of such plans may have a dramatic positive effect on the traffic into lawyers' offices. And the fees will be collectible! But after all this is said it is clear that much of the current interest in prepaid legal service plans is attributable to the fact that labor unions are now interested in such plans as a fringe benefit.

On August 15, 1973 President Nixon signed Public Law 93-95 amending § 302(c) of the Labor Management Relations Act of 1947 (the Taft-Hartley Act). This amendment permits employers to contribute to jointly administered trust funds established for the purpose of "defraying the costs of legal services for employees, their families and dependents for counsel or plan of their choice." As soon as Congress enacts some needed amendments to the Internal Revenue Code we may see widespread bargaining for the inclusion of employee legal service plans in the customary package of fringe benefits.

Q. WHO WILL RENDER THE LEGAL SERVICES?

A. This is a hot question. In fact it probably has attracted more attention and generated more heat than any other aspect of prepaid legal service plans. Many lawyers are concerned that a particular plan may be a device by which business is channeled to only a few attorneys. Thus, there has been a great deal of debate about whether the panel of lawyers rendering service under a particular plan must be open (any lawyer) or closed (restricted choice). Actually a variety of arrangements are possible. A plan may authorize reimbursement of lawyers (a) residing anywhere in the United States, (b) residing anywhere in a specific jurisdiction, (c) residing in a specific jurisdiction and indicating a desire to affiliate with a plan, (d) any lawyer from a panel chosen by the group organizing the plan, or (e) a salaried lawyer or firm which services only members of the plan. The first alternative gives the client the widest choice of lawyers, the latter alternative is the most restrictive. We move from a completely open panel through several intermediate positions to a completely closed panel. The recently adopted amendment to the Taft-Hartley Act permits either open or closed panels.

Since the completely closed panel is not an essential part of prepaid legal service plans it is possible to be against closed panels and still for the concept of prepaid legal services. Those who oppose all prepaid legal service systems because of a fear that plans organized in the future may provide for closed panels should realize (1) that the recent federal legislation permits closed panels and (2) that four times in the last fifteen years the Supreme Court has held that four different types of closed panel plans are constitutionally protected forms of representation. That is, a state through the application of its ethical standards cannot prohibit the operation of closed panel arrangements.

We must also realize that many non-lawyers believe that they get better service through closed panel arrangements.

Prepaid legal service plans are here to stay. The extent to which open panels will prevail over closed panels will depend upon the ability of the practicing bar to convince the public that better service is obtained when the individual can choose among any of the practicing attorneys in Indiana.

Q. IN VIEW OF THE FOUR SUPREME COURT DECISIONS YOU CITE, DOES THE ORGANIZED BAR RETAIN ANY CONTROL OVER PREPAID LEGAL SERVICE PLANS?

A. Yes. Those decisions simply establish that closed panel plans are constitutionally protected forms of the attorney-client relationship. Each state court retains the authority to oversee the practice of law in its jurisdiction. The suggested interim order noted at the beginning of this article contains a number of regulatory provisions and is reproduced here for your information.

"No lawyer may render legal services pursuant to a prepaid legal service plan without the following conditions having first been satisfied:

"A. Satisfaction of the interim standards of the American Bar Association adopted in August 1972 for such plan, as follows:

"(1) The entire plan shall be reduced to writing and a description of its terms shall be distributed to the members or beneficiaries thereof;

"(2) The plan and description shall:

"(a) State clearly and in detail the benefits to be provided, exclusions therefrom and conditions thereto;"
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"(b) Describe the extent of the undertaking to provide benefits and reveal such facts as will indicate the ability of the plan to meet the undertaking;

"(c) Provide that there shall be no infringement upon the independent exercise of professional judgment of any lawyer furnishing service under the plan;

"(d) Specify that a lawyer providing legal service under the plan shall not be required to act in derogation of his professional responsibilities;

"(e) Set forth procedures for the objective review and resolution of disputes arising under the plan;

"(3) There shall be a periodic written report not less often than annually disclosing to members or beneficiaries of the plan, to the American Bar Association and to the bar of any state in which benefits are paid a summary of the operations of the plan including, but not limited to all relevant financial data, the number of members or beneficiaries receiving legal services, and the kinds of benefits provided;

"(4) Each plan should provide for an advisory group including members of the bar and beneficiaries of the plan which shall meet periodically to review and evaluate the organization and operation of the plan and to offer suggestions for its improvement.

"B. A copy of such plan must be filed with the Clerk of this Court and with the Secretary of the Indiana State Bar Association.

"C. The plan shall state in writing that the satisfaction of the foregoing conditions shall not be construed as an approval of such plan by this Court or by the Indiana State Bar Association.

"No lawyer may render legal services pursuant to such prepaid legal service plan without complying with the Code of Professional Responsibility adopted by this Court March 8, 1971, as amended, supplemented or as hereafter amended, and in particular, and without limitation thereto, compliance with DR2-108(D)(5) thereof, and without complying with the Formal Opinions of the Standing Committee on Ethics and Professional Responsibility of the American Bar Association, as hereafter supplemented or amended, and in particular, and without limitation thereto, such Committee's Formal Opinions 332 and 333 issued in February 1973."

If this suggested interim order is adopted we will obtain a lot of needed information about prepaid legal services plans in operation in this state. Right now we have no way of knowing how many plans are in operation and have no way of judging whether the public is being well served by such plans or whether any changes in such plans should be suggested.

DR2-108(D)(5) cited in the last paragraph of the interim order should be studied carefully by every lawyer who renders services through a prepaid legal services plan.

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

"(1) A legal aid office or public defender office:

"(a) Operated or sponsored by a duly accredited law school.

"(b) Operated or sponsored by a bona fide non-profit community organization.

"(c) Operated or sponsored by a governmental agency.

"(d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

"(2) A military legal assistance office.

"(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

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

"(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 organ-
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ization 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."

This rule is a complicated one and might well serve as the subject of a separate article. I shall not explore its intricacies here although I must marvel at the subtle way in which the second sentence of the first paragraph uses the concept of "cooperation" to modify the traditional rules against solicitation and advertising found in the first sentence of that paragraph.

It is possible that some language in the quoted rule is now out of date. I have in mind DR2-103(D)(5)(e). As one commentator has noted: "The rule was written against a background in which there were no plans affording broad coverage of personal legal problems to members of groups. Plans then existing gave service only for job-related problems or for civil-rights-related problems. Furthermore, this provision of the code was written before the broad language of the United States Supreme Court . . . in UTU v. State Bar of Michigan." (401 U.S. 576).3

Formal opinions 332 and 333, cited in the last paragraph of the suggested interim order, deal with the question of whether participation in either open or closed panels is inappropriate under DR2-103. Formal opinion 332 validates the participation of a lawyer in open panel plans provided that certain conditions are met and Formal Opinion 333 finds that participation in a closed panel plan is not per se improper.

Q. APART FROM ETHICAL CONSIDERATIONS, WHAT OTHER PROBLEMS ARISING OUT OF PREPAID LEGAL SERVICE PLANS HAVE TO BE RESOLVED?

A. The status of such plans as insurance and some anti-trust matters are still open items. If a particular prepaid legal service plan is regarded as insurance then state regulation may be appropriate. Furthermore, since the United States Department of Justice is now taking the position that lawyers' minimum fee schedules amount to antitrust violations, it is not wise for the bar to urge that the reimbursement provided in such plans conform to official or unofficial minimum fee schedules.


3 Introductory Note on Group and Prepaid Legal Services in Compilation of Reference Materials on Prepaid Legal Services (ABA Special Committee on Prepaid Legal Services, 1973).

PROFESSOR JAMES WHITE IS NAMED IPI DEAN OF PLANNING-DEVELOPMENT

James P. White, Professor of Law at Indiana University Indianapolis Law School and consultant on legal education to the American Bar Association has been appointed dean of academic planning and development and special assistant to the chancellor of Indiana-Purdue University at Indianapolis.

Dean White will retain his position as a member of the Law School teaching faculty.

Duties of his new assignment include planning development of physical facilities and budget plans necessary for academic development.

Dean White also is chairman of the Indiana University Constitution Committee, the IPI Goals and Objectives Committee, and serves as director of external affairs and urban legal studies at the law school.

His recent appointment as American Bar Association Law School Consultant was announced in the December 1973 issue of Res Gestae.

R. M. Hall, Covington Attorney, Appointed Warren Circuit Judge

Robert M. Hall, 30, of Covington, a 1969 graduate of Indiana University School of Law, is the new judge of Warren Circuit Court succeeding Judge Walter Gillespie, of Williamsport, who resigned.

Mr. Hall was appointed by Governor Otis R. Bowen on January 23, 1974.

Judge Gillespie had served on the Warren Circuit bench 17 years. He entered the practice of law at Williamsport in 1928 and was elected to the judiciary on the Republican ticket in 1957.

Judge Hall, a native of Danville, Illinois, received his preparatory education from Indiana University, A.B. 1966, then remained in Bloomington to earn his law degree, J.D. 1969. He has been in general practice with Rex V. Keller under the firm name of Keller & Hall, largely in areas of probate, real estate, tax law and trials.

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