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Constitutional Test of the Closed Panel Prohibition.

On February 3, 1976, the Student Government of the University of North Carolina at Chapel Hill submitted its plan to establish a prepaid legal services program for the 19,000 members of its student body to the North Carolina Bar Council with a request for approval.¹ North Carolina General Statute §84-23.1(b) requires that “plans providing for prepaid legal services must be submitted to the council and may not be implemented or operated without prior and continuing approval.”² Upon receipt of the plan, B.E. James, the Secretary of the North Carolina State Bar, forwarded it to Beverly C. Moore, Chairman of the Bar’s Prepaid Legal Services Committee, and to R. W. Hutchins, President of the North Carolina Prepaid Legal Services Corporation, for approval.³ Mr. Moore prophetically responded with these concluding remarks: “I talked to some of the consumer people in Philadelphia last weekend and if we turn down the University of North Carolina plan, which I believe we must as it is presently structured, then this may afford a test case situation for consumers concerning the closed panel feature of the bill. Of course, we cannot control that.”⁴ Mr. Moore was referring to North Carolina General Statute § 84-23.1(b), which requires that the Bar Council not approve “any plan for prepaid legal services which in any way restricts the right of the client or person receiving prepaid legal services to select his own attorney from the actual members of the North Carolina State Bar, or a member of any other state bar in any other state where the claim or cause of action may arise.”⁵ North Carolina General Statute §84-23.1(e) contains language to the same effect.⁶

The University of North Carolina at Chapel Hill plan was found to be in direct violation of N.C. GEN. STAT. § 84-23.1 (b), and consequently, on February 20, 1976 the Bar Council formally refused to approve it.⁷ Mr. Moore’s perception of the Bar Council’s actions regarding the disapproval of the Student government’s plan became a reality on December 14, 1976, when the constitutional validity of N.C. GEN. STAT. §§ 84-23.1(b) and (e) was challenged in *Student Government, University of North Carolina v. Council, North Carolina State Bar*.⁸ The unpub-

1. Letter from E. William Bates, III, to B. E. James, Secretary of the N.C. State Bar, Feb. 2, 1976; See Bernholz, *Student Legal Services at the University of North Carolina at Chapel Hill*, 7 N.C. CENT. L.J. 286, 289 (1976).

2. N.C. GEN. STAT. § 84-23.1(b) (Cum. Supp. 1977).

3. Letter from B. E. James, Secretary of North Carolina Bar to E. William Bates, III, Student Body President, University of North Carolina at Chapel Hill, March 4, 1976.

4. Letter from Beverly C. Moore, Chairman, Prepaid Legal Services Committee of the North Carolina State Bar to B. E. James, Secretary of the North Carolina Bar, February 19, 1976.

5. N.C. GEN. STAT. § 84-23.1(b) (Cum. Supp. 1977).

6. *Id.* § 84-23.1(e). Section (e) reads: “Notwithstanding any other provision of this act or any other statute or law, no plan providing for prepaid legal services shall be authorized to exist or function in the State of North Carolina which in any way restricts or denies the client or person receiving prepaid legal services the right to select an attorney of his own choice from the active membership of the North Carolina State Bar, or a member of any other state bar in any other state where the claim or cause of action may arise to represent said person or client.”

7. Letter from R. W. Hutchins, President of the North Carolina Prepaid Legal Services Corporation to B. E. James, Secretary, North Carolina State Bar, February 20, 1976.

8. No. C-C-76-346 (W.D.N.C., filed Dec. 14, 1976).

lished decision in favor of the Student Government and its significance as to group prepaid legal services will be examined herein.

BACKGROUND OF PREPAID LEGAL SERVICES

There appears to be an extensive confusion of terminology as to the basic classifications of legal services arrangements.⁹ The two universally recognized classifications are prepaid legal services plans and group legal plans.¹⁰ The American Bar Association has formally described prepaid legal services as "a system in which the cost of possible legal services needed in the future is prepaid in advance by, or on behalf of, the client who receives such assistance."¹¹ Group legal services plans are commonly referred to as a method of legal service delivery whereby the group furnishes, recommends or pays for attorneys to represent the individual member.¹² David Maron, the editor of "New Directions in Legal Services" deemphasized this superficial distinction by stating, "[W]hile 'group legal services' refers to the method of delivery, and 'pre-paid' [sic] to a funding mechanism, these two terms are often used interchangeably."¹³ Such plans will be referred to as "group prepaid legal services plans" for purposes of this discussion.

Group prepaid legal services plans developed as the result of "concern over the need for legal services, combined with their present inadequate delivery and staggering costs."¹⁴ Although there has been a dramatic increase in the number of lawyers in recent years, the use by and availability of lawyers to certain income groups have not improved.¹⁵ Reasons for this nonuse include uncertainty as to the existence of a legal problem, inability to pay for legal services, and simply not knowing an attorney.¹⁶ This latter reason is directly related to potential clients

9. See generally, Delk, *The Advent of Prepaid Legal Services in North Carolina*, 13 WAKE FOREST L. REV. 271 (1977) [hereinafter cited as *Advent*]; Pfenningstorf & Kimball, *Legal Services Plans: A typology*, 1976 ABF RES. J. 411, 413 [hereinafter cited as *Typology*]; Connally, *Ethical Considerations of Prepaid Legal Services*, 11 FORUM 201 (1975) [hereinafter cited as *Ethical Considerations*].

10. *Advent*, *supra* note 9, at 271; *Ethical Considerations*, *supra* note 9, at 201. Joseph C. Delk, III attempts to distinguish group legal plans from prepaid legal services plans on the basis of the source of funding. Mr. Delk states that group plans providing legal aid and assistance to indigents are financed primarily by public funds. Prepaid plans, on the other hand, are said to require payments to the plan made by or on behalf of the recipient of the services. Tom A. Connally does not utilize this distinction, but defines prepaid legal services as any system by which the recipient of legal services, or someone on his behalf, pays for legal services in whole or in part, by means of periodic payments rather than on a "fee-for-service basis". Mr. Connally defines group legal services as any arrangement between a lawyer or lawyers in a group of potential clients (e.g. labor union, trade association, etc.) under which the lawyers undertake to render services for members of a group.

11. ABA SPECIAL COMM. ON PREPAID LEGAL SERV., Special Report to National Conference on Prepaid Legal Services 1 (1972).

12. Fisher, *The Delivery of Legal Services Under Prepaid Plans*, 11 FORUM 178, 180 (1975) [hereinafter cited as *Delivery*].

13. Maron, *Under the Rubric of Group Legal Services*, 1 NEW DIRECTIONS IN LEGAL SERVICES 1, 8 (April-May, 1976).

14. *Advent*, *supra* note 9, at 272.

15. *Id.* at 273.

16. *Id.*

not knowing how to choose a lawyer. One writer has explained the development of group prepaid legal services as follows:

All studies and surveys indicate that the greatest barrier between lawyer and client in the great middle-income bracket is the fear of the costs of legal services. The second largest barrier is the unfamiliarity of the average American with lawyers and his consequent inability to select a lawyer. The growth of group legal services in America is an attempt to surmount these two barriers. Most group legal service plans call for a membership charge which in effect prepays future legal services, thus eliminating the fear of cost as a barrier. Since by definition the group either employs or recommends the attorney, the second barrier, namely, the lack of knowledge as to what attorney to select is also eliminated.¹⁷

National, state, and local bar associations have become increasingly active in developing group prepaid legal services plans because of the potential economic rewards involved, and as a reaction to external forces, such as labor unions, who desire to offer prepaid legal services as a fringe benefit.¹⁸ This response has also been a result of recent United States Supreme Court decisions, examined herein, pertaining to the right to associate for the rendition of legal services.

There are basically two methods of attorney selection, regardless of whether the group legal services or prepaid legal services plan is employed. These are commonly referred to as "open panel" plans and "closed panel" plans. Some confusion may exist as to the use of these terms, as it is impossible to designate each plan as either open or closed, for in reality open and closed are the "two ends of the spectrum between which many degrees of 'openness' or 'closedness' fall."¹⁹ A completely open panel plan allows the individual to select *any* licensed attorney to handle his legal matters, while the plan pays for the services according to a prearranged benefit schedule.²⁰ A completely closed panel plan limits the individual's choice to either a preselected group of attorneys, or the group employed "house" counsel—a specific lawyer, or lawyers, who has been contracted by an organization, such as a union, consumer group, or student group, to provide legal services to members of the group for a specified fee.²¹

The principal alleged advantage to the consumer of legal services of an open panel plan is that it allows a group member to select an attorney of his choice without restrictions, except as to the amount which the plan will pay the attorney for his services to the group member.²² The fact of this third-party fee payment arrangement may tempt subscribers into overutilizing benefits and induce

17. *Delivery*, *supra* note 12, at 180.

18. Meeks, *Antitrust Aspects of Prepaid Legal Services Plans*, 1976 ABF RES. J. 855, 857 [hereinafter cited as *Antitrust Aspects*].

19. Note, *State Prohibition of Closed Panels—The Constitutional Question*, 27 BAYLOR L. REV. 590 (1975) [hereinafter cited as *State Prohibition*].

20. See, e.g., *State Prohibition*, *Supra* note 19, at 590; *Ethical Considerations*, *supra* note 9, at 201-02.

21. *Id.*

22. *Advent*, *supra* note 9, at 277.

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lawyers to adjust fees upward or quality downward, or to provide services that are unnecessary.²³ It is inherently apparent that this type of legal services delivery may tend to be expensive and inefficient. Projections of utilization by the group members must be made in order to estimate the budgetary allocations needed by the plan, and a sufficient amount of finances must be kept in reserve to provide for any unanticipated demand or expensive litigation.

Proponents of open panel group prepaid legal services plans applaud the freedom of choice afforded group members under this type of attorney selection arrangement. Clients select their attorneys individually in the traditional manner without guidance other than the advice of relatives, friends, or colleagues.²⁴ Thus, the problems of finding and selecting a competent lawyer are the same as for other citizens who employ lawyers individually.²⁵ The basic reason for advocating freedom of choice in the selection of attorneys is the belief that such a system helps to assure the integrity of the attorney-client relationship and the quality of legal services provided to the individual clients.²⁶ Freedom of choice may not be as extensive under open panel plans as contended. Open panel plans rely upon attorneys in the community accepting employment and participating in the plan. Whether such a plan offers its beneficiaries a meaningful freedom of choice depends upon the number and professional qualifications of these participating attorneys.²⁷ Also, a certain freedom may exist in one's not having to choose an attorney—knowing that the firm which handles the legal work for the group is staffed by carefully screened, competent attorneys, specializing in the area of the group's need.²⁸

Closed panel plans have been used by labor unions and similar consumer groups, such as students, because they are considered to be more economical than open panel plans, and because it is believed that group members, owing to a lack of information and a traditional distrust of lawyers, prefer delegating the selection of lawyers to trusted group leaders.²⁹ Cost reduction is an important aspect of closed panel group prepaid legal services. Attorneys are likely to offer more legal services coverage to a group at a lower premium under a closed panel plan. This is because attorneys, under the closed panel plan, can count on receiving a certain sum as yearly retainer from a group in exchange for providing services for a relatively predictable number of cases each year.³⁰ By reason of the predictability of the types of services which will be required, the closed panel attorney is in a better position to utilize paraprofessionals, auto-

23. Pfenningstorf & Kimball, *Regulation of Legal Services Plans*, 1977 ABF RES. J. 357,411 [hereinafter cited as *Regulation*].

24. *Id.*

25. The examination of the problems inherent in the traditional selection of attorneys by individual clients is beyond the purview of this discussion.

26. Cole, *Freedom of Choice and Group Legal Services*, 9 SUFFOLK U. L. REV. 671, 675 (1975) [hereinafter cited as *Freedom of Choice*].

27. *Typology*, *supra* note 9, at 466.

28. Note, *Prepaid Legal Services: More than an Open and Closed Case*, 22 CLEV. ST. L. REV. 425, 437 (1973).

29. *Regulation*, *supra* note 23, at 409.

30. Baron & Cole, *Real Freedom of Choice for the Consumer of Legal Services: Mr. Dooley and the Closed Panel Option*, 58 MASS. L. Q. 253, 257 (1973) [hereinafter cited as *Real Freedom*].

mation mechanization, and specialists, thus producing greater efficiency, reduced costs, and increased quality of services.³¹ The long-term experience of the attorney with the group under a closed panel plan permits the attorney to develop expertise in relevant areas, to conduct group educational programs, and to engage in preventive law projects.³² Thus, the cost of legal services can be reduced as the closed panel attorney utilizes his expertise to develop efficient procedures for dealing with frequently recurring group problems.

Delegating the selection of an attorney to group administrators is a more rational method of selecting an attorney than the traditional pattern of following the advice of unqualified individuals.³³ In open panel plans, a potential client runs the risk of selecting an incompetent attorney, while under the closed panel plan, the screening process insures an informed and rational choice by the group.³⁴ The client may feel a greater confidence in the quality of legal services which he receives if he knows that the group to which he belongs has retained confidence in the lawyers on the basis of long-term experience with them.³⁵ Though the closed panel plan may offer little freedom of choice to the group members, it poses fewer selection problems than the open panel.

THE COURT'S VIEW

Prior to 1963 the courts had generally barred group legal services, usually on the ground they constituted the unauthorized practice of law.³⁶ The court decisions holding group legal services unconstitutional were all based on the proposition that the corporations or associations were practicing law.³⁷ The Supreme Court of the United States examined the concept of group legal services in the 1960's and early 1970's, striking down the Bar's heretofore condemnation of group legal services.³⁸ *NAACP v. Button*,³⁹ decided in 1963, marked the Court's willingness to intervene in the area of group legal services. The NAACP had brought suit to enjoin the enforcement of a Virginia statute which precluded it from providing attorneys to its members or the other persons who desired to litigate racial discrimination issues.⁴⁰ In striking down the Virginia statute as in violation of the first and fourteenth amendments to the Constitution, the Court held that the activities of the NAACP in providing attorneys to its members were modes of "expression" and "association", protected by the first

31. Dunne, *Prepaid Legal Services Have Arrived*, 4 HOFSTRA L. REV. 1, 24 (1975) [hereinafter cited as *Arrived*].

32. See *Real Freedom*, *supra* note 30, at 258; W. PFENNINGSTORF & S. KIMBALL, LEGAL SERVICE PLANS: APPROACHES TO REGULATION 339 (1977) [hereinafter cited as *APPROACHES*]; *Typology*, *supra* note 9, at 420.

33. *Regulation*, *supra* note 23, at 417.

34. *Arrived*, *supra* note 31, at 24.

35. *Real Freedom*, *supra* note 30, at 257.

36. *Delivery*, *supra* note 12, at 181.

37. *Id.*

38. *State Prohibition*, *supra* note 19, at 591.

39. 371 U.S. 415 (1963).

40. *Id.*

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and fourteenth amendments, which Virginia could not prohibit as an improper solicitation of legal business under its power to regulate the legal profession.⁴¹

A year later in the case of *Brotherhood of Railroad Trainmen v. Virginia ex rel, Virginia State Bar*,⁴² the Court upheld a union activity, which was basically a referral service, in which injured members were advised of their need of legal counsel and referred to lawyers selected by the union. The Court held that the first and fourteenth amendments protected the activities of the Brotherhood in securing legal representation of its members, and that under the traditional "balancing test" used in *Button*, the state had failed to demonstrate a compelling state interest in its regulation of these constitutionally protected rights.⁴³ Although no civil rights were involved in *Brotherhood* as in the *Button* decision, the Court demonstrated its inclination in the direction of the acceptability of group legal services. The Court had signified a trend toward the inability of ethical considerations to inhibit a litigant's right to associate to secure common goals.⁴⁴

The Court continued to expand the *Button* and *Brotherhood* doctrines in the subsequent case of *United Mine Workers v. Illinois State Bar Association*.⁴⁵ The union's plan in *UMW* was essentially a closed panel plan whereby the union employed attorneys on a salaried basis to assist and represent union members with their claims to workmen's compensation. The Court rejected the contention that this plan represented the unauthorized practice of law, and reversed the injunction against the union continuing its plan: "We hold that the freedom of speech, assembly and petition guaranteed by the first and fourteenth amendments gives petitioner the right to hire attorneys on a salaried basis to assist its members in the assertion of their legal rights."⁴⁶ The Court refused to distinguish *UMW* from *Button* or *Brotherhood* on the basis of the union's plan not being "political expression" or a "referral service", respectively.⁴⁷ The state had failed again to establish a compelling state interest sufficient to overcome the protection of the union's fundamental right to hire an attorney under reasonable terms and conditions. The Court also held that the mere potentiality of threat to the attorney-client relationship was an insufficient basis for a state to interfere with the operation of a group legal services plan.⁴⁸

The most recent Supreme Court endorsement of a group legal services plan was found in *United Transportation Union v. State Bar of Michigan*.⁴⁹ The union had initiated a program to refer its members to selected attorneys with whom the union had secured commitments as to the fees to be charged. In over-

41. *Id.* at 428.

42. 377 U.S. 1 (1964).

43. *Id.* At 6.

44. *State Prohibition, supra* note 19, at 594.

45. 389 U.S. 217 (1967).

46. *Id.* at 221-22.

47. *Id.* at 223-24.

48. *Id.* at 222-25.

49. 401 U.S. 576 (1971).

turning the injunction granted in the lower Michigan court against the union's implementation of its plan, the Court held that "upholding the first amendment principle that groups can unite to assert their legal rights as efficiently and economically as practicable," the injunction here is a forbidden restraint on these first amendment rights.⁵⁰ The Bar had failed to demonstrate an interest sufficient to overcome the constitutional protection afforded the union's fundamental right to associate to obtain access to the courts; but again, the Court left open the possibility of such a compelling state interest.⁵¹ The Court attempted to synthesize the law in the area of group legal services as follows:

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.⁵²

The Court clearly established the right of a group to procure legal services, but did little to resolve the conflict between closed and open panel advocates over the interpretation of what constitutes "meaningful access."

BAR AND STATE REACTION

The organized Bar was not prepared to give full and unqualified endorsement to the group legal services concept, as was the United States Supreme Court.⁵³ The Bar's reluctance was based on its concern that group legal services would detrimentally affect the general practitioner.⁵⁴ This concern resulted in the adoption by the American Bar Association House of Delegates of the infamous "Houston Amendments," allowing for the different treatment of open and closed panel plans.⁵⁵ The amendments required that a closed plan be non-profit, that the rendition of legal services be its primary purpose, and that there not be any profit derived from the rendition of legal services to the benefit of the organization sponsoring the plan.⁵⁶ The A.B.A.'s preference for the open panel plan is best exemplified by the requirement in the Houston Amendments that any closed panel plan contain an "opt-out" provision, thereby giving the benefi-

50. *Id.* at 580.

51. *Id.* at 584.

52. *Id.* at 585-86.

53. *Advent*, *supra* note 9, at 277.

54. *Id.*

55. *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 AM. BAR. ASSOC. J. 463, 465 (1975).

56. *House of Delegates Acts on Group Legal Services, Shield Legislation, Court Organization Standards and Uniform Divorce*, 60 AM. BAR. ASSOC. J. 466, 448 (1974).

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ciary of the plan an option to use the group's attorneys or, to select counsel outside the plan, for which the plan must provide reimbursement.⁵⁷

Adoption of the opt-out provision slowed commencement of new group legal service plans, since the task of predicting controllable costs at a reduced rate was thereby made more speculative.⁵⁸ The additional restriction of the opt-out provision in closed plans raised the ire of closed panel advocates, and was severely criticized by spokesmen for consumer groups.⁵⁹ On May 14, 1974, the U.S. Senate Judiciary Subcommittee on Representation of Citizens Interests opened hearings on prepaid legal services plans and the proposed "Houston Amendments."⁶⁰ The subcommittee was chaired by Senator John Tunney of California.⁶¹ In the two days of hearings, a recurrent theme was the need for both types of legal services plans, open and closed.⁶² Senator Tunney summed up his own opinion about the cost-choice relationship of closed panel—open panel arrangements as follows: "I therefore think it is possible for both plans to thrive. I do not know why there is the desire on the part of some to destroy the closed panel plans."⁶³

The A.B.A. was faced with a dilemma: closed panel plans afforded the best opportunity for the Bar to meet the legal needs of middle income Americans at a low cost, but posed the biggest threat to established ethical standards, which standards must be upheld in order to maintain the integrity of the legal profession.⁶⁴ The A.B.A. reevaluated its position, and at its mid-winter meeting in 1975, adopted several changes to the Code of Professional Responsibility which eliminated the distinction between open and closed panel plans for group prepaid legal services.⁶⁵

North Carolina was not immune to the national controversy surrounding group prepaid legal services. In 1975, the North Carolina General Assembly amended Chapter 84 of the General Statutes to provide for the approval and supervision of prepaid plans by the Council of the North Carolina State Bar.⁶⁶ N.C. GEN. STAT. § 84-23.1(b) places all nonprofit legal service plans under the supervision of the North Carolina State Bar.⁶⁷ In addition to empowering the North Carolina State Bar to create a nonprofit corporation pursuant to

57. *Ethical Considerations*, *supra* note 9, at 202.

58. *Id.*

59. Morrison, *Bar Ethics: Barrier to the Consumer*, 11 TRIAL 14 (1974).

60. Note, *Legal Services Within Reach of the Average American: A Review of the Tunney Hearings*, 27 BAYLOR L. REV. 603 (1975); *Hearings Before the Subcomm. on Representation of Citizens Interests of the Senate, Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); *Advent*, *supra* note 9, at 277.

61. *Id.*

62. *See id.* at 212 (testimony of J. Wilson); *Id.* at 14 (testimony of L. Woodcock); *Id.* at 141 (testimony of the A.B.A. Special Committee).

63. *Id.* at 210 (testimony of Sen. J. Tunney).

64. *Ethical Considerations*, *supra* note 9, at 202.

65. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(d) (5); *Advent*, *supra* note 9, at 278. North Carolina has not adopted the new provisions of the ABA Code into its Code of Professional Responsibility, but the present provisions of Disciplinary Rule 2-103(d) (5) do not prohibit closed panel plans. *See* NORTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(d) (5).

66. N.C. GEN. STAT. § 84-23.1 (Cum. Supp. 1977).

67. *See* note 2 *supra* and accompanying text.

Chapter 55A of the General Statutes for the purpose of providing for prepayment of legal services,⁶⁸ the Council has the express authority to approve plans for prepaid legal services unconnected with this corporation.⁶⁹

The significance of N.C. GEN. STAT. §84-23.1 to this discussion is its treatment of open and closed panel group prepaid legal services plans. Although the terms open and closed panels are not specifically used in N.C. GEN. STAT. §§ 84-23.1(b) and (e), these sections effectively forbid the approval and therefore, the operation of any closed panel legal services plan in the State of North Carolina.⁷⁰ The issue of permitting closed panel plans was rigorously studied by the Special Committee on Prepaid Legal Services, appointed by the Council of the North Carolina State Bar of April 24, 1973, which recommended that *only* open panel plans be permitted for bar-sponsored programs.⁷¹ As originally introduced on behalf of the North Carolina State Bar, the bill did not contain the prohibition against closed plans.⁷² The amendment to prohibit closed plans, which was approved and became a part of the bill, was introduced by Representative R. C. Soles Jr., after the bill had been referred to a legislative committee of the North Carolina House of Representatives.⁷³ Mr. Soles intended that his amendment prohibit closed panel plans, because he felt that "if you paid your fees for legal services, you should be able to choose any attorney you want."⁷⁴ Thus, there never was a great deal of controversy over whether a closed panel plan would be prohibited by the North Carolina State Bar Council. The difficulty arose as to the determination of what constituted a closed panel plan.⁷⁵

THE TEST CASE

As of the date of the submission of the University of North Carolina-Chapel Hill plan, N.C. GEN. STAT. §§ 84-23.1 (b) and (e) had not been applied to prohibit any closed panel plans, "although a reading of the language implies that a closed panel plan which does not reimburse those beneficiaries wishing to 'opt-out' of the services of the retained panel attorney would be prohibited."⁷⁶ The plan submitted by the Student Government was closed panel instead of open, because William Bates, the Student Government President at the time, determined that the closed panel method of delivery of legal services provided significant opportunities for cost savings unavailable under an open panel plan.⁷⁷ The closed

68. N.C. GEN. STAT. § 84-23.1(c) (Cum. Supp. 1977). The North Carolina Prepaid Legal Services Corporation is beyond the purview of this discussion. See generally, *Advent*, supra note 9.

69. See note 2 *supra* and accompanying text.

70. See note 5 *supra* and accompanying text; See note 6 *supra*.

71. *Advent*, supra note 9, at 287.

72. See note 8 *supra* (Stipulation and Production of Documents, filed May 3, 1977).

73. *Id.*

74. Telephone interview with R. C. Soles, Jr., Representative, North Carolina House of Representatives, March 21, 1978.

75. See note 7 *supra*; Letter from B. E. James, Secretary of North Carolina Bar to R. W. Hutchins, President of the North Carolina Prepaid Legal Services Corporation, February 17, 1976.

76. Bernholz, *Student Legal Services at the University of North Carolina at Chapel Hill*, 7 N.C. CENT. L. J. 286, 292 (1976).

77. *Id.*

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panel plan was submitted with the hope that the North Carolina State Bar would loosely apply N.C. GEN. STAT. §§ 84-23.1(b) and (e), and find the plan in compliance with the statutory requirements.⁷⁸ The closed panel plan that was submitted would have limited each student at the University of North Carolina-Chapel Hill in his or her attorney selection to the selection of attorneys on the staff of the plan.⁷⁹ No student would have been precluded from choosing his or her own attorney, but the plan would not have paid for such retention.⁸⁰

Upon notification of the Bar Council's refusal to approve the plan,⁸¹ the Student Government contemplated the amendment of its plan to include an opt-out feature, under which members of the plan could select any attorney of their choice and receive reimbursement.⁸² At this particular juncture, the alternative of a court test of the constitutional validity of N.C. GEN. STAT. §§ 84-23.1(b) and (e) was determined not in the student's best interest because it would further delay legal services to students at great expense.⁸³ The students felt that the requirement by the state of an opt-out provision not only added uncertainty to estimates of utilization and predictions of the number of participating attorneys needed, but in addition added unpredictable program costs.⁸⁴ Due to the considerations of time and cost of litigation, the Student Government resubmitted a plan containing the opt-out feature in the hope that the majority of students would not elect to utilize the opt-out feature in preference to the on-campus attorney.⁸⁵ That plan was approved by the Bar Council on April 16, 1976.⁸⁶

The effect of the rejection of the Student Government's closed panel plan was to raise the cost of the plan and to decrease the legal services which could be offered to students. In the first 16 months of operation of the plan, none of the students opted for private attorneys.⁸⁷ Because students might use the option, the program had to set aside approximately \$2,800 of its limited budget of \$20,000.⁸⁸ This reserve could have been used for preventive law workshops, legal educational programs and legal problems common to university students. Rejection of the closed panel plan created these budgetary considerations, and prevented the Student Government from conducting desired aspects of its legal services plan.⁸⁹ The attorney hired by the Student Government also faced the possibility that her salary would be reduced because of the necessity for payments to outside attorneys pursuant to the opt-out feature required by the Bar Council.⁹⁰

78. *Id.*

79. *See* note 8 *supra* (Findings of Fact and Conclusions of Law, filed Aug. 10, 1977).

80. *Id.*

81. *See* note 7 *supra* and accompanying text.

82. Bernholz, *supra* note 75, at 293.

83. *Id.*

84. *Id.* at 294.

85. *Id.*

86. *Id.*

87. *The Charlotte Observer*, Aug. 11, 1977 § B, at 2, Col.1-2.

88. *Id.*

89. *See* note 8 *supra* (Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed Jan. 20, 1977).

90. *Id.*

The Student Government made the determination that it could successfully challenge the constitutionality of the prohibition of closed panel plans found in N.C. GEN. STAT. §§ 84-23.1(b) and (e), and on December 14, 1976, filed their complaint.⁹¹ Plaintiffs in the action were the Student Government of the University of North Carolina-Chapel Hill; Leland C. Barbour, a student at the University; William O. Richardson, a student at the University and Student Government President; and Dorothy C. Bernholz, the on-campus students' attorney for Student Legal Services at the University.⁹² Defendants in the action were Council, North Carolina State Bar, and George J. Miller, President of the State Bar and Chairman of the Council.⁹³

The challenge was filed in the District Court for the Western District of North Carolina, with the honorable James B. McMillan, United States District Judge, presiding.⁹⁴ The plaintiffs requested that the Court declare North Carolina General Statutes §§ 84-23.1(b) and (e) unconstitutional, and enjoin the defendants from enforcing those statutes insofar as they operated to hinder or preclude the approval of closed panel legal service plans.⁹⁵ The issue presented was whether the State of North Carolina could prevent a group from choosing the plan which it preferred by insisting that every panel be open rather than closed.⁹⁶ The plaintiffs argued that on the basis of the four decisions of the United States Supreme Court discussed previously herein, they had the right, under the first and fourteenth amendments to the United States Constitution, to associate together to retain attorneys under terms and conditions of their choice, including the use of a closed panel legal services plan.⁹⁷ Accordingly, the plaintiffs asserted that the provisions of North Carolina General Statutes §§ 84-23.1(b) and (e) which limit or preclude the approval of closed panel legal services plans were unconstitutional on their face and as applied, and in violation of 42 U.S.C. § 1983.⁹⁸ Interference by the State of North Carolina with the right to associate and implement a closed panel plan to provide legal services to the group was unconstitutional, at least if not supported by an overwhelming state interest in infringing the freedoms involved.⁹⁹

As closed panel plans are, by definition, in direct violation of N.C. GEN. STAT. §§ 84-23.1(b) and (e), the state was attempting to prevent entirely the use of closed panel group prepaid legal services plans.¹⁰⁰ The plaintiffs argued that the state could demonstrate no legitimate interest in limiting the right to operate a closed panel plan.¹⁰¹ The plaintiffs moved for summary judgment on January 20,

91. *Id.* (Judgment, filed Aug. 17, 1977).

92. *See* note 89 *supra*.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Compare* note 21 *supra*, and accompanying text with notes 5-6 *supra* and accompanying text. Closed panel plans by definition limit the clients selection to a preselected attorney or group of attorneys, thereby restricting his right to select under N.C. GEN. STAT. §§ 84-23.1(b) and (e).

101. *See* note 89 *supra*.

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1977 and filed a supporting affidavit.¹⁰² At the hearing on all motions of the parties, the defendants argued only that plaintiffs had failed to join all affected parties, and moved to dismiss for failure to join indispensable parties, which was decided in favor of the plaintiffs.¹⁰³ The court entered its memorandum, dated June 27, 1977, concluding that the plaintiffs were entitled to judgment as a matter of law.¹⁰⁴

The court held that "North Carolina General Statutes §§ 84-23.1(b) and 84-23.1 (e) are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution insofar as those statutes hinder or prevent the use of closed panel legal services plans."¹⁰⁵ This judgment was based on the conclusion of law that defendants' actions were taken in violation of 42 U.S.C. § 1983, under color of state law and in violation of plaintiffs' rights under the first and fourteenth amendments.¹⁰⁶ The court permanently enjoined the "defendants, their officers, agents, and employees (including any successors thereto)" from enforcing the statutes in question or any other similar rules, "which by design or effect hinder or preclude plaintiffs from contracting for, or benefiting from, or participating in, closed panel legal services programs."¹⁰⁷ Attorneys' fees of \$5,500 were awarded to the plaintiffs.¹⁰⁸

SIGNIFICANCE

Does the *Student Government* decision mean that a state may *not* constitutionally compel the use of open panels in group legal services plans submitted for approval in that state? The answer to this question seems to be an emphatic "yes". This question has never been presented to the United States Supreme Court,¹⁰⁹ and apparently it will never reach the highest Court in this particular case, as the defendants have not taken an appeal.¹¹⁰ What then is the current status of group prepaid legal services?

The decision in *Student Government* must be viewed in light of the previous decisions of the United States Supreme Court discussed herein. In each of the cases—*Button*,¹¹¹ *Brotherhood*,¹¹² *UMW*,¹¹³ and *UTH*¹¹⁴—the states were attempting to completely prohibit group legal services, and the Court found

102. See note 8 *supra*, (Memorandum, filed June 28, 1977).

103. *Id.*

104. *Id.*

105. See note 91 *supra*.

106. See note 79 *supra*. The statutes were also said to constitute a prior restraint on the first Amendment rights of plaintiffs and therefore in violation of the Constitution for that reason.

107. See note 91 *supra*.

108. *Id.*

109. *State Prohibition*, *supra* note 19, at 597.

110. Interview with Dorothy C. Bernholz, Attorney for Student Legal Services at the University of North Carolina at Chapel Hill, March 28, 1978.

111. 371 U.S. 415 (1963).

112. 377 U.S. 1 (1964).

113. 389 U.S. 217 (1967).

114. 401 U.S. 576 (1971).

the state's interest insufficient to substantiate a need for these regulations.¹¹⁵ The Court always left open the possibility that a legitimate and compelling state interest might be shown to exist, especially if the prohibitions were aimed at controlling conduct that produced substantial evils and injuries to the public interest.¹¹⁶

In *Student Government*, the court was not confronted with such a complete prohibition of group legal services. N.C. GEN. STAT. § 84-23.1 unquestionably permitted the implementation of open panel plans of group legal services. The prohibition of closed panel plans was the focus of the amendments introduced by Representative Soles.¹¹⁷ In the previous Supreme Court decisions discussed herein the state carried a heavy burden in attempting to demonstrate a compelling state interest to justify the complete prohibition of group legal services.¹¹⁸ It is only reasonable to hypothesize that if the state limits its legislation to narrowly-drawn statutes which seek to prevent specific injuries to the public interest, the burden required to justify the regulation will be much less.¹¹⁹ Arguably, the Bar Council did not bear as heavy a burden as the defendant states in *Button, Brotherhood, UMW* and *UTU*.

The adoption of N.C. GEN. STAT. §§ 84-23.1(b) and (e) was an express attempt to provide freedom of choice to members participating in a group prepaid legal services plan.¹²⁰ The language of the sections is even worded in terms of "restriction" of freedom of choice.¹²¹ Apparently, the members of the legislature were concerned that the public demanded this freedom of choice. In response to this argument, one writer asserted:

Were groups to be prohibited from offering closed panel alternatives, the public would be denied the opportunity to choose freely between open and closed panel options. If the lay public is as concerned as the Bar thinks it should be with having freedom to choose an individual attorney, then presumably, members of the public will opt for the open panel plans and pass the closed panel alternatives by. But many members of the public may feel that there are good reasons for giving the closed panel option careful consideration. . . .

. . . It is patently inconsistent for the bar to contend, on the one hand, that middle-income persons are competent to choose intelligently among the thousands of lawyers . . . who might help them with a pressing legal problem, and to argue on the other hand, that those same persons are not competent to choose between two types of legal service plans which display differences, which are few in number and fairly obvious.¹²²

115. *State Prohibition*, *supra* note 19, at 596.

116. *Id.*

117. *See* note 74 *supra*.

118. *State Prohibition*, *supra* note 19, at 597.

119. *Id.*

120. *See* text accompanying note 74 *supra*.

121. *See* notes 5 and 6 *supra*. The terminology used is "restricts or denies."

122. *Real Freedom*, *supra* note 30, at 256, 258.

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The requirement of the opt-out provisions and the effective prohibition of closed panel plans thus denies a group the right to select a plan that is wholly and entirely a closed panel plan, limiting the freedom of choice of the group or individual who desires to participate in a closed panel plan.

While this principle of free choice is often cited in support of open panel plans and in opposition to closed panel plans, close examination reveals that the concern of the advocates of open panels is less the preservation of the client's freedom to choose his attorney than the protection of the attorney and the attorney-client relationship from outside interference.¹²³ This concern with respect to closed panel plans is that the insertion of an intermediary between the attorney and client may improperly influence the attorney in the exercise of his professional judgment.¹²⁴ Experience with closed panel plans around the United States provides no evidence that these potential threats to the attorney-client relationship have been realized in practice.¹²⁵ "Indeed, the United States Supreme Court has so found and held that the presence of a mere potentiality of threat to the attorney-client relationship is an insufficient basis for a state to interfere with the operation of a group legal services plan."¹²⁶ Thus, the assertion of a legitimate state interest in providing freedom of choice and protection of the attorney-client relationship as a justification for the regulation and prohibition of closed panel plans is unavailing. The Court would not view these interests as satisfying even the lightened burden on the Bar Council in *Student Government*. Unless there is a strong showing that restrictions on freedom of choice imposed by a closed panel group prepaid legal services plan have in fact worked actual injury upon the group's members, no state rule compelling group legal services to use open panel plans should withstand constitutional challenge.¹²⁷

The injuries suffered by the plaintiffs in *Student Government* were not caused by the restrictions on freedom of choice inherent in closed panel plans, but by the very prohibition of the closed panel plans themselves. The budgetary limitations imposed because of the opt-out feature interfered with the student's meaningful access to the courts, denying the Student Government the means of enabling its student members to meet the costs of legal representation.¹²⁸ The absence of closed panel plans limits access to an attorney for many group members.¹²⁹ Since some group members are not in a position to select attorneys on their own or to pay the fees, a closed panel plan may be the only effective way for them to obtain legal assistance.¹³⁰ The budget of the legal services program would have been depleted if students had utilized the opt-out provision extensively. Students unlucky enough to incur their legal problems after this depletion would have been precluded from exercising their option and obtaining "meaningful access."

123. *Typology*, *supra* note 9, at 466.

124. *Regulation*, *supra* note 23, at 413.

125. *Real Freedom*, *supra* note 30, at 259.

126. *Id.* See *United Mine Workers v. Illinois State Bar Association*, 389 U.S. at 222-25.

127. *Freedom of Choice*, *supra* note 26, at 686.

128. See *United Mine Workers v. Illinois State Bar Association*, 389 U.S. at 595-86.

129. *Regulation*, *supra* note 23, at 416.

130. *Id.*

The decision in *Student Government* will permit the development of low cost group prepaid legal services in North Carolina and in other states that now compel the utilization of open panel plans. Although North Carolina did not attempt to completely prohibit group legal services, and narrowly construed its restriction against closed panel plans, the Supreme Court would probably have little difficulty in upholding Judge McMillan's judgment. The Bar Council would experience significant difficulty in demonstrating the harm suffered by clients from third party interference. There seems to be no legitimate state interest in the prohibition of closed panel group prepaid legal services plans sufficient to justify such regulation at the expense of constitutionally recognized rights.

CONCLUSION

Regardless of the advantages and disadvantages of each form of delivery of legal services, in order to make legal services truly available to a large number of people, the development of all types of prepaid legal services plans must be encouraged.¹³¹ The decision in *Student Government* is a step towards the elimination of the "artificial" distinction between open and closed panels that obstructs this development.¹³² It indicates that no "prophylactic" rule restricting prepaid legal services delivery plans is justified.¹³³ It seems equally clear that a state so ill-advised as to adopt such a measure subjects itself to a successful constitutional challenge of interference with first and fourteenth amendment rights. One author writes: "As consumers and attorneys recognize the ability of group and prepaid legal service programs to meet the severely underserved needs of middle and lower-middle-income people, the rules controlling attorney involvement with these programs will undoubtedly assume a form conducive to the development of these plans."¹³⁴ The transformation has already begun.

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131. *Arrived, supra* note 31, at 22.

132. Sims, *Current Developments*, 2 *NEW DIRECTIONS IN LEGAL SERVICES* 1, 72 (May-June, 1977).

133. See Stoltz, *Sesame Street for Lawyers: A Dramatic Rendition of United Transportation Union v. State Bar of Michigan*, 36 *UNAUTHORIZED PRACTIC NEWS* 14 (1971).

134. Dement, *Consumer Lookout*, 1 *NEW DIRECTIONS IN LEGAL SERVICES* 1, 15 (Sept. 1976).