



1974

Fee Schedules and Prepaid Legal Services

Charles McC. Mathias Jr.
Former U.S. Senator, Maryland

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Mathias, Charles McC. Jr. (1974) "Fee Schedules and Prepaid Legal Services," *University of Baltimore Law Review*: Vol. 4: Iss. 1, Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol4/iss1/5>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

FEE SCHEDULES AND PREPAID LEGAL SERVICES

Charles M^cC. Mathias, Jr. †

The Subcommittee on Representation of Citizens' Interests of the Senate Committee on the Judiciary was established in the 93rd Congress to study the citizens' access to legal services. The Subcommittee, of which Senator Mathias is a member, has focused its attention on two issues: the effect of fee schedules on legal representation and the desirability of prepaid legal service plans. Senator Mathias' comment reviews the testimony before the Subcommittee on these two recurring topics.

LEGAL FEES

The inhibiting effect of the cost of legal services is most acute among the middle-income group. Although these individuals are continually involved in home buying and repairs, automobile purchases and repairs, and the purchase of other consumer goods and services, the cost of legal representation frequently outweighs the value of redress when a conflict arises in one of these areas. Upper-income individuals can afford to retain counsel and there are various government and private plans to provide legal services to the poor. Thus, the image of attorneys as professional problem solvers is tarnished by the prerequisite of large fees since the notion that anyone is entitled to legal services is somewhat idealistic.¹ The factor which obviously has the greatest influence on legal fees is the use of minimum fee schedules which are established by state and local bar associations. Arguments for the retention of such schedules have been summarized as follows:

1. To provide the proper tools and a satisfactory standard of living for lawyers,
2. To establish uniformity in order to prevent "shopping" or price competition,
3. To assist the public in determining what is a reasonable fee,
4. To assist the judiciary in determining what is a reasonable fee,
5. To assist lawyers and particularly young practitioners to determine the value of their services,

† B.A., 1944, Haverford College; L.L.B., 1949, University of Maryland; U. S. Senate (R., Md.).

1. Testimony of Professor Donald R. Rothschild, Consumer Protection Center of George Washington University *Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as LEGAL FEES HEARINGS].

6. To provide for differences in competency among attorneys by fixing a fee for reasonable competency in the performance of designated services.²

The critical response to these considerations is the questionable reasonableness and utility of minimum fee schedules, and the possibility that such standardization constitutes price-fixing.³ The effect is the consumer's deprivation "... of a choice based at least in part upon the price of services he must purchase," and to deny the right of the practitioner "... to determine on an individual basis his charge for services, reflecting his own costs and abilities."⁴ This result conflicts with the goals of the Sherman Antitrust Act by enhancing prices and limiting individual competitive freedom.⁵

The adverse effect of minimum fee schedules on access to legal services was also emphasized by Mr. Lewis H. Goldfarb in his testimony before the Subcommittee: "by setting minimum fees to be charged for a variety of legal services, the Bar has decided that such services shall not be available to those who cannot afford those fees."⁶ Mr. Goldfarb was the plaintiff in *Goldfarb v. Virginia State Bar*,⁷ a suit against the Virginia State Bar, which is an integrated bar, and the Fairfax County Bar Association, which is a voluntary association, alleging that the County Bar Association's minimum fee schedule, the consistent violation of which could subject an attorney to disciplinary measures initiated by the State Bar, constituted a restraint of trade in violation of sec. 1 of the Sherman Antitrust Act.⁸ The District Court held that the County Bar Association's minimum fee schedule was a form of price-fixing, which is a *per se* violation of the Sherman Act, and that this practice did affect interstate commerce within the meaning of the Act.⁹ The court also rejected the contentions that the legal profession is exempt from the Sherman Act as a "learned profession" and that the County Bar Association conduct is state action and thus exempt under the doctrine of *Parker v. Brown*.¹⁰ The court did hold that in its minor role in this matter the Virginia State Bar was engaged in state action and was, therefore, not subject to the Sherman Act under the *Parker* doctrine.

On appeal the court affirmed the lower court's holding with respect

2. Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655, 656 (1971).

3. *Id.* at 659.

4. Testimony of Deputy Assistant Attorney General Bruce B. Wilson, LEGAL FEES HEARINGS 166.

5. *Id.*

6. Testimony of Lewis H. Goldfarb, LEGAL FEES HEARINGS 84-85.

7. 355 F. Supp. 491 (E.D. Va. 1973), *aff'd in part, rev'd in part*, 497 F.2d 1 (4th Cir. 1974).

8. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1970).

9. *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491 (E.D. Va. 1973).

10. 317 U.S. 341 (1972). The *Parker* exemption from the Sherman Act is that the Act restrains only actions of private persons and not state action. This exemption applies equally to both a state's judicial actions and its legislative actions. *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 5 (4th Cir. 1974).

to the Virginia State Bar, but reversed with respect to the Fairfax County Bar Association on the grounds that the legal profession is exempt from the Sherman Act as a learned profession, to the extent that the effect of the restraint is on attorneys themselves, and that the Association's activities did not have a direct and substantial effect upon interstate commerce as required by the Act.¹¹ Notwithstanding the Court of Appeals decision in *Goldfarb* on May 8, 1974, on the following day, the Department of Justice filed suit against the Oregon State Bar charging that its fee schedules are restraints of trade in violation of the Sherman Act.¹² There remains, then, some uncertainty as to the validity of minimum fee schedules under the Sherman Act.

The wisdom of using the antitrust approach, which equates professional services with all other commercial products, was criticized in testimony before the Subcommittee as not being in the public interest. It was pointed out that there could be no regulation of the quality of legal services, that the consumer would accept inferior service for a low price despite the legal consequences, and that commercial advertising and solicitation would increase as a result of more intense competition.¹³ It is suggested that the ideal of maximum availability of legal services at the lowest possible price, yet preserving a high quality of service, be sought through the continuation of free representation for the poor and the implementation of other programs for the middle-income group. These include no-fault insurance, court awards of an attorney's fees in successful class actions, private arrangements for group legal services plans, and prepaid legal insurance programs.¹⁴

Another solution presented to the Subcommittee is "fee-shifting" in public interest law suits, the practice of awarding attorneys' fees to the successful plaintiff in such litigation. The general rule forbids an award of attorneys' fees to the prevailing party, and at the federal level there is a statutory prohibition on the award of attorneys' fees against the federal government.¹⁵ There are, however, various statutory exceptions at the federal level.¹⁶ Moreover, it has been held that even in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the

11. 497 F.2d 1 (4th Cir. 1974).

12. *United States v. Oregon State Bar*, No. 74-362 (D. Ore. 1974).

13. Testimony of John M. Ferren, *LEGAL FEES HEARINGS* 151-52.

14. *Id.*

15. 28 U.S.C. § 2412 (1970).

16. See, e.g., Packers and Stockyards Act, 7 U.S.C. § 210(f) (1970); Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) (1970); Clayton Act, 15 U.S.C. § 15 (1970); Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act, 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Copyright Act, 17 U.S.C. § 116 (1970); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Patent Act, 35 U.S.C. § 285 (1970); Serviceman's Readjustment Act, 38 U.S.C. § 1822(b) (1970); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000c-5(k) (1970); Civil Rights Act of 1968, 42 U.S.C. § 3612(c); Railway Labor Act, 45 U.S.C. § 153(p) (1970); Merchant Marine Act, 46 U.S.C. § 1227 (1970); Communications Act of 1934, 47 U.S.C. § 206 (1970); Interstate Commerce Act, 49 U.S.C. §§ 8, 16(2), 908(b) (1970).

interests of justice so require.¹⁷ The type of litigation which is most appropriate for the award of attorneys' fees is in "private attorney general" suits.¹⁸ Such litigation involves the private citizen's enforcement of a strong congressional policy the result of which benefits a large class of people.¹⁹ An example of the private enforcement of important public policies is an action under the Civil Rights Act of 1964²⁰ which, through its statutory provision for the award of attorneys' fees, encourages an injured party to seek judicial relief.

PREPAID LEGAL SERVICES PLANS

Prepaid legal service has been defined as "any system by which the recipient of legal services, or someone on his behalf, pays for legal services in whole or in part, by means of periodic payments rather than on a 'fee for service' basis (i.e., fee based on the nature or quantity of services performed on the results obtained)."²¹ The concept of prepaid legal services is generally associated with the idea of providing legal services to persons who are members of a particular group, such as a labor union. In a series of decisions the Supreme Court has held that the First Amendment's guarantees of free expression and association protect groups which provide or recommend legal representation for their members or others.²² Group legal services, it is argued, would greatly ease the problem of access to legal representation.

One of the continuing controversies in the discussion of prepaid, group legal services plans centers on whether the participating members should have a free choice of any attorney, called an "open panel" plan, or whether the choice should be confined to attorneys selected by the group, called a "closed panel" plan. This controversy was reflected in the amendment of the Taft-Hartley Act which permits employer contributions to union trust funds for the support of legal services.²³ As enacted, employees may negotiate for employer contributions to either open or closed panels. The controversy was also apparent in the revision of the *Code of Professional Responsibility* at the American Bar Association's 1974 mid-winter meeting in Houston. The revised disciplinary rules draw a distinction between various organizations, including bar associations, with open panel plans, which are deemed "qualified orga-

17. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); see, e.g., *Mills v. Electric Auto-lite*, 396 U.S. 375 (1970); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1973).

18. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 (N.D. Cal. 1972).

19. *Id.*

20. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

21. PLI, *PREPAID LEGAL PLANS* 9 (1973).

22. *NAACP v. Button*, 371 U.S. 415 (1963); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1968).

23. Act of Aug. 15, 1973. Pub. L. No. 93-95, §§ 1, 87, Stat. 314 *amending* 29 U.S.C. § 186(c) (1970).

nizations," and other organizations with closed panel plans, which are not "qualified organizations." The new rules provide that such an unqualified organization must be non-profit, that it not be primarily engaged in providing legal services, that its legal services operation must be only incidental to its primary purpose and non-profit, that members be permitted to opt out and be reimbursed, and that it file various documents, including financial statements, with state disciplinary authorities.²⁴ A new ethical consideration provides:

An attorney interested in maintaining the noble 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.²⁵

The amendments to the *Code of Professional Responsibility* have been attacked as discriminatory in that open plans would be virtually free of restrictions while closed panel plans would be subject to stringent regulation.²⁶ It has also been suggested that the new provisions may be unconstitutional as unduly restrictive of First Amendment rights of expression and association,²⁷ and may, in the different treatment of open and closed panels, run afoul of the antitrust laws.²⁸ The amendments were defended by Cullen Smith and Frederick G. Fisher, chairman and chairman-elect, respectively, of the ABA's General Practice Section. Their statement argued that restrictions concerning the non-profit nature of the organization and the incidental nature of its legal services operation were necessary to prevent profit-making organizations and private law firms from engaging in the undesirable practices of advertising and soliciting business and that reimbursement for members opting out was necessary to provide real choice in the selection of counsel. The requirement that organization papers and financial statements be filed was defended as necessary to assure that legal services do not result in commercial profit and that other ethical standards are met. With respect to the application of the new provisions to closed panel plans of consumer organizations and labor unions, the statement said:

Consumer organizations and labor unions should have no trouble in qualifying their "closed" panel plans for legal services

24. ABA, CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5)(a).

25. *Id.*, EC 2-33.

26. Testimony of Robert J. Connerton, General Counsel, Laborers' International Union of North America, *Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong. 2d Sess. (1974) [hereinafter cited as PREPAID LEGAL SERVICES HEARINGS].

27. Testimony of F. William McCalpin, Special Committee on Prepaid Legal Services, ABA, PREPAID LEGAL SERVICES HEARINGS, May 14, 1974.

28. Testimony of Bruce B. Wilson, Deputy Assistant Attorney General, PREPAID LEGAL SERVICES HEARINGS, May 14, 1974.

under the amendments. They both are non-profit, have broad social objectives and can ethically provide their members with a wide range of legal services. It seems convincing to us that no group offering legal services to its members motivated by their social improvement will find disclosure of its financial and organizational arrangements embarrassing. We are satisfied that the requirement of some reimbursement to members of "closed" panels who feel the need to consult a private practitioner can only increase the availability of legal services and reduce their cost.²⁹

While the general controversy over closed and open panels will continue for some time, it is expected that the legal issues, such as constitutionality, raised by state and local bar association adoption of the new provisions of the *Code of Professional Responsibility* will be subject to court challenge and will be resolved ultimately.

CONCLUSION

While much of the Subcommittee's work has been concerned with a study of legal fees and prepaid legal services, other facets of the problems of access to legal services and effective representation have been explored. The Subcommittee has already held hearings on the organization of the bar, and will include in its investigation such matters as advertising and solicitation, legal education and admission to practice and the use of paralegal personnel. However, the basic concern in this work remains the problem of access to legal services and the various alternatives which might overcome the economic barriers of obtaining legal redress.

29. Statement by Cullen Smith, Chairman of the ABA General Practice Section and Frederick G. Fisher, Chairman-elect of the ABA General Practice Section, PREPAID LEGAL SERVICES HEARINGS, May 14, 1974.

*The Security Title
Guarantee Corporation
of Baltimore*



TITLE INSURANCE

Serving Maryland . . . New Jersey . . .
Delaware . . . Dist. of Col. . . . Virginia
South Carolina . . . Georgia . . . Alabama
Mississippi . . . Louisiana and Tennessee

**ALSO . . . TWO COMPLETE
JUDGMENT DEPARTMENTS:
BALTIMORE CITY AND
BALTIMORE COUNTY**



**SIX SOUTH CALVERT • BALTIMORE • 727-4456
19 WEST PENNSYLVANIA AVE. • TOWSON • 823-5485**

William C. Rogers, Jr.
President

John Paul Rogers
Senior Vice-President

UNIVERSITY OF BALTIMORE

LAW REVIEW

VOLUME FOUR

FALL 1974

NUMBER ONE

EDITORIAL BOARD

Editor in Chief

RIGNAL W. BALDWIN

Executive Editor

JUDITH D. O'NEILL

Articles Editor

RONALD R. JEWELL

Research Editor

JON W. BRASSEL

Notes & Comments Editors

STEVEN AARON ALLEN

JOSEPH PERSICO

Recent Developments Editors

STEPHEN M. HEARNE

RONALD N. CARROLL

Book Reviews Editor

RICHARD S. HAYNES

Business Editor

MICHAEL H. DAVIS

STAFF

BARRY GENKIN

JANA H. GUY

DAVID HARVIS

JEFFREY H. LEVI

LUCY LOUX

BARBARA MELLO

LAWRENCE DANIEL O'NEILL

MICHAEL D. STEINHARDT

JEFFREY M. VOLUCK

BYRON WARNKEN

SUSAN WATSON

MICHAEL L. WILSMAN

GREG WILLIAMS

LESLIE WINNER

PROFESSOR EUGENE J. DAVIDSON, *Faculty Advisor*
PHILIP G. LAMBERT, EZRA Y. SIFF, *Associate Faculty Advisors*

The University of Baltimore is a non-sectarian, non-profit state institution of higher education, open to qualified men and women without regard to race, religion, or national origin. The University consists of (1) the College of Liberal Arts, which awards the Bachelor of Arts and the Bachelor of Science degrees, (2) the School of Business, which awards the Bachelor of Science and the Master of Business Administration degrees, and (3) the School of Law, which awards the Juris Doctor degree. The University's classroom, library, social, and administrative buildings are located in mid-town Baltimore. Athletic facilities are located in the Mount Washington section of Baltimore. The University has no dormitories, but out-of-town students are assisted by the Dean of Students in finding suitable living quarters.

The School of Law was first opened with the founding of the University of Baltimore in 1925. The Mount Vernon School of Law of Eastern College was established in 1935. Effective September 1, 1970, the Mount Vernon School of Law was merged with the University of Baltimore School of Law.

The School has both a day and evening division. The day division offers a full-time, three-year program, leading to the Juris Doctor degree upon satisfactory completion of 84 semester hours of work. The evening division has a four-year Juris Doctor degree program requiring satisfactory completion of 80 semester hours. The normal evening program is 10 hours of class time each week, meeting on three nights.

The University is regionally accredited by the Middle States Association of Colleges and Secondary Schools. The School of Law is on the list of law schools approved by the American Bar Association.

SCHOOL OF LAW

Administrative Officers

H. Mebane Turner, President, University of Baltimore, B.S., B.D., M.A.
Joseph Curtis, Dean, B.S., LL.B., LL.M.
Richard A. Buddeke, Associate Dean, A.B., J.D., LL.M.
Carla Stone Witzel, Law Librarian, A.B., M.L.S.
Emily R. Greenberg, Assistant Law Librarian, B.A., M.A., M.L.S.
William I. Weston, Director of Law Placement and Law Lecturer, A.B., J.D.
Andrew A. Goletz, Director of Law Admissions, B.A., J.D.
Myron L. Steckman, Assistant Registrar for Law

Faculty

Professor Herbert Nelson Bernhardt, B.S., LL.B., LL.M.
Professor Samuel Cooper, B.S., LL.B., J.S.D.
Associate Professor Minor B. Crager, B.A., J.D.
Professor Harold D. Cunningham, Jr., B.A., J.D., B.C.L., LL.M.
Professor Eugene J. Davidson, B.A., J.D.
Stephen A.G. Davison, Instructor, B.S., J.D.
Professor A. Risley Ensor, A.B., J.D.
Philip G. Lambert, Instructor, B.A., J.D.
Associate Professor Herman Lieberman, M.S., B.S., M.S., J.D.
Associate Professor Robert W. McMillan, A.B., M.B.A., LL.B., LL.M., M.P.L., J.S.D.
Associate Professor Noor Mohammad, B.Com., M.A., LL.B., LL.M., S.J.D.
Professor Walter A. Rafalko, B.C.S., LL.B., LL.M., J.D.
Assistant Professor Charles A. Rees, B.S., M.L.A., J.D.
Professor Royal G. Shannonhouse, III, B.A., J.D.
Ezra Y. Siff, Instructor, M.E., J.D.
Joseph F. Smith, Instructor, B.A., J.D.
Professor Malcolm F. Steele, A.B., LL.B., D.S.L.

Lecturers

Paul A. Dorf, LL.B., J.D.	Lewis J. Rosenthal, B.B.A., LL.B.
Richard D. Gelfman, B.S., J.D.	Alan R. Sachs, A.B., LL.B.
L. Franklin Gerber, Jr., LL.B., LL.M.	Harry M. Sachs, Jr., LL.B.
Jo M. Glasco, B.S., J.D.	Paul M. Sandler, B.A., J.D.
Robin Goodenough, B.A., M.A., J.D., Ph.D.	Ronald M. Shapiro, A.B., J.D.
Rebecca K. Halikman, B.A., J.D.	Boylston D. Smith, A.B., M.D.
Julius Issacson, M.L.A., J.D.	Robert J. Thieblot, A.B., LL.B.
Joel L. Katz, J.D.	Gerald E. Topper, A.B., LL.B.
Joseph Lyons, B.S., LL.B., LL.M.	Larry M. Wolf, A.B., LL.B.
Joseph Murphy, A.B., J.D.	John J. Woloszyn, A.B., J.D.
James A. Perrott, A.B., LL.B.	