NOTE

THE ORGANIZED BAR AND PREPAID LEGAL SERVICES—AN ANTITRUST ANALYSIS

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I. INTRODUCTION

In *Goldfarb v. Virginia State Bar*,[1] the Supreme Court declared that "certain anticompetitive conduct by lawyers is within the reach of the Sherman Act."[2] This Note will seek to determine whether bar

1. 421 U.S. 773 (1975). The Court decided that bar association minimum fee schedules violate Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). *See* text accompanying notes 64-67 *infra*.

2. 421 U.S. at 793. Strict application of the antitrust laws to the legal profession could invalidate many bar activities including (1) agreements not to compete with other

association[3] efforts to restrict or regulate development of prepaid legal services violate the federal antitrust laws.[4]

Prepaid legal service plans use risk sharing and risk spreading principles[5] to provide legal services at reasonable cost.[6] The plans may be

professions, *compare* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (agreements not to compete), *with* STATEMENTS OF PRINCIPLES WITH RESPECT TO THE PRACTICE OF LAW FORMULATED BY REPRESENTATIVES OF THE AMERICAN BAR ASSOCIATION AND VARIOUS BUSINESS AND PROFESSIONAL GROUPS *reprinted in* 6 MARTINDALE-HUBBELL LAW DIRECTORY 71C (1975); (2) accreditation of law schools, *cf.* Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); United States Dental Institute v. American Ass'n of Orthodontists, 396 F. Supp. 565 (N.D. Ill. 1975); and (3) residence requirements for admission to the bar, *see* Note, *The Sherman Act and Bar Admission Residence Requirements*, 8 U. MICH. J.L. REFORM 615 (1975). Arrangements with individual attorneys could also be challenged as restraints of trade; for example, a lender who requires applicants for purchase money mortgages to have their title search performed by named attorneys may violate the Sherman Act under a tied product theory. *Compare* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), *with* Forrest v. Capital Bldg. & Loan Ass'n, 385 F. Supp. 831 (M.D. La. 1973), *aff'd*, 504 F.2d 891 (5th Cir. 1974).

3. Bar associations are classified according to the area from which they draw their membership—local, state, or national. Membership in most bar associations is voluntary, but state bar associations may be "integrated"—that is, membership may be required as a prerequisite to the practice of law in the state. *See* note 243 *infra*. National bar associations include the American Bar Association, National Bar Association, American Trial Lawyers Association, and National Lawyers Guild. *See generally* V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY 324-403 (1966); G. WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES (1954).

4. Because of restrictions in the state ethical code, the Antitrust Division of the Department of Justice has twice refused to give a favorable business review letter to the California Lawyers' Service prepaid legal services plan. *See* BNA ANTITRUST & TRADE REG. REP. No. 702, at A-12 (Feb. 25, 1975); BNA ANTITRUST & TRADE REG. REP. No. 677, at D-5 (Aug. 8, 1974). *See generally* Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570 (1975); Fisher & Gailey, *Antitrust Implications of Prepaid Legal Services in Texas*, 27 BAYLOR L. REV. 451 (1975); Rigler, *Professional Codes of Conduct After* Goldfarb: *A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185 (1975); Note, *Developments in California Private Legal Services Plans*, 4 GOLDEN GATE L. REV. 155, 165-71 (1974); Comment, *Applying the Sherman Act to Restrictive Practices of the Legal Profession*, 34 MD. L. REV. 571 (1974); Note, *Prepaid Legal Services, Ethical Codes, and the Snares of Antitrust*, 26 SYRACUSE L. REV. 754 (1975); Note, *Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities*, 82 YALE L.J. 313 (1972).

5. *Cf.* AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE ON THE FUTURE OF PREPAID LEGAL SERVICES 29-33 (1973) [hereinafter cited as PREPAID LEGAL SERVICES].

6. Proponents of prepaid legal services often assert that although the rich have always been adequately supplied with lawyers and the poor receive legal services through legal aid, the middle class constitute a vast undersupplied legal services market. *See* note 99 *infra*. Prepaid legal services are designed to meet the assumed need for low cost services in the middle market. The ABA Special Committee to Survey Legal Needs has

divided into two types, open panel plans and closed panel plans. Open panel plans are analogous to Blue Cross prepaid medical service plans; the client may select the lawyer of his choice, and the lawyer may charge his customary fee.[7] Closed panel plans provide legal services only through preselected attorneys, and generally the fees are prearranged.[8] Plans offered by organizations to their members are called group plans; they may be open or closed.

Bar associations initially opposed all prepaid legal service plans. The plans were presumed to conflict with traditional ethical prohibitions against solicitation, third-party control of the attorney-client relation, and "aiding the unauthorized practice of law."[9] In addition, the plans appeared to pose a competitive threat to traditional forms of delivery of legal services, thus raising the specter of lower fees or complete loss of some legal services to the competing prepaid form of delivery. Eventually, however, the bar came to realize that open panel plans merely change the method of payment; since the lawyer's activities and fees are unaffected, such plans do not pose an ethical or competitive threat. Thus, the bar began actively supporting formation of open panel plans,

attempted to quantify legal needs; for a preliminary release of results, see 3 ALTERNATIVES: LEGAL SERVICES & THE PUBLIC No. 1 (Jan. 1976) (special issue). More conclusive empirical studies should soon be available, because legal constraints on the provision of prepaid plans recently were removed by amendments to the Taft-Hartley Act permitting joint labor-management contribution to prepaid plans, *see* sources cited notes 268-72 *infra* and accompanying text, and by removal of most of the restrictions in the Code of Professional Responsibility, *see* notes 34-44 *infra* and accompanying text. Amendment of the Internal Revenue Code may also be necessary, however, for prepaid plans to realize their full potential. *See* Hendricks, *Federal Income Tax Consequences of Group Legal Services Plans*, 27 BAYLOR L. REV. 431 (1975); Comment, *Prepaid Legal Service Plans—The Grasps of the Internal Revenue Code*, 27 BAYLOR L. REV. 544 (1975).

Estimates in 1973 placed the number of prepaid legal service plans at between 2,000, H.R. REP. No. 205, 93d Cong., 1st Sess. (1973), and 10,000, PREPAID LEGAL SERVICES 35 (statement of R. Connerton). Projections that the number of lawyers in the United States will double between 1970 and 1985 stimulate interest in developing the prepaid legal service market. *Hearings on the Organized Bar: Self Serving or Serving the Public? Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. of the Judiciary*, 93d Cong. 2d Sess. 15 (1974) (statement of S. Kadison, chairman, ABA Special Committee on Delivery of Legal Services).

7. *Hearings on H.R. 13938 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 5 (1972) (testimony of F. McCalpin). *See generally* F. MARKS, R. HALLAVER, & R. CLIFTON, THE SHREVEPORT PLAN: AN EXPERIMENT IN THE DELIVERY OF LEGAL SERVICES (1974).

8. For examples of the operation of closed plans, see PREPAID LEGAL SERVICES 41-44 (plans of the California Teachers Ass'n & Laborers' Local 423, Columbus, Ohio).

9. *See* note 14 *infra*.

while maintaining opposition to closed panel plans. More recently, opposition to closed panel plans has been eroded both by consumer and legislative pressures and by increased confidence that ethical problems may be avoided without prohibiting that form of legal service delivery.

In discussing the effect of the antitrust laws on bar association efforts to control prepaid legal services, this Note will first describe the mechanisms by which bar associations have attempted to restrict and control the development of prepaid plans. Second, the Sherman Act,[10] section 7 of the Clayton Act,[11] and section 5 of the Federal Trade Commission Act[12] will be applied to bar association actions, and potential antitrust liability assessed. Third, statutory jurisdiction of the antitrust laws over bar association activities will be examined. Fourth, potential bar association defenses under the *Parker v. Brown*[13] state action exemption, *Noerr-Pennington* doctrine, and eleventh amendment will be analyzed. The Note will conclude by recommending lines of action to minimize antitrust exposure while maintaining legitimate ethical objectives.

II. BAR ASSOCIATION CONTROLS OVER PREPAID LEGAL SERVICES

A. *Ethical Restrictions on Attorney Participation in Prepaid Legal Service Plans*

Initially, bar associations successfully opposed prepaid legal service plans as unauthorized practice of law by the sponsoring organization.[14]

10. 15 U.S.C. §§ 1-3 (1970).

11. *Id.* § 18.

12. 15 U.S.C. § 45 (Supp. IV, 1974).

13. 317 U.S. 341 (1943).

14. In a series of cases decided during the 1930's, automobile clubs offering legal services to their members were held to be engaging in the unauthorized practice of law. *E.g.*, People *ex rel.* Chicago Bar Ass'n v. Motorists Ass'n, 354 Ill. 595, 188 N.E. 827 (1933); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 A. 139 (1935). In several instances quo warranto actions were successfully maintained against corporations set up to provide legal services. *E.g.*, State *ex rel.* Lundin v. Merchants' Protective Corp., 105 Wash. 12, 177 P. 694 (1919); People *ex rel.* Lawyer's Institute v. Merchants Protective Corp., 189 Cal. 531, 209 P. 363 (1922). *See generally* Note, *Group Legal Services and the Organized Bar*, 10 COLUM. J.L. & SOC. PROBS. 228, 234-39 (1974).

The ABA Canons of Professional Ethics contained four provisions that could be used against a lawyer providing prepaid legal services: Canon 27, prohibiting direct or indirect solicitation; Canon 28, prohibiting "stirring up litigation;" Canon 35, prohibiting control of the attorney-client relationship by a lay intermediary; and Canon 47, prohibiting "aiding the unauthorized practice of law." The ABA Canons are set out in V. COUNTRYMAN & T. FINMAN, *supra* note 3, at 885-97.

A series of Supreme Court decisions, however, established that organizations have a fundamental right, protected by the first amendment freedoms of speech, assembly, and petition, to provide legal service plans for members.[15] Bar associations then shifted from direct attack on sponsoring organizations to indirect control through ethical restrictions on attorneys, and provision of legal services to a prepaid plan was made a violation of the American Bar Association's (ABA) Code of Professional Responsibility. The Code has been adopted by most jurisdictions, and thus is the primary source of law governing attorney practices.[16]

The Code contains three classes of provisions—general statements of ethical norms or Canons;[17] Ethical Considerations, described as "aspirational" recommendations of how an attorney should govern his professional behavior;[18] and Disciplinary Rules, "mandatory" provisions that may subject an attorney to disciplinary proceedings, including disbarment, if violated.[19]

As originally adopted in 1969, the Disciplinary Rules of the Code (after exempting certain charitable organizations) prohibited attorney participation in prepaid legal services; exceptions were permitted "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires."[20] The

15. *See* United Transp. Union v. State Bar, 401 U.S. 576 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). *See generally* note 303 *infra*.

16. *See* notes 45-48 *infra* and accompanying text.

17. Prepaid legal services are most directly affected by Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA CODE].

18. *See* ABA CODE (Preamble).

19. *Id.*

20. ABA CODE, DR 2-103. The Disciplinary Rule provided in part (emphasis added):

> (D) *A lawyer* shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he *may cooperate in a dignified manner with* the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> (1) A legal aid office or public defender office:
>
> (a) Operated or sponsored by a duly accredited law school.
>
> (b) Operated or sponsored by a bona fide nonprofit community organization.
>
> (c) Operated or sponsored by a governmental agency.
>
> (d) Operated, sponsored, or approved by a bar association represen-

rule prohibited attorney participation in any prepaid plan not specifically approved by the courts, since only then would the bar be "required" to acquiesce in the plan.[21] Thus, the rule had the purpose and effect of inhibiting attorney participation in prepaid legal service plans.

The prepaid legal services rules were heavily criticized.[22] In the

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tative of the general bar of the geographical area in which the association exists.

(2) A military legal assistance office.

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

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

(5) *Any* other *non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities,* and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

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

This rule operated in combination with two others.

DR 2-101(B) A lawyer shall not publicize himself . . . through . . . commercial publicity . . . except as permitted under DR 2-103.

. . .

DR 2-103(C) A lawyer shall not request a[n] . . . organization to recommend employment, as a private practitioner, of himself . . . except that he may request referrals from a lawyer referral service operated . . . by a bar association . . . .

Id. *See also id.* DR 2-104(A)(2), (3).

21. *See* DR 2-103(E):

A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

Id. *See also id.* DR 1-102(A)(1), (6).

22. The most extensive critique of the 1969 Code is contained in Symposium, 48 TEXAS L. REV. 255 (1970). Professor Sutton, Reporter for the ABA Special Committee on Evaluation of Ethical Standards, called DR 2-103 "more in the nature of a lateral pass of the problem to the United States Supreme Court than an attempt to find solid grounds upon which to regulate group legal services." Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction,* 48 TEXAS L. REV. 255, 262 (1970). A member of the ABA Special Committee on Availability of Legal Services called DR 2-103(D)(5) "unrealistic, inadequate, irresponsible, and unprofessional. It disserves both the public and the bar." Nahstoll, *Limitations on Group Legal*

1974 Houston Amendments the rules were changed[23] to provide that attorneys could participate in prepaid plans sponsored by bar associations[24] or in open panel plans sponsored by "an insurance company or other organization."[25] Open panel plans could operate for profit and

Service Arrangements Under the Code of Professional Responsibility, DR 2-103(D)(5); *Stale Wine in New Bottles*, 48 TEXAS L. REV. 334 (1970). The provision appears to have been a necessary compromise. *See* Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available,"* 48 TEXAS L. REV. 285, 306-10 (1970). Many of the criticisms are summarized in Brown & Cohen, Book Review, 5 VALP. U.L. REV. 683 (1971), *reprinted in Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 1, at 73 (1973). *See also* F. MARKS, K. LESWING & B. FORTINSKY, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 264 (1972).

23. ABA, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, 1974 MIDYEAR MEETING 3 (Action of the House on recommendations of the Ethics and Professional Responsibility Committee) (Rep. No. 127).

24. DR 2-103:

> (D) *A lawyer shall not knowingly assist a person or organization that furnishes, or pays for legal services to others, to promote the use of his services* or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as permitted in DR 2-101(B). *However, this does not prohibit a lawyer*, or his partner, or associate, or any other lawyer affiliated with him or his firm, *from being employed or paid by or cooperating with, one of the following* offices or organizations that promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, if his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> (1) A legal aid office or public defender office:
>
> (a) Operated or sponsored by a duly accredited law school.
>
> (b) Operated or sponsored by a bona fide nonprofit community organization.
>
> (c) Operated or sponsored by a governmental agency.
>
> (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
>
> (2) A military legal assistance office.
>
> (3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
>
> (4) *A bar association* representative of the general bar of the geographical area in which the association exists *or an organization operated, sponsored or approved by such a bar association.*

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1974) (emphasis added) [hereinafter cited as Houston Amendments]. References will be made to the Code as printed in the 1974 pamphlet by Martindale-Hubbell, Inc., but amendments can also be found in ABA, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, 1974 MIDYEAR MEETING (Section of General Practice Recommendations, Report No. 118).

25. Definition 8: 'Qualified legal assistance organization' [means a DR 2-103(D)(1)-(4) organization, or] plan operated . . . by an insurance company or other organization which plan provides that the members or bene-

be offered by an organization formed solely to provide legal services.[26] But attorney participation in a closed panel plan was permitted only if the sponsoring organization was nonprofit and not formed primarily to provide legal services. The client had to be given a refund if he wanted an outside attorney.[27] Lawyers employed by bar-

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ficiaries may select their counsel from lawyers [in good standing numbering not less than the greater of three hundred or twenty percent of those licensed to practice in the geographical area].

Id. at 48C. *See* note 26 *infra.*

26. DR 2-103(D)(5)(b): [Lawyers may participate in plans sponsored by] a qualified legal assistance organization (not described in DR 2-102 [*sic*: should be 2-103](D) (1) through (4)) [provided the following conditions are satisfied]:

(i) The primary purpose of such organization may be profit or nonprofit and it may include the recommending, furnishing, rendering of or paying for legal services of all kinds.

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

(iii) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.

(iv) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

Houston Amendments.

27. DR 2-103(D)(5). Lawyers may participate in plans sponsored by:

[a]ny other organization that furnishes, renders, or pays for legal services to its members or beneficiaries, provided the following conditions are satisfied:

(a) As to such organizations other than a qualified legal assistance organization:

(i) *Such organization is not organized for profit and its primary purposes do not include the recommending, furnishing, rendering of or paying for legal services.*

(ii) Said services must be only incidental and reasonably related to the primary purposes of such organization.

(iii) Such organization or its parent or affiliated organization does not derive a profit or commercial benefit from the rendition of legal services by the lawyer.

(iv) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

(v) *Any of the organization's members or beneficiaries is free to select counsel of his or her own choice, provided that if such independent selection is made by the client,* then *such organization,* if it customarily provides legal services through counsel it pre-selects, *shall promptly reimburse the member* or beneficiary in the fair and equitable amount said services would have cost such organization if rendered by counsel selected by said organization.

(vi) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.

(vii) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

(viii) The articles of organization, by-laws, agreement with counsel, and

sponsored plans, open panel plans, and insurance plans could solicit individuals to join their plan; lawyers employed by closed panel plans could not.[28] A provision of the 1969 Code making the lawyer liable for disciplinary action if employed by an organization that violated the Code rules was retained.[29] Ethical consideration 2-33 was added to the Code; it strongly suggested that participation in closed panel plans was unethical.[30]

The Houston Amendments were criticized more severely than the original Code provisions;[31] critics included the Antitrust Division of the

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the schedule of benefits and subscription charges are filed along with any amendments or changes within sixty days of the effective date with the court or other authority having final jurisdiction for the discipline of lawyers within the state, and within sixty days of the end of each fiscal year a financial statement showing, with respect to its legal service activities, the income received and the expenses and benefits paid or incurred are filed in the form such authority may prescribe.

(ix) Provided, however, that any non-profit organization which is organized to secure and protect Constitutionally guaranteed rights shall be exempt from the requirements of (v) and (viii).

Id. (emphasis added).

28. DR 2-104 Suggestion of Need of Legal Services

(A) *A lawyer who has given unsolicited advice to a layman that he should obtain counsel* or take legal action *shall not accept employment resulting* from that advice, *except* that:

. . . .

(2) *A lawyer may accept employment that results from his participation in activities designed to educate laymen . . . if such activities are conducted or sponsored by a qualified legal assistance organization.* [*See* note 25 *supra.*]

(3) A lawyer who is recommended, furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5) may represent a member or beneficiary thereof . . . . A lawyer whose services are currently being . . . paid for by a legal assistance organization defined in DR 2-103(D)(5)(a) may not accept employment as a private practitioner from a member or beneficiary of such a legal assistance organization in any matter not covered by the benefits provided under the plan of such organization when such member or beneficiary has been his client under such plan.

Id. (emphasis added).

29. *See* note 21 *supra.*

30. *See* EC 2-33, Houston Amendments, *quoted in* note 102 *infra.*

31. *See* Brinkman, *Of Arterial Passageways Through The Legal Process: The Right of Universal Access to The Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595, 659 n.358 (1973) ("arguably even more inconsistent with the first amendment than the present rule"); Elson, *Canon 2—The Bright and Dark Face of the Legal Profession*, 12 SAN DIEGO L. REV. 306, 308 (1975). *See generally Hearings on Recent Developments in Prepaid Legal Services Plans Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974). A suit was filed by consumer groups against the ABA. Prelaw Society v. ABA, Civil. No. 75-009 (M.D. Tenn., Jan. 10, 1975) (complaint withdrawn following amendment of the Code in Feb. 1975).

Justice Department.[32] The ABA, aware of the questionable legality of the Houston Amendments,[33] removed most of the restrictions at the 1975 Midyear Meeting in Chicago (the Chicago Amendments).[34]

The Chicago Amendments permit attorney participation in prepaid plans if three kinds of requirements are met. First, the sponsoring organization must not profit from "the rendition of legal services,"[35] and, if the sponsoring organization is "organized for profit," the plan must be open panel.[36] Second, the attorney must not use the organization to solicit clients for private practice.[37] Thus, although "dignified commercial publicity" is now permitted for authorized organizations, identification of lawyers is permitted only "in communications . . . directed to a member or beneficiary of such organization."[38] Under

32. *See Hearings, supra* note 31, at 94, 98-99 (testimony of Deputy Assistant Attorney General Wilson); BNA ANTITRUST & TRADE REG. REP. No. 677, at E-1 (Aug. 20, 1974) (text of address by Assistant Attorney General Kauper).

33. The following notice was printed in the preface to the Code as published by Martindale-Hubbell, Inc.:

> SPECIAL NOTICE
>
> Prepaid legal service plans are of fundamental importance to the method and system by which legal services are delivered. The Association is aware that certain amendments to the Code of Professional Responsibility adopted in February, 1974, may raise complex questions of constitutional and statutory law. These amendments are now being studied and appropriate recommendations will be made to the Association's House of Delegates at the earliest possible date . . . . Therefore, the House of Delegates suggests to all interested entities that further action on the amendments to the Code of Professional Responsibility involving Disciplinary Rules 2-103 and 2-104 and Ethical Consideration 2-33 be taken only with the knowledge that the matter is now being studied and will be further considered by the Association.

ABA CODE ii (1974). *See* ABA, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, 1974 ANNUAL MEETING 8 (Action of the House in lieu of the recommendation of the Special Committee on Prepaid Legal Services).

34. *See* ABA SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1975 MIDYEAR MEETING 4-8 (Action of the House on recommendations of the Ad Hoc Study Group on Legal Services, Report No. 110) [hereinafter cited as Chicago Amendments].

35. DR 2-103(D)(4)(a), Chicago Amendments, *quoted in* note 43 *infra*.

36. Such organization . . . is so . . . operated that . . . if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it *except in connection with matters where such organization bears ultimate liability of its member or beneficiary.*

Id. (emphasis added). The exception permits liability insurance companies to use their own counsel in litigation for the insured. It apparently has no other practical application.

37. DR 2-103(D)(4)(b), (c), Chicago Amendments, *quoted in* note 43 *infra*.

38. DR 2-101(B):

> A lawyer shall not publicize himself . . . as a lawyer through . . . commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization [defined by Definition 8 as an organization authorized by DR 2-101(D)(1)-(4)] may authorize or permit or

this provision, apparently only closed panel plans may use advertising that mentions a particular lawyer or firm. Finally, the plan must provide:

> appropriate relief for any member . . . who asserts a claim that representation by counsel furnished, selected, or approved would be unethical, improper or inadequate under the circumstances of the matter involved.[39]

This provision can be interpreted in a way that would convert closed panel plans into open panel plans; the organization may be required to refund the amount that the plan's attorney would have been paid whenever the member seeks outside counsel.[40] A different interpretation is possible, however. The phrase, "improper or inadequate under the circumstances,"[41] is ambiguous; it could be read to require a refund only when the organization is unable to provide services that it had contracted to provide.[42] Thus, the effect of the phrase may vary with the interpretation it is given in disciplinary proceedings or in the opinions of bar association ethics committees.

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assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. *This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name*:

. . . .

(6) *In communications by a qualified legal assistance organization . . . directed to a member* or beneficiary of such organization.

Chicago Amendments (emphasis added). *See also* DR 2-103(C):

A lawyer shall not request a person or organization to recommend or promote the use of his services . . . as a private practitioner, except that:

. . . .

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization.

Id.

39. DR 2-103(D)(4)(e), Chicago Amendments; *see* note 43 *infra*.

40. *Cf.* DR 2-103(D)(5)(a)(v), Houston Amendments, *quoted in* note 27 *supra*.

41. Assuming that "unethical" is limited to direct violation of the Disciplinary Rules, interpretation of that word is not problematic. A broader interpretation of "unethical" would be inconsistent with the function of the Disciplinary Rules as mandatory minimum standards. *See* note 19 *supra* and accompanying text.

42. Under this reading, the rule provides the same relief otherwise available in an action for breach of contract. It is unlikely that the phrase was inserted merely to codify existing law; however, it may have been intended to guarantee that the consumer was aware of his rights. In this view the relevant phrase is "and the plan provides an appropriate procedure for seeking such relief." *See* note 39 *supra* and accompanying text.

The remainder of the provisions of the Chicago Amendments apply equally to open and closed panel plans,[43] and are regulatory, not prohib-

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43. The organizational restrictions are contained in DR 2-103:

DR 2-103 Recommendation of Professional Employment

. . . .

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

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

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

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

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

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

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

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any nonlawyer, shall have initiated or promoted such organization for

itive. Ethical Consideration 2-33, as amended, encourages attorney participation in prepaid legal services.[44] The Code of Professional Responsibility must be adopted by the jurisdiction for disciplinary actions to be based on it. Although 47 states have adopted the Code by statute or rule of court,[45] not all have adopted all the subsequent amendments. Therefore, ethical regulation of attorney participation in prepaid plans currently falls into the three patterns of the 1969 Code,[46] the Houston Amendments,[47] and the Chicago Amendments.[48]

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the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

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

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

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

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

Chicago Amendments (footnotes omitted).

44. *See* EC 2-33, *id.*, *quoted in* note 110 *infra.*

45. *Hearings on the Organized Bar, supra* note 6, at 1 (statement of Sen. Tunney).

46. Ellen Broadman, Legal Research Associate of the Resource Center for Consumers of Legal Services in Washington, D.C., reports that 24 states regulate prepaid legal services under the 1969 Code.

47. Kansas, North Dakota, South Carolina, South Dakota, and Vermont have adopted the Houston Amendments. *Id.*

48. Arizona, Arkansas, Illinois, Louisiana, Maine, Nebraska, New Jersey, New York, Ohio, and Tennessee have adopted the Chicago Amendments. *Id.*

Some states regulate prepaid legal services under provisions that do not fit within the 1969 Code or any of its subsequent amendments. These states are Alabama, California, Florida, Hawaii, Idaho, Minnesota, New Mexico, Oregon, Virginia, Washington, and Wisconsin. *Id.* Disciplinary Rules 20 and 23 of the State Bar of California are similar in effect to the Houston Amendments. *See* BNA ANTITRUST & TRADE REG. REP. No.

B. *Promotion of Open Panel Prepaid Legal Services*

Although the Code was amended in 1974 to permit open panel prepaid legal service plans, mere removal of restrictions was not sufficient for such plans to become widespread. Consumers generally prefer the lower cost of closed panel plans, and insurance plans, though open panel, are not widely available. Bar associations have attempted to counter this lack of interest by sponsoring open panel plans and by forming organizations to stimulate interest in such plans. Two such efforts will be described below.

The State Bar of California, pursuant to enabling legislation,[49] has organized a corporation to administer a state-wide open panel prepaid legal service plan.[50] The corporation, known as California Lawyers' Service (CLS), is controlled by the State Bar. Any member of the State Bar may participate. The plan contemplates that groups will negotiate with CLS to determine the amount that beneficiaries will pay. Negotiation will start with a minimum "target" hourly rate computed from a relative value schedule independently compiled by Price Waterhouse & Co. from empirical data.[51] The CLS program has not to date commenced operations due to refusal of the Antitrust Division of the Department of Justice to grant CLS a favorable business review letter.[52]

The ABA has authorized formation of a not-for-profit corporation to be known as the American Prepaid Legal Services Institute.[53] The Institute will not administer plans;[54] rather, its corporate purpose is to promote and co-ordinate all types of prepaid plans.[55] The fact that a

677, at E-1, E-2 (Aug. 20, 1974) (text of address by Asst. Att'y Gen. Kauper); *id.* at D-5 (text of Business Review Letter of California Lawyers' Service).

49. CAL. CORP. CODE § 9201.2 (Deering Supp. 1975).

50. *See Text of Request for Business Review Letter Submitted by California Lawyers' Service Concerning Prepaid Legal Services and Justice Department Response*, BNA ANTITRUST & TRADE REG. REP. No. 677, at D-1 to D-5 (Aug. 8, 1974).

51. *Id.*

52. *See* note 4 *supra*. The Department's objections center on control of the CLS program by the bar, *cf.* notes 142-53 *infra* and accompanying text, and provisions of the state ethical code discriminating against closed panel plans, *see* notes 78-100 *infra* and accompanying text.

53. *See* ABA, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, 1974 MIDYEAR MEETING 3-4 (Action of the House on the first recommendation of the Special Committee on Prepaid Legal Services).

54. As originally proposed, the Institute would have administered plans. *See* 38 UNAUTHORIZED PRACT. NEWS No. 1, at 19 (1974) (proposed bylaws).

55. *See* Report of the Special Committee on Prepaid Legal Services at 4, in ABA, *supra* note 53 (No. 120).

majority of the directors will be ABA nominees,[56] however, creates a strong probability that the Institute will concentrate primarily on stimulating development of open panel plans.[57]

III. ANTITRUST ANALYSIS

Four provisions of the federal antitrust laws may be applicable to activities of the organized bar.[58] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[59] Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize . . . or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states."[60] Section 7 of the Clayton Act provides:

> No corporation engaged in commerce shall . . . [merge with another], where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[61]

Finally, section 5 of the Federal Trade Commission Act prohibits "[u]nfair methods of competition in or affecting commerce."[62] Although all of these provisions are arguably applicable, only section 1 of the Sherman Act has been applied to the organized bar to date.[63]

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56. The Institute will have thirteen directors—seven nominated by the ABA, three nominated by open panel plans, and three nominated by closed panel plans. *See* American Prepaid Legal Services Institute By-Laws, Article Five, in Report, *supra* note 55 (Exhibit 1), *as amended by* Action of the House, *supra* note 53.

57. *See generally* Official Transcript of ABA House of Delegates Debate on Amendments to Code of Professional Responsibility, Houston, Texas, February 4, 1974, *reprinted in Hearings, supra* note 31, at 54.

58. All antitrust statutes do not apply. The Robinson-Patman Act, 15 U.S.C. §§ 13-13b (1970), would not apply because it deals with price discrimination "between . . . purchasers of commodities" or "in respect of a sale of goods." *Id.* at § 13(a). Likewise, section 3 of the Clayton Act refers only to "commodities." 15 U.S.C. § 14 (1970). Certain aspects of the practice of law have been held to be "trade or commerce," *see* notes 170-181 *infra* and accompanying text, but it is unlikely that legal services will become "commodities" or "goods." *But cf.* Group Health Coop. v. King County Medical Soc'y, 39 Wash. 2d 586, 638, 237 P.2d 737, 765 (1951) (holding prepaid medical services "products" within meaning of antitrust provisions of state constitution).

59. 15 U.S.C. § 1 (1970). Section 3 of the Sherman Act makes similar activities illegal in the District of Columbia. *Id.* § 3.

60. *Id.* § 2.

61. *Id.* § 18.

62. 15 U.S.C. § 45 (Supp. IV, 1974).

63. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974).

Goldfarb v. Virginia State Bar[64] is the only Supreme Court case that has examined antitrust liability of bar associations. The Goldfarbs needed a title search to obtain real estate financing; only a member of the Virginia bar was authorized to conduct the search.[65] Although the Goldfarbs contacted 27 attorneys, none would perform the search for less than the minimum fee set by the county bar association. The Goldfarbs brought suit against the state and county bar associations for an injunction and treble damages, alleging that the minimum fee schedule was a trade restraint prohibited by section 1 of the Sherman Act.[66] The Supreme Court saw the issue as limited to "whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of real estate."[67] Nevertheless, in holding that the Sherman Act did apply, the Court discussed many issues presented by restraints on prepaid legal services. These issues will be discussed below. First, possible theories of antitrust liability under each of the applicable antitrust statutes will be isolated, followed by a short description of antitrust remedies. Next, jurisdiction of the federal antitrust laws over restrictions on prepaid legal services will be analyzed. Finally, theories under which bar associations may claim immunity from antitrust liability will be discussed.

A. *Theories of Liability*

1. *Section 1 of the Sherman Act*

Literal interpretation of section 1 of the Sherman Act would invalidate every ordinary contract, since every contract restrains trade by limiting the commercial freedom of the contracting parties. Such an interpretation would be constitutionally unsound,[68] but the statute provides no clue of the test by which the legality of a restraint may be judged.[69] Early in the history of the Act, Chief Justice White's opinion in *Standard Oil Co. v. United States*[70] provided the necessary guideline:

> [T]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is

64. 421 U.S. 773 (1975).

65. *Id.* at 775, *citing* Unauthorized Practice of Law Opinion No. 17, Aug. 5, 1942, VIRGINIA STATE BAR—OPINIONS 239 (1965).

66. *See* Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973), *rev'd*, 497 F.2d 1 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

67. 421 U.S. at 780.

68. *See* Standard Oil Co. v. United States, 221 U.S. 1, 63 (1911).

69. *Id.*

70. *Id.*

> the *rule of reason* guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.[71]

The public policy behind the Act is prevention of the evils of monopoly power—price fixing, limiting production, and "deterioration in quality of the monopolized article."[72] Under the "rule of reason," liability is incurred only if a particular restraint is an "*undue* restraint."[73] Then Professor Bork explained that the rule permits restraints when their anticompetitive effects are outweighed by their beneficial commercial results, such as increased availability of goods to the consumer through greater production or efficiency.[74] Nevertheless, the Court has deter-

71. *Id.* at 62 (emphasis added).

72. *Id.* at 52. A frequently cited statement of antitrust policy was given by Judge Learned Hand in *United States v. Aluminum Co. of America*:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. . . . [Moreover, in enacting the antitrust laws Congress] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

148 F.2d 416, 427 (2d Cir. 1945).

Clearly, the major policy goal of antitrust laws is the preservation of competition. Other goals include maximizing the use of economic resources, preventing unfair trade practices, and discouraging concentration of economic power. These principles are broad and readily applied to the practice of law. *See, e.g.*, Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971, 974-81 (1972); Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 WIS. L. REV. 1237. In the economic sense, an attorney merely sells services such as the title search in *Goldfarb*. *See* 421 U.S. at 787. The antitrust laws have long been held applicable to the sale of services. *Id. See, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491 (1950); American Medical Ass'n v. United States, 317 U.S. 519 (1943).

73. 221 U.S. at 60 (emphasis added).

74. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 375-76 (1966) (pt. 2); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 776, 833-34 (1965) (pt. 1). Courts generally state the rule formulated by Justice Brandeis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see, e.g.*, United States

mined certain forms of restraint to be so anticompetitive that their presence will foreclose evidence of reasonableness.

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[75]

These restraints, illegal per se, include group boycotts[76] and price fixing.[77]

a. *Boycott*

The 1970 Code virtually prohibits attorney participation in prepaid legal services plans.[78] The Houston Amendments prohibit participation

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v. Topco Associates, 405 U.S. 596, 607 (1972); White Motor Co. v. United States, 272 U.S. 253, 262 (1963). For examples of use of the rule of reason to uphold restraints, see Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35 (1961) (requirements contract); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 373-78 (1933) (joint selling agent); Chicago Bd. of Trade v. United States, 246 U.S. 231, 239-41 (1918) (exchange rule fixing price of grain "to arrive" at final bid in day's auction).

75. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The Court listed price fixing, division of markets, group boycotts, and tying arrangments as activities that are illegal per se. *Id.* For similar statements of the absolute presumption of unreasonableness with per se violations, see United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956); United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-14 (1940).

76. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127, 146 (1966) (concerted action to prevent dealers from selling cars through discount stores); Silver v. New York Stock Exch., 373 U.S. 341, 347 (1963) (rule prohibiting members from transmitting information over private wires to nonmembers); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659 (1961) (association composed of utilities and manufacturers of gas burners refused to grant "seal of approval" to plaintiff's appliance; utilities would not connect gas to the appliance without a seal); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (arrangement with distributors not to sell, or to sell only at unfavorable terms, to competitor); Associated Press v. United States, 326 U.S. 1, 11-12, 19 (1945) (association bylaws "on their face, and without regard to their past effect, constitute restraints of trade"); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (association members refused to sell to retailers who sold lower-priced copies of their original designs). *See generally* Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Rahl, *Per se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959); Note, *A Re-examination of the Boycott Per Se Rule in Antitrust Law*, 48 TEMP. L.Q. 126 (1974).

77. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-14 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

78. *See* ABA CODE, DR 2-103(D)(5), 2-103(E), *discussed in* notes 20-21 *supra* and accompanying text.

in closed panel plans that do not meet stringent requirements.[79] The Chicago Amendments prohibit participation in closed panel plans sponsored by most profit making organizations.[80] All are, in effect, boycotts[81] of the proscribed plans. Therefore, under the per se analysis all are illegal.[82] Antitrust liability was sustained by the Supreme Court in *American Medical Association v. United States*[83] under similar facts. The AMA's code of ethics prohibited physician participation, on a salaried basis, in prepaid medical service plans.[84] The Court held that:

> Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market . . . [it was] within the scope of the statute.[85]

Nevertheless, there is some evidence in the *Goldfarb* opinion that per se rules may not be automatically applied to bar associations. In a footnote to its holding that sale of a title search is a "business aspect" of an attorney's practice and therefore "commerce,"[86] the Court stated:

> *The fact that a restraint operates upon a profession* as distinguished from a business *is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to*

79. *See* DR 2-103(D)(5), 2-103(E), Definition 8, Houston Amendments, discussed in notes 21, 25-27 *supra* and accompanying text.

80. *See* note 36 *supra* and accompanying text.

81. A boycott is a "group action to coerce," or concerted refusal to deal. REPORT OF THE UNITED STATES ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 133 (1955). For example, a boycott was found where:

> [T]he combination exercised sufficient control and power in the women's garments and textile businesses "to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of said respondents, and thus tend to create in themselves a monopoly in the said industries."

Fashion Originators' Guild v. FTC, 312 U.S. 457, 466-67 (1941).

82. *See* notes 75-76 *supra* and accompanying text.

83. 317 U.S. 519 (1943) (upholding criminal antitrust conviction by jury).

84. *Id.* at 526. The AMA was charged with attempting:

> "(1) to impose restraints on physicians affiliated with Group Health by threat of expulsion or actual expulsion from the societies; (2) to deny them the essential professional contacts with other physicians; and (3) to use the coercive power of the societies to deprive them of hospital facilities for their patients."

Id. at 532, *quoting* United States v. American Medical Ass'n, 110 F.2d 703, 711 (D.C. Cir. 1940).

85. *Id.* at 529, *citing* Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941), *quoted in* note 74 *supra*. The lower court gave a detailed discussion of the liability issues, including an analogy to the practice of law. *See* American Medical Ass'n v. United States, 130 F.2d 233, 244-51 (D. C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943). *Cf.* United States v. Oregon State Medical Soc'y, 343 U.S. 326, 339-40 (1952).

86. Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975).

> view the practice of professions as interchangeable with other business activities, and *automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.* We intimate no view on any other situation than the one with which we are confronted today.[87]

The Court's language may be interpreted in three ways. Under the first view, the language merely complements the Court's later assurances that the power of the state to regulate its professions remains unimpaired.[88] If this view is correct, the anticompetitive activity is protected only by the *Parker* state action doctrine.[89] Thus, a private restraint unduly restricting competition would be illegal under the rule of reason regardless of its ethical foundation. This reading is consistent with the general rule that a beneficial noncommercial purpose is irrelevant to the question of antitrust liability since the rule of reason is used only to determine whether an undue *commercial* restraint exists.[90] But it is incon-

87. *Id.* at 787-88 n.17 (emphasis added). It is arguable that the Supreme Court in *Goldfarb* was applying the rule of reason to price fixing, a per se violation. The district court in *Goldfarb* held that if the antitrust laws applied, the fee schedules were per se illegal. 355 F. Supp. 491, 493 (E.D. Va. 1973). The Fourth Circuit did not disagree. *See* 497 F.2d 1, 20 (4th Cir. 1974) (Craven, J., concurring in part and dissenting in part). But the Supreme Court did not mention the per se rule. Instead, it analyzed the effect of the fee schedules on the consumer, arguably applying the rule of reason to hold the restraint illegal. *See* 421 U.S. at 781-83. Nevertheless, since the Court did not expressly use the rule of reason, and in fact called the fee schedule a "classic illustration of price fixing," *id.* at 783, *Goldfarb* is readily viewed as a per se case. *See* United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457, 460-61 (D.D.C. 1975) (per se). *See also* United States v. Oregon State Bar, 385 F. Supp. 507, 516 (D. Ore. 1974); Rigler, *supra* note 4, at 190-91.

88. [*T*]*he States* have a compelling interest in the practice of professions . . . *they* have broad powers to establish standards for licensing practitioners and regulating the practice of professions. . . . [*T*]*he State* may decide that ". . . competition . . . may be demoralizing . . . ." . . . *The interest of the States* in regulating lawyers is especially great . . . . [W]e intend no diminution of the *authority of the State* to regulate its professions.

Id. at 792-93, *quoting* United States v. Oregon Medical Soc'y, 343 U.S. 326, 336 (1952) (emphasis added) (citations omitted).

89. *See* notes 232-77 *infra* and accompanying text.

90. *See, e.g.*, United States v. Topco Associates, 405 U.S. 596, 610 (1972), United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967), Sugar Institute, Inc. v. United States, 297 U.S. 553, 599 (1936).

One commentator, labeling "good motives" as a "false issue," states that if a restraint were shown to cause a very great lessening of competition . . . , it would be no defense to show that the purposes were laudable. And even if the arrangement were greatly beneficial to the national interest in lower prices, better quality, military defense, full employment, foreign trade, health and safety,

sistent with the Court's indication that the legal profession may "be treated differently," since the *Parker* doctrine applies in all cases.

Second, one commentator has suggested that the language indicates that noncommercial professional restraints are exempt from the antitrust laws.[91] This proposed noncommercial exemption depends, however, on a questionable reading of the legislative intent of the commerce requirement of the Sherman Act.[92] Moreover, it is not useful for analysis. Since an antitrust complaint is unlikely to occur unless the restraint has a commercial effect, the exemption would have to depend on noncommercial purpose to be meaningful. But antitrust exemptions always are narrowly construed.[93] A court applying the proposed exemption therefore would first examine the restraint to see if it was narrowly drawn to fulfill the asserted beneficial purpose and then determine whether the beneficial purpose justified an apparent antitrust violation[94]—essentially applying the modified rule of reason approach described below.

Under the third view, the Court's emphasis on "the public service aspect" of the practice of law indicates that one factor in the rule of

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good morals, and exploration of outer space, it would still be illegal under the rule of reason as that rule has evolved.

Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U.L. REV. 137, 146-47 (1962).

91. Rigler, *supra* note 4, at 189. Rigler suggests that noncommercial restraints have total exemption, but commercial restraints are subject to the per se rules. *Id.* at 189. *See also* Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. L. REV. 705 (1962). *But see* Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities*, *supra* note 4, at 317-18, 325-27.

The noncommercial exemption has been applied by one court. *See* Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650, 653-55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *cf.* Associated Press v. United States, 326 U.S. 1, 25-29 (1945) (Frankfurter, J., concurring); Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-04 (1940); United States v. Oregon State Bar, 385 F. Supp. 507, 516 (D. Ore. 1974).

92. *See* notes 170-73 *infra* and accompanying text. *See also* notes 189-97 *infra* and accompanying text.

93. For example, the Court will imply an antitrust exemption from a federal regulatory scheme "only if necessary to make the . . . Act work, and even then only to the minimum extent necessary." Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963). *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973). If regulators empowered to approve actions that they find to be in the "public interest" do not weigh the potential harm to competition, the approved action is still subject to *antitrust liability*. *See, e.g.*, Gulf States Util. Co. v. FPC, 411 U.S. 747 (1973); Denver & R.G.W.R.R. v. United States, 387 U.S. 485 (1967); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

94. *See* Coons, *supra* note 91, at 747; *cf.* Silver v. New York Stock Exch., 373 U.S. 341, 361 (1963).

reason analysis must be whether the restraint has the purpose and effect of protecting the public from unscrupulous practices.[95] Since this approach is a radical departure from the usual practice under the rule of reason,[96] it should be used, if at all, only upon a showing that the anticompetitive ethical restraint is essential to protect the public. This approach to the rule of reason would balance the anticompetitive effect against the ethical need.

The effects of Code restrictions on closed panel prepaid legal service plans are clearly anticompetitive. First, the negotiated fees of closed panel plans are lower than fees charged under conventional or open panel forms of delivery. Analogous closed panel prepaid medical service plans operate at two-thirds the cost of traditional forms of medical care.[97] By eliminating the closed panel alternative, the Code rules keep the price of legal services at a level considerably higher than the price would be if such plans were generally available.[98] In addition, since persons of moderate income may not be able to afford traditional fees but could manage payments under a prepaid plan, the rules tend to limit the supply of legal services available to the middle class.[99] Finally,

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95. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 & n.9 (2d Cir. 1975).

96. *See* note 90 *supra* and accompanying text. The Court usually responds to public policy arguments by stating that exemptions from the antitrust laws must come from Congress, not the courts. *See, e.g.*, United States v. Topco Associates, 405 U.S. 596, 611-12 (1972).

97. *See* Note, *The Role of Prepaid Group Practice in Relieving the Medical Care Crisis*, 84 HARV. L. REV. 887, 921-27 (1971).

98. *See* PREPAID LEGAL SERVICES, *supra* note 5, at 179-80 (statement of J. Bernstein); Bartosic & Bernstein, *Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients Through Collective Bargaining*, 59 VA. L. REV. 410, 428-33 (1973).

99. Studies indicate that consumer use of legal services increases when prepaid plans become available. *See* F. MARKS, R. HALLAVER & R. CLIFTON, *supra* note 7. The studies are summarized in C. LILLY, LEGAL SERVICES FOR THE MIDDLE MARKET 1-18 (1974). They do not, however, conclusively demonstrate that the expansion in use would be significant. PREPAID LEGAL SERVICES 171-72 (statement of P. Stolz). In addition, since the majority of lawyers are solo or small practitioners dependent on low and middle income clients, they may be hurt by expansion of prepaid plans. *See* Ells, *The Primrose Path for Lawyers*, 36 UNAUTH. PRACT. NEWS No. 3, at 1 (1972). *See generally* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970); C. LILLY, *supra; Hearings on H.R. 77 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., 126-82 (1973) (Prepaid Legal Services Report of the Special Committee of the State Bar of California); Hayes, *Delivery Systems for Legal Services—Prepaid Legal Services and Prepaid Legal Insurance*, 40 INS. COUNSEL J. 414 (1973); *cf.* EC 2-1, 2-24 ABA CODE.

by eliminating a competing form of delivery of legal services, the restrictions prevent the stimulus for improvement that competition can provide.[100] The effects of the boycott of closed panel prepaid legal services on the price, quantity, and quality of legal services run contrary to the strong policy of the Sherman Act.[101]

The Code restrictions on prepaid legal services are intended to prevent solicitation and to maintain the independence, integrity, and competence of the bar.[102] But, to outweigh anticompetitive effect, "mere labels" will not suffice;[103] the restrictions must be shown actually to further these policy goals.[104] Solicitation of employment after a cause of action arises ("ambulance chasing") tends to stir up litigation and is said to lead to spurious claims, bribery, destruction of

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100. Lawyers have been slow to utilize techniques that increase efficiency. For example, though a large part of the activities of a lawyer consist basically of information retrieval, use of computers to assist in that function only recently has been developing. *See generally* Sprowl, *Computer-Assisted Legal Research—An Analysis of Full-Text Document Retrieval Systems, Particularly the LEXIS System*, 1976 AM. B. FOUNDATION RESEARCH J. 175. Were competing forms of delivery allowed, it is reasonable to believe that such advances would be adopted more quickly with lower costs to the consumer resulting.

101. *See* note 72 *supra* and accompanying text.

102. *E.g.*,

> The basic tenets of the profession, according to EC 1-1 are independence, integrity and competence of the lawyer and total devotion to the interests of the client. *There is substantial danger that lawyers rendering services under legal service plans which do not permit the beneficiaries to select their own attorneys will not be able to meet these standards.* The *independence of the lawyer may be seriously affected* by the fact that he is employed by the group and by virtue of that employment cannot give his full devotion to the interest of the member he represents. *The group which employs the attorney will inevitably have the characteristic of a 'lay intermediary'* because of its control over the attorney inherent in the employment relationship. It is probably [*sic*] that attorneys employed by groups will be directed as to what cases they may handle and in the manner in which they handle the cases referred to them. *It is also possible that the standards of the profession and quality of legal service to the public will suffer* because consideration for economy rather than experience and competence will determine the attorneys to be employed by the group. *An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully consider the risks involved before accepting employment by groups under plans which do not provide their members with a free choice of counsel.*

EC 2-33, Houston Amendments (emphasis added) (footnotes omitted).

103. *Cf.* NAACP v. Button, 371 U.S. 415, 429 (1963).

104. *Cf.* Group Health Coop. v. King County Medical Soc'y, 39 Wash. 2d 586, 602-03, 605-08, 237 P.2d 737, 746-49 (1951).

public confidence in the bar, and poor service to the client.[105] In open panel plans, employment is initiated by the client and the traditional attorney-client relation exists; therefore none of the solicitation objections can justify the prohibitions of the 1969 Code against all prepaid service plans. The solicitation objections also appear inapplicable to closed panel plans. Encouraging a consumer to participate in a plan that will make legal services, should they become necessary, less expensive is totally dissimilar to ambulance chasing—it does not stir up dormant litigation. Moreover, since a closed panel plan facilitates access to legal services, it is more likely to increase than decrease public confidence in the bar. The severe restraints of the Houston Amendments are therefore not justified by the solicitation objections.

The policies furthering independence, integrity, and competence are incorporated in other disciplinary rules applied on a case-by-case basis.[106] To justify prohibition of participation in prepaid plans, there should be a strong showing that the plans present such severe ethical dangers that rules governing other forms of practice will not suffice. But the ethical dangers of participation in prepaid legal service plans are no greater than those faced by a salaried attorney employed by an insurance company[107] and the case-by-case approach is considered sufficient in the latter instance. The case-by-case method likewise regulates public defenders and legal aid lawyers who are essentially participating in closed panel prepaid legal service plans sponsored by the state or charity. Thus, the prohibition of participation in prepaid plans amounts to an unwarranted conclusive presumption of unethical behavior.[108] The

105. *See* Note, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958) (concluding that the traditional prohibitions are unjustified).

106. Independence is mandated by the Disciplinary Rules under Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client," especially DR 5-107(B):

> A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

ABA CODE (footnote omitted).

Competence is mandated by Canon 6: "A Lawyer Should Represent a Client Competently." *See* DR 6-101(A), DR 7-101(A)(1), ABA CODE. Integrity is required by Canon 1: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." *See* DR 1-102(A)(1), (6), ABA CODE.

107. Limitation of insurance liability can create severe conflicts of interest when a proposed settlement exceeds the limitation. *See generally* V. COUNTRYMAN & T. FINMAN, *supra* note 3, at 96-113.

108. *See* Feinstein v. Attorney Gen., 36 N.Y.2d 199, 204, 326 N.E.2d 288, 291, 366 N.Y.S.2d 613, 617 (1975); F. MARKS, K. LESWING & B. FORTINSKY, *supra* note 22, at

restrictions of the 1969 Code and Houston Amendments are at best redundant and at worst intentionally anticompetitive;[109] they are not justified by ethical policies, and have been abandoned in the Chicago Amendments.[110]

188; PREPAID LEGAL SERVICES 141 (statement of L. Bernstein); *cf.* Silver v. New York Stock Exch., 373 U.S. 341, 364-66 (1963); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 583, 589-91 (E.D.N.Y. 1973) (dicta), *aff'd*, 518 F.2d 751, 757 & n.9 (2d Cir. 1975) (rejecting Judge Weinstein's dicta).

109. Though the restrictions are asserted to protect the public, they are probably intended primarily to protect fees from the competition of lower-priced prepaid plans. Professor Sutton, Reporter of the ABA Committee on Reevaluation of Legal Ethics, testified that:

> *Many of the problems* [with legal services] . . . *are economic problems; they are problems of financing the delivery of legal services. They are not really problems of ethics*, and we mislabel if we label these matters ethics. I think that as far as the Code and interpretation of the Code is concerned, the object is to protect the professional values . . . at the same time avoiding all unnecessary roadblocks to new and proper methods of delivering legal services, and we shouldn't try to bring under the umbrella of ethics many other matters that do not belong there. It would be a mistake for the ABA to regulate legal service plans, in the name of ethics, by regulations that are designed mainly to regulate the economics of law practice.

Hearings on the Organized Bar, supra note 6, at 32-33 (emphasis added). At the ABA meeting in Houston, the ABA Standing Committee on Ethics and Professional Responsibility after considerable study had recommended regulating open and closed panel plans equally, but the House of Delegates instead adopted the discriminatory proposals of the Section of General Practice. *See* ABA, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, 1974 ANNUAL MEETING (Report of the Special Committee on Prepaid Legal Services, Report No. 105). This action provides some evidence that ethical questions were not the primary consideration motivating adoption of the Houston Amendments.

If anticompetitive purpose were shown, the rule of reason would provide no protection from antitrust liability. *See* United States v. Columbia Steel Co., 334 U.S. 496, 522 (1948).

110. EC 2-33 now reads:

> As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so par-

The provision of the Chicago Amendments prohibiting most profit-making organizations from sponsoring closed panel prepaid plans[111] is defended by the argument that:

> The desire to make the highest possible profit from the rendition of legal services would present too great a temptation to the laymen-controlled organization to interfere with the independent professional judgment of an attorney.[112]

If the organization bears ultimate liability, the Chicago Amendments permit sponsoring of closed panel plans[113] because the interests of the organization and those of the client coincide, eliminating the ethical problem.[114] But even if the interests of the organization and client do not coincide, the anticipated unethical behavior is prohibited by other disciplinary rules.[115] If a case-by-case disciplinary system is not sufficient to prevent abuse, state regulation similar to insurance laws would be a less restrictive means of protecting the consumer.[116] On balance, though, the restrictions are not severely anticompetitive—the closed panel plan is permitted, if only in nonprofit form—and do have some ethical foundation.[117] They may be sustained if a modified rule of reason is adopted.[118]

The provision in the Chicago Amendments requiring payment of outside counsel under certain circumstances does not require an anticompetitive interpretation;[119] thus, an ethical opinion with anticompetitive effect would not be sustained under the rule of reason.

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ticipating should adhere to the highest professional standards of effort and competence.

Chicago Amendments.

111. *See* note 36 *supra* and accompanying text.

112. Comment, *Group Legal Services, The Ethical Evolution*, 27 BAYLOR L. REV. 527, 540 (1975).

113. *See* note 36 *supra* and accompanying text.

114. *But see* note 107 *supra.*

115. *See* note 106 *supra.*

116. Bar spokesmen generally do not use the term "insurance" to describe prepaid legal services since insurance implies state statutory and administrative requirements that bar plans may not be able to meet. *See* PREPAID LEGAL SERVICES 22, 63, 127; *cf.* Note, *supra* note 97, at 969-74. *See generally* C. LILLY, *supra* note 99, at 189-214. But amendment of state insurance codes to accommodate the distinctive features of prepaid legal services is the most direct answer to these problems. *See* Comment, *Texas Legislation: Prepaid Legal Services*, 27 BAYLOR L. REV. 500 (1975) (the Texas statute is set out at 631).

117. *But see* Elson, *supra* note 31, at 331.

118. *See* BNA ANTITRUST & TRADE REG. REP. No. 720, at A-7 (July 1, 1975) (Asst. Att'y Gen. Wilson).

119. *See* notes 41-42 *supra* and accompanying text.

b. *Restraints Incorporated in Bar-sponsored Prepaid Plans: Price Fixing*

Many prepaid legal service plans use schedules of benefits that set out the amount of legal services to which the client becomes entitled by his payments.[120] Such a schedule, if imposed uniformly on all plan members, is an overt mechanism fixing the price of the services similar to the fee schedules that *Goldfarb* held to be a "classic illustration of price fixing."[121] Since there appear to be no ethical defenses to price fixing, the main factor barring liability is that section 1 of the Sherman Act requires a "contract, combination . . . or conspiracy."[122] An organization may unilaterally fix the prices of services it will provide.[123] Thus, if a prepaid plan is viewed as a single entity, the element of agreement necessary under section 1 is absent. The Department of Justice, however, argues that the *Penn-Olin* joint venture theory,[124] under which the plan is viewed as a combination of attorneys providing legal services, would satisfy this element, at least if the plan represents a significant portion of the legal market.[125] If the courts accept the Department's position, antitrust liability could still be avoided by showing that the schedule of benefits is not a price fixing mechanism. Two methods have been suggested. First, if consumers participate in arms-length negotiation of the schedule, the schedule could become part of an ordinary legal contract.[126] Second, if the schedule gives, not the price of the services, but an accurate empirical calculation of the relative value of the various services provided, it might be held valid[127]—absent evi-

120. *See* DR 2-103(D)(4)(g), Chicago Amendments, set out at note 43 *supra* (requiring schedule of benefits to be filed "with the appropriate disciplinary authority").

121. Goldfarb v. Virginia State Bar, 421 U.S. 773, 783 (1975).

122. 15 U.S.C. § 1 (1970).

123. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919). The power of a producer to set resale prices is, however, limited. *See* Albrecht v. Herald Co., 390 U.S. 145, 149-50 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 38-43 (1960).

124. *See* notes 149-50 *infra* and accompanying text. The Supreme Court adopted the theory under § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), but found no violation of § 1 of the Sherman Act. *See* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 161 (1964).

125. *See Hearings, supra* note 31, at 107 (statement of Dep. Asst. Att'y Gen. Wilson).

126. PREPAID LEGAL SERVICES 141 (Statement of L. Bernstein).

127. A purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint on trade, would present us with a different question . . . .

Goldfarb v. Virginia State Bar, 421 U.S. 773, 781 (1975). *See* PREPAID LEGAL SERVICES 142 (statement of L. Bernstein); *Hearings, supra* note 22, at 171 (statement of Acting Asst. Att'y Gen. Wilson). Such information should be aggregated by an inde-

dence showing use of a uniform scale by participating attorneys to convert the relative value schedule into a fee schedule.[128]

2. *Section 2 of the Sherman Act*

"Every person who shall monopolize, or attempt to monopolize . . . any portion of the trade or commerce among the several states" is in violation of section 2 of the Sherman Act.[129] Bar associations allowing open panel plans to advertise while restricting advertising of closed panel plans could violate this section. Under the Houston Amendments, bar-sponsored plans may solicit clients,[130] but closed panel plans may not.[131] The effect is to limit severely consumer knowledge of the availability of closed panel plans. Under the Chicago Amendments, any nonprofit organization (including a bar association) may start and promote a plan[132] but only if:

> Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.[133]

This provision limits promotion of closed panel plans to preexisting organizations; a new organization formed solely for the purpose of sponsoring a closed panel plan could always be viewed as intended

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pendent party and not be confidential or accompanied by an agreement in order to minimize antitrust problems. BNA ANTITRUST & TRADE REG. REP. No. 704, at A-1, E-1 (Mar. 11, 1975) (Dep. Asst. Att'y Gen. Baker). *See generally* Herold, *Antitrust Implications of Statistical Reporting by Trade Associations: Cost Indexing in an Inflationary Economy*, 26 MERCER L. REV. 951 (1975).

128. *See* United States v. American Soc'y of Anesthesiologists, No. 75-4640 (S.D.N.Y., filed Sept. 22, 1975), *described in* BNA ANTITRUST & TRADE REG. REP. No. 732, at A-16 (Sept. 30, 1975) (antitrust action under theory that relative value guides "have effect of raising, fixing, stabilizing, and maintaining fees").

129. 15 U.S.C. § 2 (1970).

130. DR 2-103(D)(4) and Definition 8 combine to make a bar-sponsored plan a "qualified legal assistance organization;" DR 2-104(A)(2) allows lawyers to promote "qualified legal assistance organizations." Houston Amendments. *See* notes 24-25, 28 *supra*.

131. Closed panel plans are not "qualified legal assistance organizations" under Definition 8 and thus cannot be promoted. DR 2-104(A), Houston Amendments. *See* notes 25, 28 *supra*.

132. *See* DR 2-103(D)(1)(a), (1)(d), (3), (4)(a), Chicago Amendments, *quoted in* note 43 *supra*.

133. DR 2-103(D)(4)(b), Chicago Amendments. *See also* DR 2-103(D)(4)(c), *id.*, *quoted in* note 43 *supra*.

primarily to benefit the attorneys hired by the plan. Thus, knowledge of closed panel plans would be limited to members of organizations existing for other purposes. It is forseeable that many individuals would join open panel plans not knowing of the closed panel alternative. Such restrictions on advertising may be viewed as an attempt to monopolize the market for nongroup legal services.[134]

In *United States v. Griffith*,[135] the Court stated that:

> It is indeed "unreasonable *per se* to foreclose competitors from any substantial market." . . . The antitrust laws are as much violated by the prevention of competition as by its destruction. . . . It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.[136]

The Court has held that control of advertising, if abused, can violate section 2.[137]

Despite the strong language of the *Griffith* case, a modified rule of reason, if adopted, would be applied in section 2 as in section 1.[138] The anticompetitive effect is clear.[139] The Houston Amendments appear

134. Monopolization cases often turn on how large the court draws the relevant market which is the area of anticompetitive activity. Here, if the relevant market included all legal services, the anticompetitive effect would be minimal. *See* United States v. Grinnell Corp., 384 U.S. 563, 585 (1966) (Fortas, J., dissenting). If the relevant market included only nongroup prepaid legal services, the anticompetitive effect would be enormous. *See* United States v. Grinnell Corp., 384 U.S. 563 (1966) (majority opinion). *See generally* SECTION OF ANTITRUST LAW, ABA, ANTITRUST LAW DEVELOPMENTS 47-52 (1975) [hereinafter cited as ANTITRUST LAW DEVELOPMENTS].

135. 334 U.S. 100 (1948).

136. *Id.* at 107 (citations omitted).

137. *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (newspaper violates § 2 by refusing to accept advertising from customers that also advertise on new radio station):

> [I]t seems clear that if all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate §§ 1 and 2 of the Sherman Act. . . . It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the "attempt to monopolize" clause of § 2 when it uses its monopoly to destroy threatened competition.

Id. at 154 (footnote and citations omitted).

138. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911); notes 95-96 *supra* and accompanying text.

139. *See* BNA ANTITRUST & TRADE REG. REP. No. 713, at A-11 (May 13, 1975) (statement of J. Simes, Antitrust Division attorney); *cf.* BNA ANTITRUST & TRADE REG. REP. No. 715, at A-19 (May 27, 1975) (statement of FTC Chmn. Engman). Other advertising rules regulating law lists are under constitutional attack. *See* Consumers Union v. American Bar Ass'n, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975)

indefensible, since they rest on irrebuttable presumptions of unethical acts.[140] The Chicago Amendments, however, may be found reasonable because they seem only to prohibit direct solicitation for private practice—an activity long assumed to be unethical. But the solicitation rationale does not withstand close analysis.[141]

3. *Section 7 of the Clayton Act*

Section 7 of the Clayton Act states:

> [N]o corporation engaged in commerce shall acquire, directly, or indirectly . . . another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly.[142]

Section 7 "was intended to arrest anticompetitive activities in their 'incipiency' "[143] by preventing merger of competitors. Prepaid legal service plans are easily combined,[144] and the evidence indicates that the competitors are sufficiently concentrated for the Clayton Act to apply.[145] In 1972, for example, 27 firms accounted for 75 percent of the prepaid plans in California; three firms accounted for 30 percent of the market.[146]

The ABA has authorized formation of a national corporation to promote prepaid legal service plans;[147] state and local bar associations have formed corporations to administer prepaid plans.[148] Although

(challenging DR 2-102(A)(6) as violating the first and fourteenth amendments); *cf.* note 303 *infra* and accompanying text. The 1976 Philadelphia Amendments liberalized the law list rules and may moot the constitutional litigation. *See* note 306 *infra* and accompanying text.

140. *See* notes 106-10 *supra* and accompanying text.

141. *See* notes 105-06 *supra* and accompanying text. The argument can be extended to the point that general advertising by lawyers, a practice traditionally condemned, would not be within the ethical prohibition. This is a line-drawing problem. But if no public harm can be shown from dignified, accurate commercial publicity, the antitrust laws may eventually require the bar to permit such publicity. The 1976 Philadelphia Amendments permit limited advertising by lawyers in the yellow pages of telephone directories. *See* note 306 *infra* and accompanying text.

142. 15 U.S.C. § 18 (1970).

143. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

144. *See* PREPAID LEGAL SERVICES 45-46 (statement of R. Duane).

145. *See* ANTITRUST LAW DEVELOPMENTS 74-76.

146. 36 UNAUTH. PRACT. NEWS NO. 3, at 9 (1972); *see also* PREPAID LEGAL SERVICES 47-51 (statement of L. Weller) (ten percent of firms control 50 percent of group plans).

147. *See* notes 53-57 *supra* and accompanying text.

148. *See* Note, *Developments in California Private Legal Services Plans, supra* note 4, at 181-87. *See also* notes 49-52 *supra* and accompanying text.

such proposals create a new organization instead of combining existing ones, they may violate section 7 under the theory approved by the Supreme Court in *United States v. Penn-Olin Chemical Co.*[149]

In *Penn-Olin*, two large existing corporations formed a new joint venture to produce a chemical that neither previously had marketed. The Court held that this combination could violate section 7, since both companies could have entered the market as competitors, or one might have entered alone while the other remained as potential competition at the edge of the market.[150] Under the *Penn-Olin* theory, a bar-sponsored organization large enough "substantially to lessen competition"[151] by elimination of potential competition[152] may violate section 7.[153]

4. *Section 5 of the Federal Trade Commission Act*

The "unfair methods of competition" proscribed by section 5 of the Federal Trade Commission Act[154] include activities that violate the Sherman and Clayton Acts and activities that are contrary to the policies of those acts without amounting to actual violations.

> When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.[155]

Thus, the FTC may prosecute Clayton Act violations even when the jurisdictional requirements of the Clayton Act are not met.[156] All the

149. 378 U.S. 158 (1964).

150. The Court was also presented with a claim under § 1 of the Sherman Act, but concluded that the record did not show a violation. *Id.* at 161. Since the Court relied on the record and did not analyze the joint venture theory in this context, the argument remains that agreements preceding formation of a new corporation may violate § 1. *See* notes 122-25 *supra* and accompanying text.

151. 15 U.S.C. § 18 (1970). *Cf.* Standard Oil Co. v. United States, 337 U.S. 293, 297-331 (1949) (discussing the meaning of "substantially lessen competition" under § 3 of the Clayton Act).

152. *Cf.* Ohio Medical Indemnity, Inc., Civil No. 2-75-473 (S.D. Ohio, filed July 9, 1975), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 724, at A-8 (July 29, 1975).

153. *Cf.* United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-38 (1973).

154. 15 U.S.C. § 45 (Supp. IV, 1974).

155. Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369-70 (1965); *accord,* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 (1953); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394-95 (1953); FTC v. Cement Institute, 333 U.S. 683, 708 (1948).

156. *See* United States v. American Bldg. Maintenance Corp., 422 U.S. 271, 279 n.7 (1975). This power is important because prepaid legal services may not meet the jurisdictional requirements of the Clayton Act. *See* notes 198-217 *infra* and accompanying text.

theories of liability discussed under the Sherman and Clayton Acts are equally applicable to actions brought by the FTC.[157] Moreover, the FTC is asserting its regulatory powers over professional activities. Proceedings have commenced against the AMA's prohibition of advertising,[158] and trade regulation rules[159] have been proposed that would preempt state laws[160] prohibiting price advertising by pharmacists[161] and opticians.[162]

B. *Remedies*

Persons injured by violations of the Sherman or Clayton Act can obtain injunctions and recover treble damages.[163] The United States can sue for injunction and other equitable relief[164] and can seek criminal penalties[165] under the same acts. Finally, the Federal Trade Commission can issue cease and desist orders[166] which, when final,[167] are enforceable by fines of up to $10,000 per day and equitable relief.[168] In addition to the remedies available against bar associations as entities,

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157. *See* notes 78-153 *supra* and accompanying text.

158. *In re* American Medical Ass'n, No. 9064 (FTC, filed Dec. 22, 1975), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 744, at AA-1 (Dec. 23, 1975).

159. Section 202(a) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(a) (Supp. IV, 1974), granted the FTC power to issue trade regulation rules; one court had previously determined that the Commission had implicit rulemaking authority. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

160. The Act does not specifically grant power to preempt state legislation. *See* 15 U.S.C. § 57a(a) (Supp. IV, 1974). The asserted power is questionable in light of the *Parker* rule of nonpreemption. *See* note 254 *infra*.

161. *See* BNA ANTITRUST & TRADE REG. REP. No. 716, at A-2 (June 3, 1975).

162. *See id.* No. 745, at A-6 (Jan. 6, 1976).

163. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), allows recovery of treble damages for "anything forbidden in the antitrust laws," and § 16 of the Act, *id.* § 26, allows such persons equitable relief, but § 1 of the Clayton Act, *id.* § 12, limits "antitrust laws" so that violations of the Federal Trade Commission Act are excluded. *E.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973); *see* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76 (1958).

164. 15 U.S.C. §§ 4, 25 (1970); *see* United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974).

165. 15 U.S.C. §§ 1, 2 (Supp. IV, 1974), *amending* 15 U.S.C. §§ 1, 2 (1970); 15 U.S.C. § 24 (1970).

166. 15 U.S.C. § 45(b) (Supp. IV, 1974), *amending* 15 U.S.C. § 45(b) (1970).

167. *See* 15 U.S.C. § 45(g) (1970).

168. 15 U.S.C. § 45(*l*) (Supp. IV, 1974), *amending* 15 U.S.C. § 45(*l*) (1970).

association members who ratify antitrust violations may become individually liable.[169]

C. *Jurisdiction of the Antitrust Laws Over Restrictions on Prepaid Legal Services*

1. *The Sherman Act*

The Sherman Act takes effect only when "trade or commerce among the several states or with foreign nations"[170] can be shown. This language mirrors that of the commerce clause,[171] and is generally interpreted as incorporating all the power granted by that clause.[172] Jurisdiction under the Sherman Act thus extends to all activities that "substantially affect" interstate commerce.[173]

The *Goldfarb* Court rejected the argument that a title search is wholly intrastate and therefore outside the reach of the Sherman Act.[174] The

169. *See generally* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), *noted in* 1975 UTAH L. REV. 292.

170. 15 U.S.C. §§ 1, 2 (1970). Section 3 is based on congressional power to legislate for the District of Columbia and the territories, and thus does not require a showing of interstate commerce. *See, e.g.*, American Medical Ass'n v. United States, 317 U.S. 519 (1943).

171. "[The Congress shall have power] to regulate commerce with foreign nations, and among the several states . . . ." U.S. CONST. art. I, § 8(8).

172. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) ("Congress intended to strike as broadly as it could in § 1 of the Sherman Act"); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194-95, 201-02 (1975); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 550-54 (1944) ("Language more comprehensive is difficult to conceive"). The commerce requirement of the Sherman Act is discussed in Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236; Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L. REV. 323 (1974).

173. United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 278 (1975); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948); *see* Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85 (1975); United States v. Employing Plasterer's Ass'n, 347 U.S. 186, 189 (1954); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464-65 (1949); Montague & Co. v. Lowry, 193 U.S. 38, 44-46 (1904).

174. The County Bar argued that it was protected by the decision in United States v. Yellow Cab Co., 332 U.S. 218 (1947), which had found a conspiracy to control taxi transporation of passengers to and from Chicago railroad stations (and all other taxi service in Chicago) to be "too unrelated" to interstate commerce. *Id.* at 230. The Court found that the "relationship to interstate transit is only casual and incidental." *Id.* at 231. The *Goldfarb* Court distinguished *Yellow Cab*, saying "[h]ere . . . the legal services are coincidental with interstate real estate transactions in terms of time, and more important, in terms of continuity they are essential." 421 U.S. at 784 n.13. Assuming that the Sherman Act uses all of the commerce power, *see* note 172 *supra*, the

Court first relied on "the substantial volume of commerce involved."[175] "A significant portion" of purchase money loans for Virginia real estate came from outside the state, and "significant amounts" of loans were guaranteed by federal agencies in the District of Columbia.[176] Second, the Court relied on "the inseparability of this particular legal service from the interstate aspects of real estate transactions."[177] No one would lend money secured by real property without some assurance that valid title to the property would be obtained; a title search is essential "in a practical sense" to the interstate loan transaction.[178] Even if the title search were wholly intrastate, it substantially affected interstate commerce, and was thus within the jurisdiction of the Sherman Act.[179]

The test stated by the *Goldfarb* Court is:

> Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes.[180]

The Court warned that some legal services may meet the commerce requirement of the Sherman Act in other ways, but indicated that some activities of a lawyer may be purely intrastate.[181]

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continuing validity of *Yellow Cab* is questionable after more recent interpretations of the breadth of the commerce clause. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). *But cf.* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 198, 202 (1974); Diversified Brokerage Servs., Inc. v. The Greater Des Moines Bd. of Realtors, 521 F.2d 1343, 1346 (8th Cir. 1975) ("the mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act").

175. 421 U.S. at 785.

176. *Id.* at 783. The district court found that about 44 percent of all mortgages under $100,000 were located outside of Virginia. The court also found that in 1971 Fairfax County received about $50,000,000 in home loans guaranteed by the Veterans Administration and $25,000,000 in home mortgages insured by the Department of Housing and Urban Development. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 497 (E.D. Va. 1973).

177. 421 U.S. at 785.

178. *Id.* at 784.

179. *Id.* at 785. *See* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948).

> The source of the restraint may be intrastate . . . the application of the restraint may be intrastate . . . but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels that pinch, it does not matter how local the operation which applies the squeeze.

United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949). *But cf.* note 174 *supra.*

180. 421 U.S. at 785.

181. [T]here may be legal services that involve interstate commerce in other

Applied to prepaid legal services, the *Goldfarb* test is satisfied if the services are "an integral part of an interstate transaction."[182] The "integral part" requirement would be met if, as a practical matter, the transaction would not occur should the legal services not be performed.[183] The interstate element would be met if some, but not all, of the transactions were interstate.[184] Many services provided by prepaid legal service plans would meet this test. For example, one plan includes "real estate matters," which *Goldfarb* shows meet the interstate commerce requirement; "debt collection," which could involve levy on and sale of property in another state; "bankruptcy," "trusteeship," and "probate," which could involve liquidation of property through sale in interstate commerce or continuing the operation of a business engaged in interstate commerce; federal tax matters; and "other civil matters," which could include defense to collection of a debt by an out-of-state plaintiff.[185] In addition, the plan itself would meet the *Goldfarb* standard if offered in more than one state,[186] and its financing could also meet the standard under the reasoning used by the Court.[187] In short, though it may be possible to devise a prepaid legal service plan that does not meet the *Goldfarb* interstate commerce standard such a plan would be extremely limited and almost certainly commercially infeasible.[188]

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fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.

Id.

182. *Id.* Given a large enough membership, substantial effect would not be difficult to show; but the effect on commerce must be demonstrated by evidence. Mere allegations are insufficient. *See* Diversified Brokerage Servs., Inc. v. The Greater Des Moines Bd. of Realtors, 521 F.2d 1343 (8th Cir. 1975); Mortensen v. First Fed. Sav. & Loan Ass'n, Civil No. 1763-73 (D.N.J., Aug. 20, 1975).

183. *See* note 180 *supra* and accompanying text.

184. *See* note 176 *supra* and accompanying text.

185. Franklin County Police and Firefighters Program of Columbus, Ohio, *described in* C. LILLY, *supra* note 99, at 82-83. For details of other plans, see *id.* at 66-185.

186. *Cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); American Medical Ass'n v. United States, 317 U.S. 519 (1943).

187. *See* note 176 *supra* and accompanying text.

188. *See* PREPAID LEGAL SERVICES 152-53 (statement of L. Bernstein). The Employee Retirement Income Security Act of 1974 includes prepaid legal services in plans regulated by the Act under the commerce clause. *See* 29 U.S.C. § 1001(a), 1002(1)(A), 1003(a) (Supp. IV, 1974), *discussed in* notes 268-77 *infra* and accompanying text. *Cf.* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 316 (1967):

> Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of one client may involve legal problems in several states.

Quoted in Canon 3, n.8 ABA CODE.

The Sherman Act also requires the activity restrained or monopolized to be "trade or commerce."[189] The *Goldfarb* Court rejected the argument that since the practice of law is a "learned profession," it is not "trade or commerce," and thus not subject to the Sherman Act.[190] Citing the "heavy presumption against implicit exemptions,"[191] the Court held that "[w]hatever else it may be, the examination of a land title is a service," and sale of services is covered by the Sherman Act.[192] The Court flatly stated that "the nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act."[193]

Although *Goldfarb* conclusively rejected the blanket "learned profession" exemption, a related argument remains open:

> The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.[194]

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189. 15 U.S.C. §§ 1-3 (1970).

190. 421 U.S. at 785-88. The "learned profession" exemption had support in past dicta, *see id.* at 786 n.15 (cases collected), and had been tentatively suggested by some commentators. *See, e.g.*, Coleman, *The Learned Professions*, 33 ABA ANTITRUST L.J. 48 (1967). One state court in a well-reasoned opinion adopted the exemption in interpreting its little Sherman Act on the theory that abuse of minimum fee schedules should be regulated as unprofessional conduct, not as an antitrust violation. Lincoln Rochester Trust Co. v. Freeman, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974). Following the Fourth Circuit's adoption of the exemption in the *Goldfarb* case, 497 F.2d 1, 13-15 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975), several federal decisions applied the exemption, dismissing actions under § 1 of the Sherman Act against professional associations. *E.g.*, Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); Bank Bldg. & Equip. Corp. v. National Council of Architectural Registration Bds., Civil No. 74-896 (D.D.C., filed Jan. 13, 1975).

191. 421 U.S. at 787. *See generally* Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA ANTITRUST SECTION 313, 327-28 (1961).

192. 421 U.S. at 787, *citing* American Medical Ass'n v. United States, 317 U.S. 519 (1943); *see* notes 195-97 *infra* and accompanying text.

193. 421 U.S. at 787.

> In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.

Id. at 788.

194. *Id.* at 788 n.17; *cf.* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975):

> [A] proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . .
>
> . . . Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held

But this analysis is unlikely to prevent application of the Sherman Act to prepaid legal services. In *American Medical Association v. United States*,[195] a closely analogous case dealing with prepaid medical services, the Court found it unnecessary to decide whether the activities of doctors fell within the Sherman Act.[196] Instead, the Court avoided the "learned profession" issue and held that the corporation administering the plan was engaged in a "business or trade" subject to the Act.[197]

2. *Section 7 of the Clayton Act*

Section 7 of the Clayton Act only applies if both the acquiring and the acquired corporation[198] are "engaged in commerce."[199] Although the Act defines "commerce" in the language of the commerce clause,[200] the Supreme Court held in *United States v. American Building Maintenance Industries*:[201]

> the phrase "engaged in commerce" . . . means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power.[202]

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a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Id. at 622, *citing* Meat Cutters Local 189 v. Jewell Tea Co., 381 U.S. 676 (1965). *See* notes 86-96 *supra* and accompanying text.

195. 317 U.S. 519 (1943).

196. *Id.* at 528.

197. Group Health is a membership corporation engaged in business or trade. Its corporate activity is the consummation of the co-operative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With those funds, physicians are employed and hospitalization procured on behalf of members and their dependents. The fact that it is co-operative, and procures service and facilities on behalf of its members only, does not remove its activities from the sphere of business.

Id. (footnote omitted).

198. *See* notes 207-13 *infra* and accompanying text (discussion of the "corporation" requirement).

199. 15 U.S.C. § 18 (1970).

200. *Compare* the Clayton Act: " 'Commerce,' as used herein, means trade or commerce among the several states and with foreign nations . . .," *id.* § 12, *with* U.S. CONST. art. I, § 8(8), *quoted in* note 171 *supra*.

201. 422 U.S. 271 (1975).

202. *Id.* at 283. The Court held that a corporation providing local janitorial services was not "engaged in commerce." *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974); *cf.* FTC v. Bunte Bros., 312 U.S. 349 (1941) (adopting a similar construction of § 5 of the Federal Trade Commission Act).

The Court stated that "simply supplying localized services to a corporation engaged in interstate commerce does not satisfy the 'in commerce' requirement of § 7."[203] The Clayton Act can therefore be applied to a corporation providing legal services only upon a demonstration that the services themselves are "in commerce"[204] or a showing that the organization providing legal services is "in commerce"[205]—a far more difficult requirement than the showing of "substantial effect" required for the Sherman Act. Probably neither the *Goldfarb* title search nor the services provided by a lawyer under a prepaid legal services plan[206] would be found to be "in commerce." Nevertheless, the commerce requirement may be met if the plan itself operates interstate.

In addition, section 7 of the Clayton Act applies only to corporations.[207] The standard partnership law practice therefore would not be covered.[208] Prepaid legal service plans may be set up in corporate form, however, so the Act may apply to them. There are two problem areas. First, no cases have been found applying the Clayton Act to nonprofit corporations. Although it is, in theory, possible to apply the Act[209]—certainly a nonprofit corporation could "substantially lessen competition"[210]—there seems to be no precedent for holding the Act applicable to prepaid legal services in nonprofit corporate form. Second, the most common kind of profitmaking corporations providing legal services will be insurance companies[211] insulated by the McCarran-Ferguson Act[212] from antitrust liability. Nevertheless, a profit corporation providing prepaid services not regulated by state insurance law would fall within the Act.[213]

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203. 422 U.S. at 283.

204. *Cf.* ABA OPINION, *supra* note 188.

205. *Cf.* American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943) (finding a restraint of the "business of group health"), *quoted in* note 197 *supra* and accompanying text.

206. *See* note 185 *supra* and accompanying text.

207. 15 U.S.C. § 18 (1970).

208. *See* United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 278-79 (1975).

209. *Cf.* Nawalanic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 CLEV. ST. L. REV. 97 (1972).

210. For a discussion of "substantially lessen competition," see Standard Oil Co. v. United States, 337 U.S. 293, 297-314 (1949).

211. Under the Chicago Amendments, insurance companies may be the *only* profit corporations that can sponsor closed panel prepaid legal plans. *See* note 36 *supra* and accompanying text.

212. 15 U.S.C. §§ 1011-1015 (1970).

213. [T]he Sherman Act . . . the Clayton Act, and . . . the Federal Trade

Finally, to violate the Clayton Act a merger must tend to decrease competition "in any line of commerce."[214] A "line of commerce" is a "product market" in which competition may be affected.[215] Given the "heavy presumption against implicit exemptions" from the antitrust laws[216] and the provision in the McCarran Act that the Clayton Act applies to unregulated insurance,[217] there is little doubt prepaid legal services constitute a "line of commerce."

3. *Section 5 of the Federal Trade Commission Act*

The 1974 amendments to section 5 of the FTCA broadened its jurisdictional language from "unfair methods of competition *in* commerce"[218] to "unfair methods . . . *in or affecting* commerce."[219] The change was intended to overcome a restrictive jurisdictional reading by the Supreme Court,[220] and apparently makes the FTCA co-extensive with the commerce clause.[221] Thus, the FTC's jurisdiction is at least as broad as that of the Sherman Act.[222] Since the FTC has jurisdiction over "persons, partnerships, or corporations,"[223] it may regulate prepaid legal services regardless of their organizational form.

4. *Summary*

Both the Sherman Act and FTCA apply to bar association restraints on prepaid legal services since prepaid legal services can substantially

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> Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 1012(b).

214. 15 U.S.C. § 18 (1970).

215. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

216. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) *citing* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (applying the Clayton Act to a service industry—banking).

217. *Quoted in* note 213 *supra.*

218. 15 U.S.C. § 45 (1970), *as amended,* 15 U.S.C. § 45 (Supp. IV. 1974) (emphasis added).

219. 15 U.S.C. § 45 (Supp. IV, 1974), *amending* 15 U.S.C. § 45 (1970) (emphasis added).

220. FTC v. Bunte Bros., 312 U.S. 349 (1941).

221. The House Report states:

> [The amendment] will reflect both the structure of the modern American economy and the current Constitutional concept of the proper scope of the Federal Government's authority to regulate the economy.

H.R. REP. No. 1107, 93d Cong., 2d Sess. (1974).

222. *See* notes 170-88 *supra* and accompanying text.

223. 15 U.S.C. § 45(a)(6) (Supp. IV, 1974), *amending* 15 U.S.C. § 45 (1970).

affect interstate commerce. The Clayton Act probably does not apply because it requires providers of prepaid legal services to be engaged directly in interstate commerce. The Clayton Act could apply, however, to a corporation providing prepaid legal services if that corporation operated interstate.

D. *Bar Association Imunity From Antitrust Liability*

Under the old Canons of Ethics,[224] bar association ethics committees issued opinions interpreting the vague language of the Canons. The opinions were given great weight in disciplinary proceedings.[225] Although the Canons have been replaced by the specific Disciplinary Rules of the Code of Professional Responsibility, the power to issue ethical opinions, and presumably their weight in the courts, continues.[226] The *Goldfarb* Court viewed the ethical opinions of the state bar association[227] as damaging evidence of private[228] enforcement of the fee schedule by the bar association defendants:[229]

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224. ABA CANONS OF PROFESSIONAL ETHICS, *reprinted in* V. COUNTRYMAN & T. FINMAN, *supra* note 3, at 885-97.

225. The Canons were interpreted by Formal and Informal Opinions of the ABA Committee on Professional Ethics in answer to questions proposed to it. The ABA interpretations were not binding on the courts, but were very influential in guiding state disciplinary proceedings. *See* Hunter v. Troupe, 315 Ill. 293, 302, 146 N.E. 321, 324 (1924):

> The American Bar Association is not a legislative tribunal, and its canons of ethics are not of binding obligation and are not enforced as such by the courts, although they constitute a safe guide for professional conduct in the cases to which they apply, and an attorney may be disciplined by this court for not observing them.

226. *See* Armstrong, *Ethical Problems in Connection With The Delivery of Legal Services*, 12 SAN DIEGO L. REV. 336, 345-55 (1975).

227. One opinion stated that " 'evidence that an attorney *habitually* charges less than the suggested minimum fee schedule . . . raises a presumption that such lawyer is guilty of misconduct . . . .' " Goldfarb v. Virginia State Bar, 421 U.S. 773, 777-78 (1975) (emphasis original), *quoting* VIRGINIA STATE BAR COMMITTEE ON LEGAL ETHICS, Opinion No. 170, May 28, 1971. *See also* 421 U.S. at 777 n.5, 782-83.

228. 421 U.S. at 791-92 (footnote omitted):

> The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.

229. In *Goldfarb*, the County Bar Association insisted that its fee schedule merely suggested fees and that since the schedule was not mandatory it did not constitute price fixing. The Court disagreed, stating that "[t]he fee schedule was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms . . . ." 421 U.S. at 781. Although the fee

> [T]he State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths.[230]

Thus, if bar associations attempt to prevent development of prepaid legal services through restrictive ethical opinions, they are likely to build an antitrust plaintiff's case for him.[231]

The Code of Professional Responsibility, however, stands in a different position. The Code is enacted by the state by statute or rule of court, and disciplinary action can only result from violation of the specific Disciplinary Rules. Although the Disciplinary Rules may constitute a restraint of trade that would be illegal under the antitrust laws if privately enforced, the restraint can be viewed as the product of enactment of the Code by the state rather than adoption of the Code by the bar association. Enactment of the Code by the state may give antitrust immunity to bar associations under three theories—the state action exemption, the *Noerr-Pennington* doctrine, and the eleventh amendment.

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schedule had never been enforced in formal disciplinary proceedings, *id.* at 776-77, the Court did not consider this fact to be relevant.

230. 421 U.S. at 791 n.21.

231. The validity of an ethical opinion under the antitrust laws may depend upon how closely the opinion follows the Disciplinary Rules of the Code. The ethical opinion quoted in *Goldfarb*, *see* note 227 *supra*, was without support in the Code. The Disciplinary Rules of the Code did not mention *minimum* fees; they provided only that "The fee customarily charged in the locality for similar legal services" was one factor in determining whether a fee was "*clearly excessive.*" DR 2-106(B)(3), 211 Va. 295, 313 (1970) (emphasis added).

The antitrust effect of ethical opinions clarifying ambiguities in the Code may be different. Some Disciplinary Rules are obviously anticompetitive but are undefined in scope. *See* ABA Code DR 2-103(D)(5), *quoted in* note 20 *supra.* Ethical opinions interpreting such rules would perform the useful function of defining activities that are permitted, thus lessening the anticompetitive effect. Such opinions should be sustained. On the other hand, opinions defining an ambiguous but not inherently anticompetitive rule in an anticompetitive fashion should be treated in the same manner as restrictions unsupported by the Code, since the restraint flows from the opinion, not the Code. *See* DR 2-103(D)(4)(e), Chicago Amendments, *quoted in* note 43 *supra,* and notes 39-42 *supra* and accompanying text.

1. *The State Action Exemption*

The plaintiff in *Parker v. Brown*[232] alleged that an agricultural production and price stabilization program instituted by raisin growers pusuant to a California statute[233] would prevent him from marketing his crop; he argued that the program violated sections 1 and 2 of the Sherman Act. The Court held that, assuming the activities shown would violate the Sherman Act if undertaken by private parties, state involvement took the program outside the reach of the antitrust laws.

> [I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.
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> . . . .
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> The state . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[234]

The Court in *Parker*, relying on legislative intent,[235] decided that the Sherman Act does not preempt anticompetitive state action.[236] Yet the

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232. 317 U.S. 341 (1943).

233. Cal. Agric. Prorate Act, Law of June 5, 1933, ch. 754, [1933] Cal. Stats. (now Agric. Producers Mkting. Law, CAL. AGRIC. CODE §§ 59501-60015 (Deering, 1967)). The statute operated as follows: the Governor appointed a commission, the members approved by the senate; the Director of Agriculture was an ex officio member. If ten producers petitioned the Commission for an agricultural production and price stabilization program to be established, and a public hearing were held, the commission would grant the petition

> after making prescribed economic findings . . . showing that . . . a program . . . will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers . . . .

317 U.S. at 346. Then a program committee made up of producers would form a plan. After another public hearing and a finding that the plan was "reasonably calculated to carry out the objectives of the Act," the commission would approve, or modify and approve, the plan. Finally, after approval by 65 percent of the producers and owners of 51 percent of the acreage, the Director would declare the plan instituted. Violation of the plan was a misdemeanor. *Id.* at 346-47.

234. 317 U.S. at 350-51, 352 (citations omitted).

235. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .

> There is no suggestion of a purpose to restrain state action in the Act's legislative history.

Id. at 351. *See* text at note 234 *supra.*

236. *See* 317 U.S. at 344, 350, 352.

Court stated that state action will not immunize private conduct from antitrust liability.

> [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade . . . .[237]

A tension exists in the *Parker* dichotomy between unprotected private action and protected state action, since the *Parker* Court did not specify the amount of state involvement necessary to protect anticompetitive conduct from antitrust liability.[238] The Supreme Court made no at-

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237. *Id.* at 351-52 (citations omitted); *accord,* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951).

238. The dichotomy has been variously stated: "[T]he Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975). "Where a restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the Act can be made out." Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961) (footnote omitted).

The controversy centers on the amount of state regulation necessary to trigger the *Parker* exemption. One view held that "any form of state presence" was enough. *See* New Mexico v. American Petrofina, Inc., 510 F.2d 363 (9th Cir. 1974) *noted in* 1974 UTAH L. REV. 592, 596 and cases cited therein. Thus, if a state agency had jurisdiction over the anticompetitive activity, antitrust immunity was conferred—even if the state had not actively asserted its power. *See* Goldfarb v. Virginia State Bar, 497 F.2d 1, 11 (4th Cir. 1974), *rev'd,* 421 U.S. 773 (1975). In *Goldfarb,* the Fourth Circuit stated that there must be "*active* supervision by *independent* state officials" for *Parker* to apply, *id.* (emphasis original), but concluded that:

> [T]he Virginia court's inaction with regard to specifically approving or disapproving the schedules in question should not be construed as a failure to adequately supervise. . . . [O]ne should not equate silence with abandonment of the duty to supervise. "It is just as sensible to infer that silence means consent, *i.e.* approval." The Virginia court has the authority to regulate and supervise the State Bar; we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia court.

Id. (footnote omitted). Some support for the view that state presence alone suffices can be drawn from the facts of *Parker.* The anticompetitive program was devised by producers, and the commission that approved it was composed of producers (with the exception of the ex officio Director of Agriculture). *See* note 233 *supra.* The state had little to do with the actual restraint. Rigid application of the legislative intent rationale for the *Parker* exemption, *see* note 235 *supra,* could support a conclusion that state jurisdiction and federal antitrust jurisdiction are mutually exclusive. The *Parker* Court stated:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their

tempt to resolve this tension[239] until the *Goldfarb* decision.

The defendants in *Goldfarb* argued that their activities were protected state action under *Parker*. The state supreme court, empowered by statute to promulgate ethical codes,[240] adopted the Code of Professional Responsibility,[241] which referred to fee schedules as "guidance" in

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authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 351.

Commentators uniformly urged a narrow construction of the *Parker* rule. *See, e.g.*, Donnem, *Federal Antitrust Law versus Anticompetitive State Regulation*, 39 ANTITRUST L.J. 950, 957-67 (1970) (anticompetitive action questionable unless (1) valid local reason to limit competition shown; (2) action mandated and limited by statute; (3) no less restrictive alternative present); Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the* Parker v. Brown *Doctrine*, 43 U. CIN. L. REV. 61, 87-92 (1974) (state must mandate anticompetitive action; "immunity should hinge on whether the private party has made the decision to engage in anticompetitive conduct"); Tepley, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272, 298 (1974) (more than mere state presence needed; may not be inconsistent with federal policy; may not approve private restraint or have conspiracy between public official and private party; the action must be regulatory, with specific limit on discretionary power); Note, *State Action Exemption from the Antitrust Laws*, 50 B.U.L. REV. 393, 416 (1970) (mere presence of state is not enough; must weigh whether public or private action; regulation must be in good faith); Note, Parker v. Brown—*Gone to* Hecht: *A New Test for State Action Exemptions*, 24 HASTINGS L.J. 287, 295 (1973) (should use the six point federal action test of Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), for state action); Comment, Whitten v. Paddock: *The Sherman Act and the "Government Action" Immunity Reconsidered*, 71 COLUM. L. REV. 140, 156 (1971) (under "solid policy guidelines" would limit *Parker* to "deliberately regulatory activity"); 26 MERCER L. REV. 995, 1001 (1975); Comment, *Antitrust Immunity—Reevaluation and Synthesis of* Parker v. Brown—*Intent, State Action, Causation*, 19 WAYNE L. REV. 1245, 1263 (1973) (three factors of immune state action: (1) intent to supplant competition; (2) valid state action; (3) not "tainted through intervention of private decision-making"). The state presence test has now been conclusively rejected by the Supreme Court. *See* note 250 *infra* and accompanying text.

239. The Court did cryptically refer to the *Parker* state action antitrust exemption four times. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962) (*Parker* "sustained the validity of mandatory state . . . governmental regulations"); Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 135-36 (1961) ("valid governmental action, as opposed to private action"); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951) (state may not "demand private conduct which the Sherman Act forbids"); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 562 (1944):

> the argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates.

Cf. Rice v. Board of Trade, 331 U.S. 247, 253 n.4 (1947) (since rules of the Board of Trade were not enforced by civil or criminal penalties, "[w]e . . . have no attempt here to endow private groups with law-making functions").

240. VA. CODE ANN. § 54-48(b) (1974 repl. vol.).

241. 211 Va. 295 (1970).

setting fees.[242] The state bar, integrated[243] by order of the state supreme court[244] as authorized by statute,[245] was "a state agency by law."[246] The state bar asserted "that in issuing fee schedules . . . it was merely implementing the fee provisions of the ethical code."[247] The county bar could not claim to be a "state agency," but said "the activities of the State Bar 'prompted' it to issue fee schedules and thus its actions, too, are state action."[248]

In the process of holding that neither defendant was entitled to *Parker* immunity, the Supreme Court clarified the state action exemption through a "threshold inquiry"—"whether the activity is required by the State acting as sovereign."[249] The Court stressed that "anticompetitive activities must be *compelled* by direction of the State acting as a sovereign."[250] Further analysis was unnecessary:

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242. *See* EC 2-18, 211 Va. 295, 302 (1970). The provision was eliminated after the *Goldfarb* litigation commenced. *See* EC 2-18, Houston Amendments.

243. Membership in the state bar association is a prerequisite for the practice of law in states with integrated bars. *See* Glaser, *The Organization of the Integrated Bar* (1960), *in* V. COUNTRYMAN & T. FINMAN, *supra* note 3, at 348. Integration does not infringe the first amendment rights of attorneys, *see* Lathrop v. Donohue, 367 U.S. 820 (1961), and permits a centralized disciplinary structure, thought necessary for effective regulation of the bar. *See* Emslie v. State Bar, 11 Cal. 2d 210, 225, 520 P.2d 991, 999, 113 Cal. Rptr. 175, 183(1974); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 5-6, 24-29 (1970) (the Clark Committee Report).

244. 171 Va. xlvii (1938).

245. VA. CODE ANN. § 54-49 (1974 repl. vol.).

246. Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975). The statute specifically authorized the State Bar "to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court." VA. CODE ANN. § 54-49 (1974 repl. vol.).

247. 421 U.S. at 790.

248. *Id.*

249. *Id.* (emphasis added). The Court cited Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962), a case rejecting a claim of antitrust immunity under the act of state doctrine. *See* note 254 *infra.*

250. 421 U.S. at 791 (emphasis added). The Court stated:

> Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving the regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical code. In our view that is

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules *required* the anticompetitive activities of either respondent.
>
> . . . .
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> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.[251]

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not state action for the Sherman Act purposes. *It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action;* rather, *anticompetitive activities must be compelled by direction of the State acting as a sovereign.*

Id. at 791-92 (emphasis added). The Court implicitly rejected the state presence test. *See* note 238 *supra.*

The compulsion test can be drawn from language in *Parker.*

> The state [creates] the machinery for establishing the prorate program. . . . [And the] state, acting through the Commission . . . adopts the program and enforces it with penal sanctions, in the execution of a governmental policy. . . . The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.
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> . . . .
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> . . . The state . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

317 U.S. at 351-52. Nevertheless, the state in *Parker,* though actively involved, fell short of compelling the specific anticompetitive program; it rather permitted the program to be instituted and provided procedural safeguards and enforcement. The program went through two public hearings before being instituted; the commission, which was appointed by the Governor and approved by the senate had discretion to reject or modify the plan; the commission had to make specific findings regarding the plan's economic impact and whether the plan met the Act's objectives; violation was punishable by fine or imprisonment. *See* note 233 *supra.*

Since *Parker* remains good law, it therefore seems that the state/private action tension will continue—though the area of controversy is restricted to the differences between the *Parker* facts, *supra,* and the *Goldfarb* facts. *See* notes 240-48, 250 *supra* and accompanying text.

251. 421 U.S. at 790-91 (emphasis added) (footnote omitted). The Court cited Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973). In the *Gibson* case, licensed optometrists, not members of the Alabama Optometric Association, were charged by the Association with unprofessional conduct for being employed by corporations. The charge was brought before the state board of optometry which was composed entirely of Association members. The action was challenged under 42 U.S.C. § 1983 (1970) on the ground that the board's pecuniary bias constituted a denial of due process. The district court found an unconstitutional bias, and the Supreme Court affirmed. Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973). The *Goldfarb* citation of *Gibson* suggests that:

> Valid state action or regulation of an industry may include participation even by interested private parties, but such parties must not be those who ultimately decide whether the policies of the federal antitrust laws are to be subordinated to other interests, and particularly to their own direct pecuniary interests.

Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 22, United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974) (citing *Gibson*). Alternatively, constitutional challenge of *Parker* state action is suggested. *See* note 303 *infra* and accompanying text.

Since the State Bar "voluntarily joined in what is essentially a private anticompetitive activity" by issuing ethical opinions threatening disciplinary action if the County Bar's minimum fees were not followed, it could not claim *Parker* immunity.[252]

By the threshold analysis, if the anticompetitive action is not "*compelled*" by statute or court rule, *Parker* does not apply.[253] Since it is only a threshold analysis, *Parker* might not apply even if the action is compelled—but the *Goldfarb* opinion provides no further concrete guidelines.[254]

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252. 421 U.S. at 792. *See* text at note 230 *supra*. *See also* Parker v. Brown, 317 U.S. 341, 351-52 (1943).

253. The *Goldfarb* opinion suggests the activities could have been compelled by being: (1) required by statute; (2) directed by court rule; (3) a means of reaching an anticompetitive end required by court rule; (4) required by ethical opinion approved by the supreme court. *See* 421 U.S. at 790-91. Lower courts have not been consistent in applying the *Goldfarb* standard. *Compare* Duke & Co. v. Foerster, 521 F.2d 1277, 1288 (3d Cir. 1975) *and* Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 159 (D.D.C. 1975) (strict standard), *with* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1133 (5th Cir. 1975) (weaker standard).

254. One possibility is that anticompetitve activity will escape antitrust liability only if, to find liability, the court must hold invalid a formal, binding declaration of state law. In this view the *Parker* rule is not one of exemption but rather nonpreemption. There is some support for this theory in the *Goldfarb* opinion; the Court refers to the "*so-called* state-action *exemption*," 421 U.S. at 788 (emphasis added), and both *Goldfarb* and *Parker* cite Olsen v. Smith, 195 U.S. 332, 344-45 (1904), for the underlying theory. 421 U.S. at 788; 317 U.S. at 352. In *Olsen*, the petitioner had violated a state licensing statute; when sued, he defended by asserting that "the statutes . . . contain provisions . . . repugnant . . . to the laws of Congress forbidding combinations in restraint of trade or commerce." 195 U.S. at 339. The Court concluded that:

> if the State has the power to regulate . . . those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. . . . [T]he remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.

Id. at 345. *Parker* itself was phrased in terms of preemption. *See* 317 U.S. at 344, 350. An excellent analysis of the scope of the *Parker* rule may be found in Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1974). Analogy to four related areas of antitrust law may be helpful.

(1) The "act of state" doctrine. Actions compelled by a foreign government are excluded from antitrust liability. *See, e.g.*, Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 702-08 (1962), *cited in* Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975); 3 DENVER J. INT. L. & POL. 133 (1973).

(2) The limited application of antitrust law to federally regulated monopolies. One case in particular is often cited for the same antitrust rule as *Parker*.

> If the [Agricultural Marketing Agreement] Act and Order [of the Secretary of

The Court emphasized that its opinion was not an attack on legitimate state regulation of the practice of law.

> We recognize that *the States have a compelling interest in the practice of professions* within their boundaries, and that . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the States in reg-

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Agriculture] are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the first market would not violate the Sherman Act . . . .

United States v. Rock Royal Co-Operative Inc., 307 U.S. 533, 560 (1938).

The *Parker* rule can be viewed as simply "eliminat[ing] the preemption effect of the federal antitrust laws on state legislation," and putting the state law on a "parity" with federal legislation. Simmons & Fornaciari, *supra* note 238, at 71. The logical conclusion is that the state action and federal regulation standards of immunity should be the same. *See* Note, Parker v. Brown, *Gone to* Hecht: *A New Test for State Action Exemptions*, *supra* note 238.

Antitrust violations can occur in federally regulated industries despite approval by the regulators if sufficient weight is not given to competition in making the regulatory decision. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964). In addition, the regulations may be "reconciled" with the antitrust laws, with anticompetitive regulation permitted "only to the minimum extent necessary." Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963). *See generally* Schwarzer, *Regulated Industries and the Antitrust Laws—An Overview*, 41 I.C.C. PRAC. J. 543 (1974); Shenefield, *Annual Survey of Antitrust Developments—The Year of the Regulated Industry*, 31 WASH. & LEE L. REV. 1 (1974); 47 TEMP. L.Q. 370 (1974).

(3) Limited application of antitrust law despite possession of a patent. Despite the grant of monopoly rights to patent holders, 35 U.S.C. §§ 101, 102-03, 154, 261 (1970), *see* U.S. CONST. art. I, § 8, a patent cannot be relied upon to immunize a restraint on competition if the holder knows the patent to be invalid. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). By analogy, the bar association should not be able to rely on probably unconstitutional state action, *see* note 303 *infra*, as a defense. *See* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1295 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *But cf.* discussion of *Noerr-Pennington* defense, notes 278-88 *infra* and accompanying text. *See generally* Stedman, *Patents & Antitrust —The Impact of Varying Legal Doctrines*, 1973 UTAH L. REV. 588, 596-617; Symposium, 42 ABA ANTITRUST L.J. 631, 679-80 (1973).

(4) Limited application of the antitrust laws to insurance. The antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by state law . . . ." 15 U.S.C. § 1012(b) (1970) (the McCarran-Ferguson Act). It has been suggested that the McCarran Act and the *Parker* exemption are "coterminous." *See* Simmons & Fornaciari, *supra* note 238, at 92-94. More accurately, the McCarran Act defines the outer limits of *Parker* immunity; the *Parker* rule must be narrower, since it provided no immunity in United States v. South-Eastern Underwriters, 322 U.S. 533 (1944), the case prompting passage of the McCarran Act. *See id.* at 562. *See generally* Note, *The Applicability of Antitrust Laws to the Insurance Industry*, 22 DRAKE L. REV. 810 (1973).

An excellent discussion of the *Parker* rule may be found in Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 10-32, United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974).

> ulating lawyers is especially great. . . . *In holding that certain anti-competitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.*[255]

The *Goldfarb* threshold analysis is a convenient test of bar association immunity from antitrust liability for restraints on prepaid legal services. Acts of the ABA and local bar associations are not "compelled" by the state; they are voluntary organizations, not state agencies. Thus, *Parker* grants them no immunity. By the same reasoning, no acts of a state bar association are protected unless the association is integrated by statute or rule of court.[256] Moreover, *Goldfarb* demonstrates that specific anti-competitive actions of an integrated state bar will not be protected by *Parker* if those actions are not ordered by statute or court. Thus, promulgation of ethical opinions with anticompetitive effects is not protected by *Parker*.[257]

The restrictions contained in the Code of Professional Responsibility require more analysis. Apparently it is not sufficient for the statute or rule of court to adopt by reference "The ABA Code and all future amendments," since that would delegate power to create anticompetitive regulations to a private organization rather than "the State acting as a sovereign."[258] Presumably, it would suffice for the state to adopt an existing version of the Code, assuming its provisions were sufficiently specific to compel the restriction for the *Parker* exemption to apply.

The 1969 Code prohibited participation in prepaid legal services; exceptions were allowed "only . . . to the extent that controlling constitutional interpretation . . . requires."[259] This language is as close to an absolute prohibition as the law would permit; since it is included in a Disciplinary Rule, it is mandatory. Therefore, it may pass the *Goldfarb* threshold.[260]

The Disciplinary Rules of the Houston Amendments are specific and prohibitive,[261] and therefore pass the *Goldfarb* threshold. Anticompeti-

255. 421 U.S. at 792-93 (emphasis added) (citations omitted).

256. *See* note 250 *supra*.

257. *See* 421 U.S. at 791 & n.21. *See also* notes 224-31 *supra* and accompanying text.

258. 421 U.S. at 791. *See* ANTITRUST LAW DEVELOPMENTS 408-09.

259. *See* note 20 *supra* and accompanying text.

260. If the provision were held unconstitutional, *see* note 303 *infra*, *Parker* would probably not apply. *Cf.* patent discussion in note 254 *supra*; preemption discussion in notes 267-77 *infra* and accompanying text.

261. *See* notes 24-30 *supra* and accompanying text.

tive actions based on Ethical Consideration 2-33[262] would not pass the threshold, however, since Ethical Considerations are not mandatory.[263]

The provision of the Chicago Amendments restricting closed panel plans to nonprofit organizations[264] passes the *Goldfarb* threshold. But the provision requiring a closed panel plan to pay outside counsel under certain undefined circumstances[265] does not require an anticompetitive interpretation;[266] thus if a state bar association issued an opinion based on this provision that a closed panel plan must provide a refund to a member whenever he seeks outside counsel, the opinion would not pass the threshold.

Restrictions that pass the *Goldfarb* threshold are subject to further scrutiny,[267] but would probably be granted antitrust immunity as state action. The question is complicated, however, by federal preemption of state laws regulating prepaid legal services.

Section 302(c) of the Taft-Hartley Act,[268] as amended in 1973, makes prepaid legal service plans available as a fringe benefit through collective bargaining.[269] The Pension Reform Act of 1974[270] includes Taft-Hartley legal service plans in the definition of "employee benefit plan,"[271] regulates them,[272] and states that:

> the provisions of this subchapter . . . shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .[273]

" 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law . . . ."[274] This broad definition would include ethical codes adopted by statute or rule of court. Legislative history indicates that the preemption extends to regulation of prepaid

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262. *See* note 102 *supra*.
263. *See* note 18 *supra* and accompanying text.
264. *See* note 36 *supra* and accompanying text.
265. *See* DR-2-103(D)(4)(e), *quoted in* note 43 *supra* and accompanying text.
266. *See* note 42 *supra* and accompanying text.
267. *See* note 254 *supra* and accompanying text.
268. Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c) (1970), *as amended*, (Supp. IV, 1974).
269. *See* 29 U.S.C. § 186(c)(8) (Supp. IV, 1974).
270. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (Supp. IV, 1974).
271. *Id.* § 1002(1), (3).
272. *See id.* §§ 1021-1144.
273. *Id.* § 1144(a) (§ 514 of the Pension Reform Act of 1974).
274. *Id.* § 1144(c)(1).

legal services.[275] Thus, the legislation preempts the Code of Professional Responsibility in regulating prepaid legal service plans "established or maintained by an employer or by an employee organization, or by both,"[276] but has no effect on Code regulation of other prepaid legal service plans.

The Code has no effect when preempted; therefore any attempt to enforce it through bar association disciplinary actions or ethical opinions could not pass the *Goldfarb* threshold because the state could no longer compel the restraint.[277] If the bar chose to attack only plans not covered by the federal legislation, *Parker* may still apply. But since the bar's objections are now primarily centered on closed panel plans and

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275. "All state laws would be preempted except for those covering plans not subject to titles II and III." H.R. REP. No. 533, 93d Cong., 1st Sess. 28 (1973). The debates contain more direct evidence:

> [Because of section 514,] State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized—for example, prepaid legal services programs—whether closed or open panel . . . .

120 CONG. REC. S15,742 (daily ed. Aug. 22, 1974) (remarks of Sen. Williams); "[T]he State, directly or indirectly through the bar, is preempted from regulating the form and content of a legal service plan . . . in the guise of disciplinary or ethical rules or proceedings." 120 CONG. REC. S15,758 (daily ed. Aug. 22, 1974) (remarks of Sen. Javits). Commentators frequently cite Sen. Javits to show legislative intent, *see, e.g.*, Young, *Group Legal Services and Canon II*, 34 MD. L. REV. 541, 559-60 n.83 (1974); Note, *Prepaid Legal Services, Ethical Codes, and the Snares of Antitrust*, *supra note* 4, at 756-57. The bar claims the remark was inserted in the record after the bill passed and should be given no weight. *See* Comment, *The Effect of ERISA on Prepaid Legal Services*, 27 BAYLOR L. REV. 566, 579-80 (1975). The point is at best peripheral; the language of § 514 is clear, *see* text at notes 273-74 *supra*, and debates are of little value in deriving congressional intent, *see* United States v. O'Brien, 391 U.S. 367, 385 (1968). The question is whether the state may prohibit lawyers from participating in a plan specifically authorized by the Act. One court suggests this result:

> the new Federal legal service statute may, perhaps, pre-empt the regulation of union prepaid plans, qua plans, but does not reach the professional licensure and regulation of lawyers, qua lawyers, who would render legal services under the plans.

Feinstein v. Attorney Gen., 36 N.Y.2d 199, 205-06, 326 N.E.2d 288, 292, 366 N.Y.S.2d 613, 618 (1975) (dictum). Nevertheless, a professional regulation making it impossible to establish such plans would accomplish indirectly what § 514 expressly forbids and should be found to be within the intent of that section. Regulations that do not prohibit participation but merely define generally applicable standards of professional conduct would be allowed. The test should be whether the regulation has the effect of regulating the plan instead of the attorney. *See generally* Bowers, *ERISA and its Exceptions*, 27 BAYLOR L. REV. 475 (1975); Comment, *supra*.

276. 29 U.S.C. § 1002(1) (Supp. IV, 1974).

277. *See* note 250 *supra* and accompanying text.

most such plans would be within the federal legislation, the *Parker* exemption may have little practical value.

In summary, the *Parker* state action exemption does not protect the ABA, local bar associations, or nonintegrated state bar associations. Integrated state bar associations are not protected against antitrust liability for restraints contained solely in ethical opinions or based on Ethical Considerations of the Code of Professional Responsibility. Anticompetitive Disciplinary Rules of the Code of Professional Responsibility, if specific, are probably protected by *Parker*, but the practical utility of the exemption has been greatly eroded by preemptive federal legislation.

2. *The* Noerr-Pennington *Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*,[278] the Supreme Court held that collective action by railroads to secure veto of legislation favorable to competing truckers did not violate the Sherman Act, even if the veto created a trade restraint or monopoly. The Court found nothing in the legislative history to indicate that the Act applied to "political activity,"[279] and recognized that application to such activities would raise serious first amendment questions.[280] *United Mine Workers v. Pennington*[281] involved a similar question. The union was accused of conspiring with the owners of large mines to influence the Secretary of Labor to take certain actions that would effectively eliminate competition from small mines. The Court held that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[282] Bar associations may urge that the *Noerr-Pennington* doctrine[283] immunizes the organized bar

278. 365 U.S. 127 (1961).

279. *Id.* at 137.

280. *Id.* at 138.

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510-11 (1972).

281. 381 U.S. 657 (1965).

282. *Id.* at 670.

283. *See* California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972), *noted in* 76 DICK. L. REV. 593 (1972) *and* 26 SW. L.J. 926 (1972); United Mine Workers v. Pennington, 381 U.S. 651 (1965); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See generally* Howe, *The* Noerr-Pennington

from antitrust liability, arguing that in promulgating the Code of Professional Responsibility the ABA drafted a model statute that it and other bar associations then lobbied to secure enaction into law. If the Code had no force or effect until it became law by statute or rule of court this reasoning would be correct. The *Noerr-Pennington* defense should be valid, however, only when the act of a public officer is necessary to complete the anticompetitive action.[284] The Code, even when not adopted, has a status similar to that of the old Canons. It is a statement of policy carrying tremendous influence in the profession; it is interpreted by ethical opinions intended to influence the actions of attorneys; and it carries the implicit threat of professional censure.[285] The Code is far more than a proposed uniform law; it has the immediate effect of a trade organization's private ethical code.[286] Restraints in trade organization codes of ethics have often been found to violate the antitrust laws.[287] Thus, although the *Noerr-Pennington* doctrine protects bar associations lobbying for state adoption of the Code, it does not protect bar associations that adopt the Code as a private standard and attempt to enforce it.[288]

Doctrine and Inroads into it—Recent Supreme Court Decisions and Some Guidelines for Trade Association Activity, 26 MERCER L. REV. 527 (1974); Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From* Noerr-Pennington *to* Trucking Unlimited, 29 WASH. & LEE L. REV. 209 (1972).

284. *Noerr-Pennington* protects efforts to obtain anticompetitive *state* legislative, administrative, or judicial action; private actions having anticompetitive effect without any public action would be separable and therefore not protected. The doctrine is related to the *Parker* state action exemption, *see* notes 232-67 *supra* and accompanying text; *Noerr* protects efforts to obtain the results protected by *Parker*. *Cf.* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 n.17 (1961). *See generally* Oppenheim, *supra* note 283, at 224-31.

285. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 n.21 (1975), *quoted in* text at note 230 *supra*.

286. The analogy to trade associations is developed in *Hearings on the Organized Bar*, *supra* note 6, at 37 (remarks of Sen. Tunney), 100-08 (statement of M. Green).

287. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 11-12 (1945). *See generally* Brebbia, *Joint Legislative Activities and Codes of Ethics*, 19 ANTITRUST BULL. 681 (1974); Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities*, 21 U. CHI. L. REV. 527 (1954).

288. Possible methods of private enforcement include promulgation of ethical opinions to coerce anticompetitive activity, *see* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 n.21 (1975); issuance of formal unauthorized practice of law opinions and sending them to "offenders," *see Minutes of the Northeastern Regional Conference on Unauthorized Practice of Law, reported in* 39 UNAUTHORIZED PRACT. NEWS No. 1, at 8 (1974); expulsion of "offenders" from local bar associations, with resulting loss of prestige and trade, *cf.* Note, *The Role of Prepaid Group Practice in Relieving the Medical Care*

3. *The Eleventh Amendment*

The eleventh amendment states that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State . . . ."[289] State bar associations assert that, as state agencies,[290] this immunizes them from antitrust attack.[291] The *Goldfarb* Court did not reach the question.[292]

The eleventh amendment does not prohibit actions by the United States[293] to enforce the antitrust laws.[294] But it may prohibit suit by any private party.[295] There are two issues. First, it is not clear that a state bar association is "one of the United States" for eleventh amendment purposes. Although the state need not be a named party,[296] not

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Crisis, supra note 97, at 956-57; and local restrictions on advertising, *cf. id.* at 958. *See also* Rayack, *Restrictive Practices of Organized Medicine*, 13 ANTITRUST BULL. 659, 665-68 (1968).

In addition, if a lobbying effort

> ostensibly directed toward influencing governmental action, is a mere *sham* to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . application of the Sherman Act would be justified.

Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961) (emphasis added). Similarly, intentional abuse of judicial or administrative proceedings to harm a competitor will not be protected by *Noerr*. *See* California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 511-16, 518 (1972). Thus, "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." *Id.* at 513. *See* Duke & Co. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975). *See generally* Oppenheim, *supra* note 283, at 215-24.

289. U.S. CONST. amend. XI. *See generally* Edelman v. Jordan, 415 U.S. 651 (1974), *noted in* 88 HARV. L. REV. 243 (1974); C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1 (1967); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

290. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 789-90 (1975).

291. *Id.* at 792 n.22.

292. *Id.*

293. Edelman v. Jordan, 415 U.S. 651, 669 (1974); *see* United States v. Texas, 143 U.S. 621, 641-46 (1892).

294. *See* United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974).

295. Although the amendment does not expressly prohibit suits against a state by citizens of that state, such suits are excluded by judicial interpretations. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Hans v. Louisiana, 134 U.S. 1, 10-21 (1890).

296. Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462-64 (1945).

all "state action" is protected by the amendment.[297] The test is that when monetary damages "will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action"[298] the eleventh amendment applies. A state bar financed by individual dues may not be covered, since damages would not have to be paid from the state's treasury.[299]

Second, if the state bar threatened enforcement of restraints that violate federal constitutional[300] or statutory law,[301] the eleventh amendment would prohibit only monetary damages. Injunctions, prospectively applied, would be allowed.[302]

Where the eleventh amendment applies, it gives greater protection against monetary damages than does the *Parker* state action exemption; the action contested, if lawful, may be totally discretionary—it need not be compelled for immunity to result.

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297. *E.g.*:

> while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment.

Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974). *See generally* Jaffe, *supra* note 289.

298. Edelman v. Jordan, 415 U.S. 651, 668 (1974); *see id.* at 663; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 563 (1945).

299. The issue becomes more complex when dues are required by statute or supreme court rule.

300. The possible constitutional arguments relating to restrictions on prepaid legal services are discussed in note 303 *infra*.

301. Federal statutory preemption is discussed in notes 168-76 *supra* and accompanying text.

302. In *Ex parte* Young, 209 U.S. 123 (1908), the Court upheld an injunction issued by a federal court that restrained the Attorney General of Minnesota from enforcing a state statute alleged to be unconstitutional. The Court reasoned that since an unconstitutional statute has no effect, any action to enforce it would be private action not protected by the eleventh amendment. *Id.* at 155-60, 167-68.

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official. . . . If the act which the Attorney General seeks to enforce be a violation of the Federal Constitution, the officer . . . is . . . stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 159-60. *See* Edelman v. Jordan, 415 U.S. 651, 663-68 (1974); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 303-06 (1952). Since a state law preempted by federal legislation is similarly void as violating the supremacy clause, U.S. CONST. art. VI (2), action against the state officer is similarly permitted. "The State cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States." *Ex parte* Young, *supra*, at 167. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 868 (1824); *cf.* Edelman v. Jordan, *supra* at 654.

4. *A State/Private Action Dilemma*

The common thread running through the *Parker* and *Noerr-Pennington* doctrines and the eleventh amendment is that anticompetitive activities may be immune from antitrust liability if they are state action. But if they are state action they are subject to constitutional challenge.[303]

303. Four constitutional theories may apply. First, the Supreme Court has recognized a right under the first amendment for groups to sponsor prepaid plans.

> [W]e 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 salary basis to assist its members in the assertion of their legal rights.

UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 221-22 (1967).

> *[T]he principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action. . . .* The common thread running through our decisions . . . is that *collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. . . .* [T]hat 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.

United Transp. Union v. State Bar, 401 U.S. 576, 585-86 (1971) (emphasis added). *Accord*, Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 7 (1964); NAACP v. Button, 371 U.S. 415, 442 (1963). *See generally* Gilmore, *The Organized Bar and Prepaid Legal Services*, 21 WAYNE L. REV. 213 (1975); Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966 (1967); Comment, *Group Legal Services: From Houston to Chicago*, 79 DICK. L. REV. 621 (1975). Although the right belongs to the group, not the attorney, consumer groups could challenge bar restrictions on attorney participation in prepaid plans under a theory of unconstitutional overbreadth, *see* United States v. Robel, 389 U.S. 258, 265-66 (1967). The 1969 Code is also susceptible to attack on grounds of first and fourteenth amendment vagueness, *see* Smith v. Goguen, 415 U.S. 566, 572-76 (1974). *Cf.* Feinstein v. Attorney Gen., 36 N.Y.2d 199, 205, 326 N.E.2d 288, 291-92, 366 N.Y.S.2d 613, 618 (1975); *In re* Thom, 33 N.Y.2d 609, 613-15, 614 n.3, 301 N.E.2d 542, 544-47, 545 n.3, 347 N.Y.S.2d 571, 574-77, 575 n.3 (1973). In addition, attorneys may have standing to assert the rights of consumers. *See* Freeman & Bass, P.A. v. Commission of Invesigation, 359 F. Supp. 1053, 1059 (D.N.J.), *rev'd on the merits*, 486 F.2d 176 (3d Cir. 1973); *cf.* Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 906 (1975). But the rule of Younger v. Harris, 401 U.S. 37 (1971), will probably prevent federal interference with an ongoing state disciplinary proceeding. *See* American Civil Liberties Union v. Bozardt, No. 75-1335 (4th Cir., Mar. 8, 1976). The Supreme Court has stated that "the States have a compelling interest in the practice of professions within their boundaries," Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975); thus, regulation of the bar "to protect the public health, safety, and other valid interests," *id.*, would be constitutional if drawn with sufficiently narrow specificity.

Second, consumers may challenge advertising restrictions by asserting a first amendment "right to know" of essential services. *See* Terry v. State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975); Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974), aff'd, 44 U.S.L.W. 4686 (U.S. May 25, 1976), *noted in* 23 U. KAN. L. REV. 289 (1975); *cf.* Note, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A.L. REV. 483, 503-15 (1974).

Third, the attorney may argue that disciplinary proceedings are not impartial, and

Thus, plaintiffs attacking ethical restraints generally plead both antitrust and constitutional violations,[304] hoping that the restraints will be held illegal as either private or state action.

IV. CONCLUSION

This Note has, of necessity, been speculative. Nevertheless, several conclusions regarding the ethical restrictions on prepaid legal services are permissible. First, the anticompetitive provisions of the 1969 Code and Houston Amendments would probably violate the antitrust laws unless exempt from liability—and no exemption is available to the ABA or local bar associations. Second, state bar associations have some protection under the *Parker* state action exemption, but preemption by federal law makes that defense unreliable. By a strict antitrust analysis, then, it would be advisable for the 1969 Code and Houston Amendment restrictions on prepaid legal services to be abandoned. Moreover, legitimate ethical concerns with solicitation, interposition of lay intermediaries, integrity, and competence may be enforced on a case-by-case

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therefore violate due process because the hearing officials have a financial interest in the outcome. Hearing officials will generally be attorneys engaged in traditional forms of the practice of law; elimination of the competitive threat of prepaid legal services would be in their financial interest. *See* Gibson v. Berryhill, 411 U.S. 564 (1973). Due process must be afforded in disciplinary proceedings. *See, e.g., In re* Ruffalo, 390 U.S. 544 (1968); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). The financial interest theory, however, is limited by the necessity to have qualified individuals on the disciplinary panel. *See* Berger v. Board of Psychologist Examiners, 521 F.2d 1056, 1064 n.12 (D.C .Cir. 1975).

Finally, discriminatory restrictions may be challenged as a denial of equal protection. *Cf.* Silverman v. Browning, 359 F. Supp. 173, 177-80 (D. Conn. 1972), *aff'd*, 411 U.S. 941 (1973).

A consumer group is challenging the constitutionality of DR 2-101(A)(6), ABA CODE, which prohibits lawyers from allowing their names to be published in law lists not certified as "reputable." Consumers Union of the United States, Inc. v. American Bar Ass'n, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 703, at A-9 (Mar. 4, 1975). A similar action has been filed in the Northern District of California. *See* 2 ALTERNATIVES: LEGAL SERVICES & THE PUBLIC No. 6, at 2 (Dec. 1975). The law list litigation may be mooted by 1976 amendments to the Code. *See* note 306 *infra*.

304. *See* Person v. Association of the Bar, Civil No. 75 C 1473 (E.D.N.Y., filed Sept. 18, 1975) (fee splitting), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 731, at A-6 (Sept. 23, 1975); Person v. Association of the Bar, Civil No. 75 C 987 (E.D.N.Y., filed June 23, 1975) (advertising fees or specialties), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 720, at A-8 (July 1, 1975); Prelaw Society v. American Bar Ass'n, Civil No. 75-009 (M.D. Tenn., filed Jan. 10, 1975) (Houston Amendments) (dismissed pursuant to agreement of the parties Mar. 13, 1975). *Cf.* Sokol v. University Hosp., Inc., 402 F. Supp. 1029 (D. Mass. 1975) (restriction on practice of cardiac surgery).

basis under the rules specifically governing those concerns. The standard suggested by Professor Sutton, Reporter of the ABA Committee on Reevaluation of Legal Ethics, should avoid antitrust problems while maintaining necessary regulation of the bar:

> The rule[s] [governing prepaid legal services] are unduly restrictive if they limit use of such plans more than is necessary in order to assure that lawyers do not abuse clients or the public.[305]

The Chicago Amendments, unless restrictively interpreted, are close to Professor Sutton's standard; they pose severe antitrust problems only in the prohibition of closed panel plans sponsored by profitmaking organizations and in the regulation of advertising. Some advertising restrictions were relaxed in 1976 by further amendments to the Code,[306] but the amendments will not greatly affect prepaid legal services.[307]

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305. *Hearings on the Organized Bar, supra* note 6, at 36. *Cf.* American Medical Ass'n v. United States, 317 U.S. 519, 533 (1943).

306. As amended, the Code now permits "a lawyer or law firm" to have:

> *A listing in a reputable law list,* legal directory, *a directory published by a state, county or local bar association, or the classified section of telephone company directories* giving brief biographical and other informative data. *A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list or any directory is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following:* name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates, a statement that practice is limited to one or more fields of law, or *a statement that the lawyer or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject and in accordance with rules prescribed by that authority;* date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented; *whether credit cards or other credit arrangements are accepted;* office and other hours of availability; a *statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject.*

DR 2-102(A)(6), as approved by the House of Delegates, ABA, Feb. 17, 1976 [hereinafter cited as Philadelphia Amendments]. *See* BNA ANTITRUST & TRADE REG. REP. No. 752, at A-1 (Feb. 24, 1976).

307. The Philadelphia Amendments apply only to advertising by "a lawyer or a law firm." *See* note 306 *supra.* Promotion of prepaid legal services is regulated by other

Current litigation should define the permissible range of advertising regulation by professional associations.[308] The need for litigation would be eliminated, however, by adoption of a proposal of the ABA Standing Committee on Ethics and Professional Responsibility that would permit any advertising that did not amount to "a false, fraudulent, misleading, deceptive or unfair statement or claim."[309]

There are antitrust problems in promoting prepaid legal services as well as in restricting them. Bar-sponsored plans large enough to stifle competition can be challenged under the Clayton Act and FTCA; therefore it may be advisable, if such plans are desired, for the bar to avoid control of them. Such plans, if sponsored by insurance companies, should be exempt from antitrust liability under the McCarran Act.[310] Price-fixing mechanisms incorporated in plans can also violate the antitrust laws. Thus, uniform benefit schedules should be avoided, but relative value schedules ought to be permissible.[311]

The bar should easily be able to live within the boundaries of the antitrust laws. If, however, the changes necessary to avoid liability are

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rules which were not amended. *See* DR 2-101(B), Chicago Amendments, *quoted in* note 38 *supra*; DR 2-103, Chicago Amendments, *quoted in* note 43 *supra*. The problems with those rules therefore continue. *See* notes 129-41 *supra* and accompanying text.

Even as applied to lawyer's advertising, the Philadelphia Amendments are unlikely to satisfy antitrust plaintiffs. Under the Amendments, the bar controls all methods of advertising except classified ads in the yellow pages of telephone directories. Telephone companies do not accept price advertising in their directories. Thus, despite authorization of price advertising by the Amendments, it is as a practical matter unlikely to occur. *See* Wall Street Journal, Feb. 18, 1976, at 6, col. 4; BNA ANTITRUST & TRADE REG. REP. No. 752, at A-1, A-2 (Feb. 24, 1976).

308. *In re* American Medical Ass'n, No. 9064 (F.T.C., filed Dec. 22, 1975), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 744, at AA-1 (Dec. 23, 1975); United States v. American Pharmaceutical Ass'n, Civil No. G 75-558-CA5 (W.D. Mich., filed Nov. 24, 1975), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 741, at A-1 (Dec. 2, 1975).

309. ABA Press Release No. 120575 (Dec. 6, 1975).

310. *See* note 213 *supra*. The Arizona State Bar plans to follow this route. *See* PREPAID LEGAL SERVICES 18 (statement of G. Randolf). *But cf.* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(b)(2) (Supp. IV, 1974), which provides that although insurance laws are not preempted by the Act, an ERISA plan or trust shall not

> be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Id. § 1144(b)(2)(B).

311. *But see* United States v. American Soc'y of Anesthesiologists, Civil No. 75-4640 (S.D.N.Y., filed Sept. 22, 1975), *discussed in* BNA ANTITRUST & TRADE REG. REP. No. 732, at A-16 (Sept. 30, 1975).

found too arduous, the bar should at the minimum assure that all anticompetitive restrictions are compelled by the state,[312] and preferably seek a federal statutory exemption from application of the antitrust laws. Continued pursuit of unprotected anticompetitive activity can only result in litigation damaging to the image of the bar and a probable finding of antitrust liability.

312. *See* Fisher & Gailey, *supra* note 4, at 466-68.