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20 The Future
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The Challenge of Change

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A Report of the Young Lawyers' Conference



The Future of the Legal Profession: The Challenge of Change

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Chapter Six

Prepaid Legal Service Plans

“This ‘telephone’ has too many shortcomings to be seriously considered as a means of communication.”

Western Union memo, 1876

D) Introduction

There is always the possibility of change in legal services where there are unmet needs; what is needed is a way for those services to be supplied at a cost that meets their demand. Prepaid legal service plans have the potential to allow the “latent legal market”¹⁷³ to be tapped, providing legal services to people who would not otherwise be able to afford them, and providing business to lawyers that they would otherwise not have.

Legal services to individual clients, as opposed to business clients, are generally paid for in one of two ways. If the client has an income that falls below a certain level, and if the type of legal problem is one the local legal aid plan covers, some provincial scheme for providing those services at no cost to the client will be available. Failing that, the client will have to pay for service personally. In that event, given the cost of legal services, many people avoid hiring a lawyer unless there is no other choice. Many others do not hire a lawyer at all, even when it would be very beneficial to do so, because they simply cannot afford it.

In some ways, middle income consumers are in the worst position when it comes to obtaining legal services. Despite an estimated \$1 billion unmet demand for legal services in Canada, “the suppliers and consumers can’t agree on a price. Many people simply can’t afford to hire a lawyer at the current prices”.¹⁷⁴ It has been suggested, for example, that one in three Canadian families experiences a legal need each year, though many do not hire a lawyer.¹⁷⁵ Accordingly, it would seem that there is a market and a potential for change, in a system that would allow consumer need to be met in a way that meets the financial needs of both sides.

¹⁷³ R.E. Suskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford: Oxford University Press, 1996) at 272.

¹⁷⁴ O. Lippert, “Consumer Demand for Legal Services” (1996) 20 Can Law. 14 at 16.

¹⁷⁵ S. Ginsberg, “Legal Services Plans in the Year 2020” (Roundtable on Accessible and Appropriate Law-Related Services in 2020, Faculty of Law, University of Windsor, 14-16 January 1999) at 1[unpublished].

II) The Market for Prepaid Legal Service Plans

Legal service plans are held out by many as having the ability to bridge that gap. In essence, prepaid legal service plans are a form of insurance: a large group of people subscribe to the same plan, and can receive legal services as they need them. There is nothing innovative about the notion of consumers all paying a small premium to avoid a large risk. These plans simply apply that concept in the context of legal services. The Canadian Bar Association has recommended the use of prepaid legal service plans in appropriate circumstances.¹⁷⁶

The basic structure of prepaid legal service plans was developed in the United States in the early 1970s. Since then, the market for legal service plans has grown substantially in the U.S. As of 1996, it was estimated that approximately 98 million Americans were covered by legal insurance.¹⁷⁷ One company, Prepaid Legal Services Inc., was ranked number five of the top 200 best small companies in 1998, and ranked number 29 out of America's 100 fastest growing companies in the September 29, 1997, issue of *Fortune Magazine*.¹⁷⁸

While the market for prepaid legal insurance has exploded in the United States, the development of legal service plans in Canada is still in an early stage. The first major plan in Canada, the Canadian Auto Workers Legal Services Plan, was only established in 1985. As of 1989, there were fewer than a dozen plans in Canada.¹⁷⁹ By 1999, the number of plans had not grown significantly.¹⁸⁰

The Barreau du Quebec, in early 2000, undertook a campaign to make prepaid legal service plans in that province better known to the general public. The Barreau is not involved in the running of plans, but has issued pamphlets and put information on its website publicizing the privately run plans which are available in various parts of the province.¹⁸¹

¹⁷⁶ Albert Strauss, Q.C. (Chair), Recommendations of the Special Committee on the Status of Paralegals to the CBA Council (Ottawa: Canadian Bar Association, 1989), recommendation 3. The recommendations in the Strauss Report were endorsed by CBA Council resolution 89-25-A. Recommendation 3 reads that the "CBA both encourage and, if appropriate, sponsor through its Provincial Branches open panel prepaid legal insurance programs based on sound insurance principles to provide for the payment of routine legal services such as wills, mortgages, residential property real estate transactions, matrimonial agreements and similar defined services".

¹⁷⁷ Eric Fisher, "Legal Alternatives Balance Interests of Business, Worker: Prepaid Plans Court Both with Time, Money Savings", *The Washington Times* (March 24, 1997), p. D12, quoting figures from the National Resource Center for Consumers of Legal Services.

¹⁷⁸ "America's Fastest-Growing Companies: The Top 100", *Fortune Magazine* 136.6 (29 September 1997) 86.

¹⁷⁹ M. Kideckel, "Legal Help for Less or Less Help?" (1989) 13 Can. Law. 22 at 22.

¹⁸⁰ Information provided by Stephen Ginsberg, Executive Director, Canadian Auto Workers Legal Services Plan, August 5, 1999.

¹⁸¹ Barreau du Quebec, "Assurance Protection Juridique", <http://protectionjuridique.com/> { GOTOBUTTON BM_1_ <http://protectionjuridique.com/> } or { GOTOBUTTON BM_2_ <http://legalprotectioninsurance.com/> } <http://legalprotectioninsurance.com/> (June 7, 2000).

Most prepaid legal service plans are employer-based and are negotiated by a union as part of a collective agreement. However, there are some private plans offered by insurance companies and credit card companies to which individual consumers can subscribe.

Prepaid legal service plans can take a variety of forms, but the essential feature is that all subscribers to the plan pay a small premium on a regular basis, for which they are entitled to various services. Prepaid access plans provide coverage for initial advice and consultations, and may also include some simple legal services such as the preparation of a will. Comprehensive prepaid plans provide coverage for a much broader range of legal services and are designed to cover most of a person's legal needs. They often involve caps on fees or co-payments, depending on the type of legal problem. Additional services not covered under prepaid plans are offered to subscribers at a reduced rate. Most prepaid plans are designed for individuals, although some plans in the U.S. have been designed for small businesses.

Lawyers who participate in the plan can be compensated in a variety of ways. A lawyer who gives telephone advice, for example, might be able to submit a bill to the plan, or might receive a certain amount per month for providing telephone advice, regardless of the number of calls actually handled. If a lawyer handles a matter for the client, either by appearing in court, preparing a will or handling a real estate transaction, the bill is submitted to the plan for payment.

In reaching the "latent legal market", the plan can provide benefits to both clients and lawyers. Clients receive legal services in a variety of situations where they simply would not have done so otherwise. Where telephone advice is free, there is not the disincentive to contact a lawyer that the uncertainty about a bill would bring; in that event, a client is much more likely to seek the advice. Similarly, many people might undertake simple legal tasks, like preparing a will, that they would leave undone if they had to pay for it. Services which are of value to the clients, and which they could not otherwise afford, become affordable.

In addition, quite apart from the issue of cost, contacting a lawyer can be intimidating for many people. Some argue that having access to legal services in a familiar way, analogous to programs like a health or dental plan, reduces that intimidation and makes it more likely clients will seek services.¹⁸²

There are two main ways that lawyers can become involved with a prepaid legal services plan. On the one hand, a group of lawyers can establish their own plan. This approach involves

¹⁸² Ginsberg, note 3 at 3.

a large initial investment in time and capital, as well as proficiency with marketing techniques, and is unrealistic for most lawyers.¹⁸³

Alternatively, a lawyer could become a legal service provider under an existing plan. Depending on the plan, there are several ways in which lawyers can be associated. In the CAW plan, for example, there are staff lawyers, cooperating lawyers and non-cooperating lawyers. Staff lawyers work for the plan and only provide legal services to plan members. The other two categories are lawyers in private practice who spend some of their time dealing with plan members. Cooperating lawyers are associated with the plan and have agreed to accept the fee payments under the plan as full payment for their services. However, plan members have the right to approach any lawyer they wish, not just those associated with the plan. A plan member who obtains legal services from a non-cooperating lawyer can be reimbursed by the plan up to the plan's fee schedule.

Some lawyers choose not to be cooperating lawyers because the fees allowed under the CAW plan are lower than the fees they would normally charge. In their view, the benefits of joining as a cooperating lawyer do not outweigh this loss. For lawyers who are building a client base, however, or who are in a position to work for something less than the full market rate (the market rate which largely excludes lower to middle income earners), joining the plan might be worthwhile.

The major disadvantage, as noted, is that the fees paid are at a lower rate. However, the reasons noted above, in combination with some other factors, create potential advantages for lawyers who associate themselves with prepaid plans. First, participating lawyers receive clients they would not otherwise have had. The prepaid legal service clients are often people who would not otherwise have sought legal services, and so no lawyer would have had their business. In making those services affordable for the client, the plan also makes them a source of income for the lawyer.

Further, plans have the potential to generate a steady flow of business. They provide a chance for lawyers who are starting out in private practice to build a client base. For lawyers with an established client base, they serve as an additional source of business. Any associated referrals from the members of the plan also provide another source of business external to the fee schedule of the plan itself.

In addition, payment for services is guaranteed under a plan. For services that are covered under the plan, lawyers do not have to worry that clients may not pay their legal bills. Also, plans serve an educational function whereby plan members become more likely to

¹⁸³ P.J. Keating and A.M. Schwartz, "How to Get into a Prepaid Legal Insurance Plan" (1984) 70 A.B.A. J. 84 at 85.

recognize when legal guidance would be helpful. This serves to increase the likelihood that plan members will seek legal advice. It also increases the likelihood that plan members will advise their friends to seek out legal help when it would be beneficial.

Finally, the plans bring in business without any associated marketing costs. Some argue that when the money a firm spends on marketing is taken into account, the difference between the legal services plan fee and other fees is much reduced.¹⁸⁴

III) Conclusion - Will Legal Service Plans Become More Common?

While proponents of prepaid plans predict that they will dramatically alter the way in which legal services are delivered in Canada, others are more skeptical. The CAW plan in Ontario/Quebec was greeted with resistance from the legal community and the suggestion from the Law Society of Upper Canada that participation in the plan might be professional misconduct. Members of the local Bars feared that the plans would have an adverse impact on their client base. They also feared that the lower fee schedules under the plan would lower the fees for legal services in the region generally. Litigation launched by both sides ensued, though a settlement was eventually reached.¹⁸⁵

While the implementation of the CAW plan did not have the devastating effects on the legal community in Ontario/Quebec that some had predicted, it is possible that it had some effect on fees.¹⁸⁶ Regional resistance within legal communities is quite possible when new plans are proposed.

Besides institutional resistance within the legal community, there are other regulatory and taxation issues that may prevent prepaid plans from catching on in Canada. There are still unresolved issues with respect to Law Society rules in certain provinces: for example, whether the plan must allow clients to choose any lawyer, or whether a "closed panel" is permissible.¹⁸⁷ There are also unresolved issues as to the regulatory classification of legal plans. If, for example, a prepaid legal service plan is a form of insurance, provincial insurance regulations will apply to it. Whether this is so has not been determined yet.¹⁸⁸

¹⁸⁴ J. Dhalgren, "Consulting the Future" (1994), 80 A.B.A. J. 76 at 78.

¹⁸⁵ C. J. Wydrzynski, K. Hildebrandt and D.J. Blonde, "The CAW Prepaid Legal Services Plan: A Case Study of an Alternative Funding and Delivery Method for Legal Services", (1990) 10 Windsor Y.B. Access Just. 22 at 29-30.

¹⁸⁶ Ibid. at 69.

¹⁸⁷ Ginsberg, note 3 at 9.

¹⁸⁸ The 1991 Report of the Insurance Legislation Review Project to the Ontario Insurance Commission recommended that prepaid legal service plans should be excepted from the definition of "insurance" in the *Insurance Act*. This recommendation was not acted on, leaving the situation ambiguous: Ginsberg, note 3 at 8.

Furthermore, there is a lack of consistency in certain regulatory policies and exemptions that may hamper the inter-provincial spread of a plan. In addition, prepaid plans are not exempted from employees' taxable income under the *Income Tax Act* in Canada. Taxable benefits are less likely to appeal to both employees and employers. This factor has been cited as a major stumbling block to the widespread development of plans in Canada thus far.¹⁸⁹

Two main factors increase the likelihood of prepaid legal service plans becoming more common. The first is the primary justification for such plans noted above: they create new business for lawyers while providing affordable service to clients. Second, there is the growth of prepaid legal service plans in the United States. Companies there are growing and seeking new markets. For example, PrePaid Legal Services Inc., one of the leading U.S. prepaid legal service companies, has recently bought TPN Inc., a marketing company with a sales force of 30,000 and a television channel. It also has an independent sales force of 123,000 people in the United States.¹⁹⁰ As of July 1999, that company began operating in Ontario through a wholly-owned Canadian subsidiary, and expected to begin operating in British Columbia shortly.¹⁹¹

In one sense, then, there is no doubt that the future holds prepaid legal services plans in it. The only question is whether those plans will be operated by Canadian or American-owned companies.

¹⁸⁹ Ginsberg, note 3 at 9.

¹⁹⁰ Ginsberg, note 3 at 2.

¹⁹¹ Yahoo! Finance website, http://biz.yahoo.com/bw/990707/ok_pre_pai_1.html (July 10, 1999).

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2020 Hindsight

1) Prepaid legal service plans will become more common in Canada, at least in larger markets. They will allow lawyers to tap into the “latent legal market”, providing services at an affordable price to members of the public who otherwise would have gone without representation.