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The Shreveport Plan for Providing Legal Services

Richard R Clifton

Since January, 1971, the members of Local 229 of the Laborers' International Union of North America have been covered by the "Shreveport Prepaid Legal Service Plan," a program popularly described as "legal insurance." Briefly, "legal insurance"¹ calls for payment of premiums by individuals into a fund which is used to pay the fees of lawyers selected and hired by members when they need legal help. It may prove to facilitate the delivery of legal services to middle-class citizens, who today may be deprived of some of the legal assistance they need. The Shreveport program was instigated by the American Bar Association to test the concept; and the American Bar Foundation, a legal research institute affiliated with the A.B.A., was asked to observe and report on it.²

This article is intended to highlight the A.B.F. report; anyone with a further interest in the subject, including the detailed descriptions, statistics and analysis, should refer to the full report.³ The focus of our concerns here is the availability and use of legal services by persons of moderate income—in particular the failure to use such services when they would seem advantageous, the extent and reasons for such non-use, and the observed effects of the legal insurance plan on that pattern.⁴

The Background:

Delivering Legal Services

The 1960s marked a decade of increased prominence for the law and lawyers' services, contributed to by the activism of the judiciary, in particular the Supreme Court, as well as by increased efforts for providing legal assistance to low-income citizens, realized in the development of the O.E.O. Legal Services Program and the expansion of local legal aid offices. Supreme Court decisions, headed by *Gideon v. Wainwright*,⁵ which required that counsel be provided free of charge to criminal defendants who could not afford their own, further emphasized the importance of legal services.

The idea of providing legal services has quickly expanded to include coverage of the middle class as well as of the poor. If legal services are "needed" by low-income people, the argument goes, the rest of the populace could find them useful as well, particularly persons of "moderate income." The poor may be able to go to legal aid offices, and commercial and wealthy clients can afford to hire private attorneys on their own, but the individuals in the middle often seem left out. The definition of this neglected group varies, but all agree that it is large. In what is probably the best book on the subject, *Lawyers for People of Moderate Means* by Barlow F. Christensen, it is estimated that this moderate-income group, if encompassing those with annual incomes between \$5,000 and \$15,000, would include at least 60 percent of the nation's families (or would have in 1963).⁶ For these middle-income persons, it is thought, attorneys are too often financially out of reach, implying the existence of a substantial unfulfilled need here for legal services.

How can attorneys fulfill this need? One widely-recognized answer is the use of established groups—unions, political associations, ethnic and fraternal clubs and the like—as the channels for bringing clients and lawyers together. Programs providing legal assistance through such groups for purposes related to the group's function have been a natural development. For example, the NAACP has furnished and paid for counsel in civil rights cases,⁷ and some unions have arranged for lawyers to handle workmen's compensation claims.⁸ These plans do not always limit themselves to group-related problems, but occasionally provide formally or informally, for legal assistance for a broader range of matters.⁹

1 There has been some question about the use of the term "legal insurance" in referring to this kind of program. The organized bar has shifted to the rather unwieldy phrase "prepaid legal service plan." at least in part because of laws and regulations applying to "insurance" programs. In addition, it is true that the primary group-oriented alternative to the concept—closed-panel group legal services—also contains elements of "insurance," notably pooling of risks. Nonetheless, "legal insurance" is a convenient term to use, and since it has been commonly employed, it will be used here to refer to the Shreveport plan and the open-panel concept.

2 The report of that investigation—*The Shreveport Plan: An Experiment in Delivery of Legal Services* by F. Raymond Marks, Robert Paul Hallauer, and Richard R. Clifton with the assistance of Phyllis Munro Satkus—is being published in the spring of 1973. It evaluates the results of the experiment and provides certain insights into a subject about which too little is known: the relationship of the "average citizen" to lawyers, including the use and non-use of legal services.

3 The report may be ordered from the American Bar Foundation, 1155 East 60th St., Chicago, Ill. 60637. Because the pagination of the published edition was not settled at the time of this writing, direct references to it cannot be given here. The summary offered in the last chapter may serve as an index to subjects, however, and it can be consulted for quick references.

4 Before continuing I must acknowledge the involvement of my colleagues in this article. The report was a group project, under the direction of Mr. Marks. Most of the ideas and some of the words used here were spawned by that effort.

5 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6 B. Christensen, *Lawyers for People of Moderate Means* 5, n. 4 (1970).

7 Such a program was the subject of controversy in *NAACP v. Button*, 371 U.S. 415 (1963).

8 As in *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U.S. 1 (1964), and *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967).

9 A broader plan has included, for example, the preparation of wills and assistance in divorce proceedings. See *United Transportation Union v. The State Bar of Michigan*, 410 U.S. 576 (1971).

Basing the delivery of legal services on groups is an idea that has spread and attracted considerable attention. One A.B.A. official estimated in 1972 that there were at least 3,000 group arrangements of various types then in existence.¹⁰ In California alone there were said to be almost 200 groups covering more than 300,000 people in early 1971.¹¹ Moreover, these existing groups represent merely a tiny fraction of the potential. For the great majority of potentially interest parties, such group arrangements remain subjects for discussion concerning possible implementation in the future.¹²

In looking at group programs it is important to recognize that they differ greatly among themselves in terms of benefit coverage, membership, financing and mechanics. One variable in particular that has attracted considerable attention is the means by which an attorney is selected under the plan. In most of the programs which exist today, the group not only pays for the attorney, but selects him as well. The member is simply referred to a particular lawyer, or at most is given a short list of names to choose from. This may be described as a "closed-panel" plan, and the concept is commonly known as "group legal services." On the other hand, the group may restrict itself to paying the legal fees, permitting the member to freely choose his own lawyer. This "open panel" alternative has been labeled "legal insurance," under which financing of legal services is accomplished by group contribution and pooling of risk, otherwise leaving the member on his own.

A great deal has been written about these proposals,¹³ especially the difference between open- and closed-panel systems. The organized bar has objected vigorously to closed-panel arrangements. It originally expressed its opposition as a concern for professional ethics, trying to use its power of self-regulation to block closed-panel plans on the grounds that they violated rules against unauthorized practice of law and practicing law through intermediaries.¹⁴ When the organized bar attempted to enforce ethical regulations against group legal services, however, the Supreme Court stepped in and effectively eliminated the restrictions. In a series of four cases, each raised by a state or state bar's attempt to block a closed-panel arrangement, the Court rejected the ethical core of bar opposition to group services as an infringement on the First Amendment right of association.¹⁵

Faced with these decisions, an A.B.A. committee—the Special Committee on Availability of Legal Services—recommended that the bar accept closed-panel programs and adopt a proposed set of regulations which provided minimum safeguards against exploitation and abuse, required written agreements, and established the existing disciplinary structure of the bar and the judiciary in the role of supervisor, with power to enforce the regulations.¹⁶

To underscore its fundamental opposition to group legal service programs, however, the A.B.A. House of Delegates at its 1968 annual meeting instead adopted, as part of its Code of Professional Responsibility, a prohibition against group arrangements, leaving a single exception: only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the service requires the allowance of such legal services.¹⁷

In other words, the A.B.A. accepted group legal services only to the extent required by Supreme Court decisions, and no further.

Although generally couched in ethical terms, in actuality the opposition of the bar is based on somewhat more complex concerns.¹⁸ Many lawyers fear that closed-panel plans will result in control by the intermediary groups over legal practice, changing the lawyer from a professional to a service employee, to the detriment of both the quality of service rendered and the lawyer's independence. If an organization exercises some control over their selected attorneys, there is danger to the individual litigant if his interests in a particular case collide with those of the organization. Even where there is no conflict of interest, it is feared that the attorney may be more vulnerable to outside pressure, or feel less responsible to the specific interests of the individual if his livelihood is controlled, instead, by a group. In addition, much of the bar's hostility seems to rest on concern about unfair competition among lawyers, since a closed-panel plan excludes those not on the panel from getting any of the group's business. One factor of the highest importance is the frank fear that an increase in groups offering the services of a lawyer to their members will result in shifts in practices with serious economic consequences for members of the profession: the law practice now enjoyed by some private practitioners may go to other lawyers retained or employed by groups.¹⁹ Moreover, the lure of the possible financial bonanza in being a group's "designated" attorney, or the threat of being left out in the cold without such a designation, might

produce an irresistible temptation to violate the profession's long-standing regulations against advertising or solicitation of business, or even those against "paying off," financially or other wise, the group's officials. Many other lawyers and observers deprecate these fears, of course. But it is evident that the observation that "group legal services are dreaded, perhaps even despised, by most practicing lawyers"²⁰ is not without foundation and cannot be ignored.

The Supreme Court's protection of group service plans and the continued growth of such arrangements has forced lawyers to re-evaluate—or, for many, evaluate seriously for the first time—attitudes toward group delivery of legal services. The concept of legal insurance is not new but only now in the context of this judicial favor for group services, and the fact of their continued growth has it been embraced by the legal profession. Legal insurance offers a viable alternative to closed-panel programs, since it allows for the separation of arrangements for payments for services from group control of lawyer selection and the threat of group interference with the lawyer-client relationship.

The bar's recognition of open-panel, legal insurance as an attractive alternative to group legal services was exhibited during the 1968 A.B.A. convention. After having rejected the proposals permitting regulated group service plans, the convention considered and accepted another report from the same special committee which favored the idea of legal insurance and called for its further examination.²¹ As there had not previously been any actual full-service legal insurance programs, however, there remained several unanswered questions about how well such a program would work. A field test was needed. A call went out to local bar associations for volunteers. The Shreveport plan was the eventual result.

The idea of legal insurance can be realized in many different ways. The Shreveport experiment is deliberately designed as broadly inclusive. It covers virtually all types of legal problems. All active members of the union chosen for the experiment, and their dependents are included, the fund being supported by a contribution of two cents per hour worked, taken from the member's paycheck. The schedule of benefits is broad, with liberal maximum annual benefit limits and small deductible charges. If the upper limits of each category of benefits are added together, the plan could be responsible for \$1,665 a year in coverage for a single member.²²

- 10 Murphy, *Group Legal Service Plans in California, Florida, Maryland, and Oregon*, 36 *Unauthorized Practice News* 7 (June, 1972).
- 11 Plant, *Increasing Availability of Legal Services*, 46 *J.St.B. of Ca.* 442, 444 (1971).
- 12 Union officials in particular have expressed interest. See Bernstein, *Legal Services, the Bar, and the Unions*, 58 *A.B.A.J.* 472 (1972).
- 13 Both a comprehensive discussion and extensive list of bibliographic references may be found in B. Christensen, *supra* n. 5. Especially notable on the idea of legal insurance is Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 *U.Chi.L.Rev.* 417 (1968).
- 14 For a discussion of the ethical issues, see Zimroth, *Group Legal Services and the Constitution*, 76 *Yale L.J.* 966 (1967).
- 15 *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967); *United Transportation Union v. The State Bar of Michigan*, 410 U.S. 576 (1971).
- 16 *A.B.A. Spec. Comm. on Availability of Legal Services, Report Number 2*, 93 *Reports of the A.B.A.* 518 (1968).
- 17 *A.B.A., Code of Professional Responsibility*, Disciplinary Regulation 2-103(D)(5).
- 18 See n. 13, *supra*. For examples of the discussion of this subject, see the symposium on the Code of Professional Responsibility, 48 *Texas L.R.* 255 (1970).
- 19 *A.B.A. Spec. Comm.*, *supra* n. 15 at 523.
- 20 Sutton, *The A.B.A. Code of Professional Responsibility: An Introduction*, 48 *Texas L. Rev.* 255, 262 (1970).
- 21 *A.B.A. Spec. Comm. on Availability of Legal Services, Report Number 1*, 93 *Reports of the A.B.A.* 231 (1968).
- 22 A complete description of the program is given in the full report, *The Shreveport Plan: An Experiment in Delivery of Legal Services*, with the plan's official information booklet reprinted as its Appendix A. See n. 2, *supra*.

The operation of the Shreveport plan was expected to answer two types of questions. It was hoped that it would demonstrate that the concept was financially practical, as well as perhaps providing an actuarial basis for devising other plans.²³ And it was intended to establish a basis of comparison between open and closed panel programs in terms of their relative effectiveness in providing legal services and any ancillary advantages and disadvantages. It is the effectiveness in providing legal services with which we are concerned here.

The locale, covered group, and specific provisions of the plan were all settled when the A.B.F. researchers, including myself, entered the scene. Essentially, we decided on a before and after study, a panel study, of the experimental group.²⁴ Thus we interviewed all the members of the union local that we could before the plan started and again after it had been in operation for one year.²⁵ The first survey provided information about the use of lawyers prior to the insurance plan, which could be compared with use under the program. Similar comparisons could be made of the attitudes, before and after, toward the law and lawyers. The covered member surveys were supplemented by interviews with local lawyers.

We recognize that there are serious difficulties in trying to generalize from this experiment, using one small group in one city for a period of only one year. Moreover, the particulars of the situation include potentially distorting circumstances. Oddly enough, though the program was organized and funded as an experiment in legal insurance, apparently little effort was made to insure that the participants and conditions were "typical"—if such assessment could ever be made—so that the results could be confidently generalized to the rest of the country. Indeed, some have wondered whether it would be possible to devise more suspicious-looking, "atypical" circumstances.

Shreveport is a southern city with a metropolitan population of about 300,000 about one-third of which is black, a 99 percent white bar, and a political and social ambience that would have to be described as conservative. It was selected as the site for the experiment because the Shreveport Bar Association, among all the local bar groups in the country, was one of the few to respond to the A.B.A.'s search for volunteers for the experiment with a proposed program, and was the only one whose program was ready to be put into operation.²⁶

The group to be covered by the insurance—Local 229 of the Laborers International Union—was similarly selected, not because the union membership was "typical," but because the local and national union officials were viewed as likely to approve and support it, as they did. The membership of the group thus chosen is almost entirely black, mostly composed of unskilled construction laborers, with an average income only slightly above the poverty level, generally middle-aged to old, and with few years of formal education. The union's active membership, (which averaged 536) was subject to considerable turnover, creating a distortion for which we attempted to compensate by concentrating our analysis on 301 union members who were active both before and after the plan's implementation.²⁷

Despite the possibly unrepresentative conditions we believe that the experiment is relevant beyond the specific circumstances. The most important lessons of the investigation do not involve the details of the legal insurance plan, but rather when and how people use lawyers. We began our examination with considerable skepticism, much of it based on the atypicality of the situation. While we are still certain that our survey results cannot be automatically assumed to be reflective of the whole nation, we now suspect, after our research, observation and discussion, that these lessons do apply elsewhere. In any event, the Shreveport data provide both a fair basis of speculation and indications of what to look for in the additional examinations of legal insurance that we believe necessary. It is with that caveat that we draw our conclusions.

The "Middle Class Need": Use and Non-use of Lawyers' Services

For all the discussion about it, the idea of a middle-class need for legal services is rather indefinite. There is, in fact, very little, if any, direct evidence that the middle class needs more legal service than it is actually getting. Preble Stolz, doing a preliminary study of the idea of legal insurance in 1968, examined the skimpy data available on the need for the public for legal services and observed that "the conclusion can be very briefly stated: The figures tell us nothing."²⁸ Barbara A. Curran, after a similar examination, has concluded that "we are abysmally ignorant of what the general public needs or wants or ought to have in the way of legal services."²⁹ Little is known about who sees lawyers for what and why. Even less is known about non-users of legal services. It would seem

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difficult to devise a sound system for meeting a perceived need without knowing what that need is and why it has not been fulfilled, but that is largely the case here.³⁰

It is probably safe to assume that there is some unfulfilled need, though the amount cannot be specified. Certainly that is the predominant opinion among both observers within the organized bar and representatives, such as union officials, of potential client groups.

In the Shreveport study we discovered the difficulty of measuring this need or non-use, but still the study does tend to confirm the existence of unfulfilled need. In response to direct inquiry 5 percent of the members indicated that they had had a problem in the preceding 12 months which they had thought of taking to a lawyer but did not. That 5 percent represents about half the number of those who actually consulted lawyers, or put another way, one-third of the problems for which members admitted they thought about using a lawyer's services were not taken to attorneys. We tried to find out why not, but were unable to get particular reasons.

A similar impression is given by responses to a battery of questions in which the respondent was asked if he had ever experienced specific situations, chosen by us, which suggested the possible use of a lawyer. Though an attorney would not expect to be called in every such situation, the overwhelming majority of the union members who had experienced those problems had not sought a lawyer, even for such situations as being arrested (86 percent did not use a lawyer) or making a will (92 percent did not use a lawyer).

Why are lawyers not being consulted when it would otherwise seem to a person's advantage to do so? Unless the barriers that stand between lawyers and middle-class individuals are understood, it will be difficult to create a program that can fully overcome them. There has been considerable theoretical speculation concerning these reasons. Discussion in the context of the Shreveport study may provide an empirical background.

- 23 The experiment failed to provide much information on the economics of legal insurance plans. The Shreveport plan survived its first year with its premium of 2 cents an hour, but it is doubtful whether that figure can be kept at that low level. We suspect that the Shreveport program is viable at some "reasonable" premium, though we cannot specify its magnitude. For a variety of reasons, centering on distortions in the experiment and inadequate data, we cannot confidently generalize from the program whether other plans would be viable at reasonable premiums, nor can we estimate what premiums might be necessary. See Chapter IX of the full report for the discussion of the economics of the plan.
- 24 A detailed description of the methodology, copies of the survey instruments, and the specific statistics hereafter referred to may be found in the full report.
- 25 Our first survey was conducted in July, 1970. The plan commenced operation in January, 1971, and our second survey was conducted in January, 1972. When we make before and after comparisons of the use of lawyers, we are comparing the 12-month periods prior to each set of interviews: July, 1969 thru June, 1970, and January thru December of 1971.
- 26 Another site, Clackamas County, Oregon, was originally selected for the experiment, but that plan collapsed when the proposed group of insureds—a labor union—declined to accept any premium expense.
- 27 The employment of unskilled construction laborers tends to be highly cyclical, and since many members pay their dues to remain members in good standing only when they have a construction job, the union's active membership is also cyclical. Members are suspended if they have not paid their dues for three months, and only active members are eligible under the insurance plan. During the year there were 1029 different persons who were, at one time or another, eligible, active members. At no single time during the year, however, did the number of eligible members exceed 593.
- 28 Stolz, *The Legal Needs of the Public: A Survey Analysis*, Research Contributions of the American Bar Foundation No. 4, 1 (1968).
- 29 Curran, *Utilization of Lawyers' Services by the General Public*, 36 *Unauthorized Practice News* 21 (March, 1971).
- 30 Recently the ABA recognized this problem and created a Special Committee to Survey Legal Needs. That committee and the A.B.F. have begun such a study, but in the meantime the data remain fragmentary.

The most commonly recognized barrier is the financial one. The idea of middle-class need is largely based on the notion that these people do not use lawyers because they are not wealthy enough to afford them, while being too affluent to qualify for legal aid. Thus one observer concluded that "full, effective legal assistance is beyond the reach of both middle-income and poor Americans." No doubt this is true for so-called "catastrophic" legal problems, like major criminal charges or large liability claims.

It is a mistake to view the problem simply as one of high fees, however. Professor Stolz's review concluded that "most of the need for legal services is either covered by liability insurance or a contingent fee or is likely to be inexpensive."³² Few of the legal problems of middle-income persons require extensive effort by lawyers. The actual fees charged the Shreveport laborers do not constitute an insurmountable barrier. For half the problems that had been taken to lawyers before the plan the charge was less than \$75. Most members were able to pay the fees from cash on hand. When asked if they could afford the fee, only 28 percent said they could not, a view that did not vary with size of income. Even for the few fees over \$300 (only 8 percent of the total number of problems), only 50 percent of the respondents said they could not afford what they had been charged. This group has an average income deep in the lower portion of the "middle class" and several members had incomes beneath the poverty level for at least some years of their lives, yet their experience has not indicated a substantial inability to pay legal fees for the kinds of problems they generally face.

What financial barrier exists is not based on inability to afford the attorneys' fees so much as it is on the *fear* of such fees. The problem is not one of overcoming catastrophic costs, but relieving the concern over potential cost. This fear must be faced before consulting the lawyer and getting the bill. A given problem might actually result in a small charge if taken to a lawyer, but the person with the problem might not know that, and so he may still be frightened away by the potential danger of being handed a huge bill. The members were asked to agree or disagree with the statement "Most of the time lawyers charge too much." Despite the statement's built-in bias, the strength of the response is still instructive: 84 percent agreed. The response did not vary according to past experience, either. The view is obviously a strong one which does not change even when experience has been to the contrary. Doubts about "next time" may remain.

The financial barrier to using legal services would thus appear to be built more on a fear of large fees rather than actually heavy expenses. This is the kind of obstacle against which a pooled-risk system, either open- or closed-panel, would seem particularly effective, in that it could eliminate the fear by fixing limited actual expenses, high premiums being unnecessary since "catastrophic" expenses are so rare.

Even when the fear element is included however, the financial barrier may not be as important as is generally believed. This was the conclusion of an A.B.F. study of the use of legal services by low-income people, observing that almost 75 percent of the respondents (the survey was of poor persons who had used a lawyer within the preceding five years) had contacted a private attorney instead of the local free legal service program.³³

In Shreveport, of the 407 problems taken to lawyers before the insurance plan and identified to us by the members, (many of whom had incomes below the poverty level for large parts of their lives) only 3 cases had been taken to legal aid and 6 to the public defender. In the 12 month period before our survey, 53 problems had been taken to lawyers, all to private attorneys. Shreveport has an active legal aid office, but when the union members decide to see an attorney they appear willing to risk the financial burden. The economic barrier may be a significant one, but there are others as well.

An early stage in deciding to take a certain problem to an attorney is identifying it as a "legal" problem, a task in which, of course, a lawyer would be of some help. Failure to recognize legal problems may be a significant factor in the non-use of legal services. Though the evolution of legal doctrine designed to protect individuals—as criminal defendants, consumers, tenants, employees, and so on—has been substantial, the individuals for whom these protections exist may not be aware of them.

Moreover, the complexity of modern society is making the recognition of a problem as "legal" harder than before. Consumer credit serves as an example. A borrower early in this century was likely to have a relatively clear and complete understanding of his legal obligations, but with the spread of credit cards, complex purchase agreements, and "easy credit" schemes this is frequently not the case today. Judicial rulings limiting the terms or requiring certain procedures and disclosures are also likely to be unknown to the consumer.

An individual with casual or random contacts with lawyers is probably unfamiliar with the nature of their services and beset by doubts about what kind of matters are appropriate to take to attorneys. Such doubts encourage a tendency to see a lawyer, if at all, only in the case of easily recognized "traditional" legal matters, the staple stuff of law practice for many years—real estate transactions, divorces, criminal offenses, estates, and workman's compensation claims. That was the actual experience in Shreveport prior to the insurance program, and the A.B.F. study of low-income persons resulted in similar findings.³⁴ When faced with hypothetical situations and asked whether a lawyer could be helpful, the respondents in the A.B.F. study reflected these conservative or conventional views of what are "legal" problems.

Furthermore, doubts about what are appropriate matters to take to lawyers produce a hesitancy about seeking lawyers until the problem becomes serious. Ambiguity about what is and what is not a legal problem especially inhibits the use of attorneys in a preventive mode. While a questionable situation could have been taken to a lawyer for consultation, to be either disposed of by advice that the problem was not a legal one or settled quickly and easily before it became serious and more complicated, the union members reported only one such occurrence before the institution of the insurance plan.

This "knowledgeability gap" thus appears to be a second barrier to full, effective use of legal services. The possible utility of attorneys is not wholly recognized by potential clients, and then doubts translate into non-use or delayed use. The extent to which group legal arrangements can bridge this gap is unclear. Especially if linked with an educational program, the potential seems to exist for increased awareness of lawyers as a problem-solving resource, especially through word-of-mouth advertising by members discovering the greater utility of attorneys.

32 Stolz, *supra* n. 12 at 454.

33 Curran, *supra* n. 18 at 23. It was not clear why free legal services were not utilized more. Certainly lack of knowledge—38 percent were unaware that the free programs existed—played an important part. Two related attitudes were also involved: suspicion about institutionalized charity and the belief that private attorneys were more likely to do everything they could to help.

34 Marks, *The Legal Needs of the Poor: A Critical Analysis*, 8 (1971).

Once a person has realized that an attorney might be able to help with a given problem, there still remains the decision to seek such help. The first does not always lead to the second, for there are major psychological barriers which make it difficult to take that step even when it is seen to be for the person's own good and which, when the lawyer's utility is uncertain, help clinch the decision not to seek him out. When a person goes to a professional there is a felt loss of control over both process and outcome. The matter may be viewed as "in the hands of the lawyer," the client feeling powerless. Furthermore, going to a lawyer seems to many to involve a commitment to a formal, legalistic resolution, which creates a sense of vulnerability to counter-attack. Seeing an attorney—electing a legal resolution—converts a painful, often intimate, problem into an object for the ministrations of others, who proceed at their own pace, on their own terms, and by their own often incomprehensible rules.

Regardless of whether they had used lawyers before, the Shreveport respondents tended to believe that most lawyers could not be trusted (60 percent so thought) and were hard to understand (77 percent). The members of this group may have had a greater than usual economic and social distance from the practicing bar because of their race and marginal economic status, but negative attitudes toward lawyers are not limited to such groups. It is no secret that lawyers are not popular, especially among the “common people.” (When a Shakespearian butcher and his friends thought about what they would do if they were in power, the conclusion was clear: “The first thing we do, let’s kill all the lawyers.”³⁵) The public distrusts the law and its institutions, viewing it as a “last resort” when all else has failed.³⁶

The fear of law and lawyers is a fundamental element in the non-use of legal services. No plan of legal services, open- or closed-panel, is likely to change basic attitudes except on a very long term basis. In the short run, however, increasing successful individual contacts with attorneys might reduce the operational effect—discouraging use of lawyers—of the negative attitudes. Thus, the impact of negative expressed opinions about lawyers in general might be minimized if the members of a legal services plan knew or could find particular lawyers with whom they could have satisfactory relationships.

That brings us to a final element in taking a problem to a lawyer: finding a good one. Selection among competitive products is a common process in our society. There may often be doubts in a consumer’s mind over which is the right choice, but usually there is some reasonable or at least explicable basis for the decision. Even for a major purchase like an automobile where simple trial-and-error is impractical, some “objective” standards exist: the consumer can check specifications and performance data, he can read *Consumer Reports*, he can take a test drive—there are some reasonable grounds for decision.

The selection of a lawyer is much more difficult.³⁷ For one thing the potential “consumer” of legal services is left to his own devices. There is no formal advertising, and lawyer referral services, where they exist, give out names but do not indicate quality. On his own, the consumer has no objective basis for selecting a satisfactory attorney—meaning one who is both competent for handling the specific problem and personally likely to be trusted by the particular client—for his situation. He is forced to depend on word-of-mouth reputation.

That basis for selection may have worked in small-town America, where the typical attorney practiced in a relatively settled, homogeneous, closely-knit community. There the effective and efficient “grapevine” could spread reputations—personal and professional—rapidly, and a few inquiries could provide some basis of choice among the available attorneys.³⁸ But small-town America is no longer the norm. For urban dwellers the number of available attorneys is much larger, and relatively reliable information about the ability of any one of them to deal with various problems is far less likely to travel among the general population. In addition, the complexity of modern law has resulted in specialization, though not formally recognized, by most attorneys. The profession’s *Code of Professional Responsibility* itself concedes that “Few attorneys are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal service.”³⁹ Nonetheless, except for the traditional exceptions for admiralty, trademark, and patent law, no lawyer is allowed to “hold himself out as a specialist or as having special training or ability.”⁴⁰

The difficulty of selection may further discourage consultation of lawyers. The potential user, faced with the unappetizing prospect of picking a name at random or on the basis of the dubious remains of the word-of-mouth system, may well choose to forget the whole thing. About half of the Shreveport respondents expressed the view that it was hard to find a lawyer. In addition, the contacts used to find lawyers before the insurance plan reflected the “lay referral network,” or word-of-mouth system, with over half the referrals coming from friends and relatives. And of those who had experience with this system, about half thought that lawyers were hard to find, which further suggests that the referrals may not have led to successful lawyer-client contacts. Not only is such a result bad in itself, but it may discourage future use of legal services by those individuals and by others influenced by them.

The difficulty of finding a lawyer is a crucial factor in the choice between open- and closed-panel arrangements. The closed-panel plan pre-selects the lawyer for the member by referring him to a particular lawyer or, at most, giving him a short list to choose from. The organizing group, presumably having screened and approved the lawyer in advance, takes the worry and guesswork out of the selection process and provides the member with grounds for putting his faith in the chosen attorney.⁴¹ On the other hand, the existing “free choice” afforded the

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potential client, outside of any program, turns out to produce discouragement, confusion, and unsuccessful contacts. If these patterns are left intact in the open-panel program, as is generally assumed, a substantial barrier to full and effective use of legal services would remain untouched. Whether these patterns persist in open-panel programs remains to be seen, but this contact barrier certainly demands careful examination.

In sum, it would appear that there is a significant need for attorneys' services among middle-income people that is unmet at present, though the extent of that legal service gap cannot be established. It stems in part from a fear of the financial cost of consulting a lawyer, but that is only part of the explanation. Other barriers separating lawyers and potential middle-income clients are present: nonrecognition of the utility of lawyers' services, psychological reluctance to turn to lawyers, and difficulties in finding a good attorney. The strength of each of these elements and how they interact with themselves and with other factors is uncertain. Basic research is still needed to understand the relationship between middle-class citizens on one hand and the law and lawyers on the other. In the meantime, we work with what knowledge we have.

The Impact of Legal Insurance

As noted earlier, the Shreveport experiment was intended to test the practicality of legal insurance and to provide a basis of comparison for open-panel plans against the alternative of group legal services. Unlike the complete report on the project, however, this article is concerned with only one aspect, albeit the most important, the availability and use of legal services by the covered members. For the other results and a more extensive discussion of this aspect, the full report should be consulted.

The use of legal services by the members of Local 229 increased significantly under the insurance program. In the 12 months prior to the first interview, 10.3 percent of the members used lawyers. Under the insurance plan that figure jumped to 16.3 percent. Moreover, the quality of legal service provided increased noticeably under the plan, according to both the member-clients and the lawyers who represented them. Of those members who had seen lawyers both before and under the plan, half thought that they had been given better service and the rest detected no decline. Similarly, many lawyers thought that

35 W. Shakespeare, *Henry VI*, Part II, Act IV, scene ii, line 86.

36 See the Missouri study, which attempted to determine public attitudes toward lawyers. Missouri Bar—Prentice-Hall, Inc., *A Motivational Study of Public Attitudes and Law Office Management* (1963).

For an excellent discussion of these problems, see Christensen, *supra* n. 5, ch. 4.

38 A personal description of the small-town model is given by Charles Hackler in Institute of Industrial Relations, U.C.L.A., *Group Legal Services: Proceedings of a Conference on Prepaid and Group Legal-Aid Plans* 17-18 (1969).

39 A.B.A., *Code of Professional Responsibility*, Ethical Consideration 2-7.

40 *Id.*, Ethical Consideration 2-14.

41 At least this is the theory. Whether this is how the system would operate and what effect, if any, it would have on the quality of service is not known.

the clients were more confident and helpful under the insurance program, and in return the attorneys provided better service. It must be conceded, however, that these results, significant as they seem, are from only the first year of this one experiment. A more comprehensive view requires analyzing the effect of the insurance plan on each of the barriers separating potential clients and lawyers.

In theory, the insurance program should eliminate the financial fear of lawyers. At least that is true for the Shreveport coverage, which leaves only small amounts, if any, to be paid by the individual client.⁴² But given this group and the short time the program has been in effect, we suspect that the financial concern has not yet been entirely relieved in the minds of some members. Indeed, we know that some members of the union either were not aware of the plan or did not understand it, since there were at least five instances of members actually incurring legal expenses during the year without the knowledge that these expenses were covered by the plan. Given time, this kind of discrepancy should be eliminated.

The difficulty of recognizing when a lawyer can be of help is not so easily alleviated. The kinds of things for which the members used lawyers' services did not change under the insurance plan; they were still the traditional types of problems. The hypothetical questions revealed a broader view of lawyer utility, but not a more sophisticated one. In the second survey, after the plan year, for each described situation more people thought of a lawyer as being helpful than had in the first survey. There were no significant differentiations according to problem type. This broader view included even a situation for which a "lawyer helpful" response seems questionable—"a person has lost his wallet." The responses to that situation, in fact, (although the percentage of those saying lawyers would be helpful was lowest here), showed the greatest increase before and after: 21 percent to 36 percent. The change indicates that lawyers are being thought of more, but not that the group's members are really more accurately aware of when a lawyer can be of assistance. Greater sophistication may come with time and experience, perhaps with the help of an educational program that could be run through the union group and plan, but it has not been manifested in the plan's first year.

There is one encouraging sign that is relevant here, however, and that is an increased use of attorneys for advice only. Only one such use had been reported before the plan, but during its first year the plan paid for five such claims. The number remains small, but the development permits a cautious inference that the plan may encourage members to take problems to lawyers before the situation in question becomes so aggravated as to force further action, suggesting a potential for the preventive use of lawyers.

As suggested in our original discussion of the psychological barriers to the use of legal services, one year's operation of the legal insurance program had little effect on existing negative attitudes toward the law and lawyers. There were signs, though, that the insurance plan and the services received under it were distinguished from the negative attitudes in the members' minds. Most respondents believed that lawyers would treat them better under insurance coverage, and those with experience with lawyers both before and under the plan—those who experienced this treatment first-hand—agreed. The clients and potential clients, when asked about the difference, seemed to feel that the lawyer would have to pay attention to them in a way he had not before, and that the client would no longer be alone and unsupported in approaching the lawyer.

Vague as these responses are, the importance of a growing feeling of social and institutional support cannot be overemphasized. It is clear evidence of the breakdown of previous feelings of isolation that had certainly inhibited the group in their dealings with lawyers. This feeling of social and institutional support should provide the kind of psychological confidence that is a necessary basis for more sophisticated and aggressive use of legal services in the future. Changes like these will naturally take time to establish their full effect, but at least some bridging of the sense of distance between the insured members and lawyers is evident. Some degree of distance or uneasiness will probably always exist—seeing a lawyer will not be as routine as going to the supermarket—but a legal insurance program may be able to reduce the barriers so that they do not serve as serious impediments to access to lawyers.

The effect of legal insurance on the methods of selecting attorneys is crucial insofar as programs using the concept are offered as an alternative to closed-panel plans. We noted earlier that there seemed to be serious weaknesses in the ways of choosing lawyers before the insurance plan. Though it may not have been expected, the Shreveport plan had the effect of significantly altering the contact pattern.

A more organized referral network developed. Informal, unstructured contacts were in part replaced by reliance on referrals by union officials and community reputation. It would seem natural, with the plan being offered through the union, that many members seeking a lawyer would ask union officers for information about the plan and about possible lawyers to hire. Any sense of group participation would encourage this process. It also follows that the union official, wanting to establish both his own and the plan's credibility and being in a position to get feedback from other users, would want to suggest a lawyer who would be effective and sympathetic to the member. The emergence of a referral system simply labelled as "community reputation" has similar implications, since it apparently indicates reputation within this particular union group. Members have experiences with lawyers and develop an opinion of the utility of individual attorneys; such information acquiring a currency within the group. In a way, this "community" represents a throw-back to the circumstances of the small-town model: a small, homogeneous group with similar problems exchanging information about individual lawyers. We would expect this kind of referral to grow as the plan continues.

The new referral patterns resulted in greater satisfaction and less complaint about the difficulties of finding a lawyer. Before the plan about half of the members agreed that it was hard to find a lawyer, regardless of respondent's prior legal experience. In the second survey, however, only 34 percent of those who found lawyers under the insurance plan agreed that lawyers were hard to find, while 53 percent of those without plan experience agreed. Of course, these figures still show, first, that one-third of the users under the new program remained dissatisfied, and, further, that awareness of the difference has not spread to those without actual experience. Whether these levels of dissatisfaction will be reduced with time and greater experience as well as how these figures would compare with the results of a closed-panel plan remains to be seen. In addition, should proposals be adopted by the bar to make selection of attorneys easier—for instance by permitting open specialization—they would have an effect that would also have to be taken into account.

- 42 Other proposed plans called "legal insurance" are radically different, as that offered in Stolz, *supra* n. 12 at 455-76. Stolz formulated a model plan the benefits of which were essentially limited to exactly what the premium paid for—one hour of consultation with a lawyer each year. Such a plan is not "insurance" in the pooled risk sense, but instead more like enforced budgeting, as a Christmas Club savings plan, and would not eliminate the risk of heavy legal fees.
- 43 The Shreveport plan was initially planned to run for at least 3 years, or until January, 1974. Whether there will be any attempt to examine the 3-year experience is not known.

The new, "community" referral system also casts some doubt on the importance of "free choice" of lawyers. The Shreveport experiment did not show it to mean very much. To some extent referrals within the union group, especially by its officials, obscure the difference between open- and closed-panel plans. If this trend continues it is conceivable that a *de facto* "closed panel" will be created. Such a development might represent the worst of both worlds: group decision-making may be involved without anybody taking formal responsibility for it. Accordingly, there may be a greater threat to the lawyer-client relationship from *de facto* closed panels than from intentionally closed panels.

However, if client-members acquire a real sense of autonomy, the open-panel plan, even with the *de facto* closed-panel effect, could turn these potential vices into virtues. The member could receive more accurate and organized information about lawyers to aid him in his selection while maintaining his sense of independence and power over the lawyer. This depends intimately on the ability to fire or change the lawyer that one chooses. The issue of free choice will have to be watched extremely closely in other, more substantial, experiments with legal insurance.

Our observation of the Shreveport experiment leads us to conclude that a system of legal insurance seems to be an effective method of delivering legal services. Given the barriers between middle-income individuals and lawyers that inhibit the use of legal services, the concept in action seems to go a long way toward overcoming those barriers. This is not to suggest that it is the most effective or efficient method for the delivery of legal services, for our examination gives us no basis for judging what would be accomplished by alternative systems, including closed-panel plans. Nor do we know enough about the long-term effects of an insurance program to make any "final" choice now.

It is, in fact, far too early to concentrate on which delivery system may be most efficient. If a substantial unfulfilled need for legal services exists, as it apparently does, legal insurance seems to operate in the right direction and so should be encouraged. Meanwhile, research into the extent and reasons for the unfulfilled need—"market research" for legal services—should be undertaken so that plans to meet the particular problems can be constructed and operated. Experimentation and observation of various systems should be conducted to determine what their capabilities actually are.⁴³