FILE

Subject: Insurance General

Copy to

STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

January 18, 1974

Opinion No. 74- 25

Mearle D. Mason
Hill, Mason & Graber
810 West Douglas - Suite D
Wichita, Kansas 67203

Dear Mr. Mason:

As chairman of the Prepaid Legal Services Committee of the Kansas Bar Association you request our opinion relative to whether operation of "Prepaid Legal Services of Kansas, Inc.," will constitute the transaction of the business of insurance within the state. You have provided a considerable amount of material concerning the organization and its mode of operation. We will briefly summarize it.

Your committee under the auspices of the Kansas Bar Association proposes the formation of a "not for profit" corporation. The articles of incorporation at section Fifth (F) provides that the corporation's purpose, in addition to more general purposes stated in other subsections, is:

> "To initiate, develop, supervise and administer, in whole or in part, experimental, demonstration and permanent legal service delivery programs primarily for the benefit of persons and groups of poor or moderate means who cannot generally afford the full cost of needed legal services. Such programs may include, but shall not be limited to, systems based on the concept of prepaid costs of legal service delivery, and shall seek to effect reductions in such costs without reduction in the quality of such legal service."

The proposed corporation's membership will be composed of three classes -- subscriber, attorney and public. These classes will be represented on the board of directors composed of from 5 to

21 members pursuant to the corporation by-laws which have not yet been drawn. The board of directors will exercise "complete control and management of the affairs of the corporation."

To implement the prepaid legal cost system the corporation will enter into contracts with participating attorneys. The attorney agrees to deposit with the corporation a nominal sum of money which will provide a fund for initial administrative costs and a reserve to cover claims in the event insufficient funds are paid into the corporation from subscribers to fully meet demands. The attorney agrees to provide legal services covered under the subscriber's agreement and look solely to the corporation for payment. The attorney agrees that in the event the corporation has insufficient funds available to pay all covered claims in full, a prorated amount will be paid.

To be eligible as a participating attorney under the plan the practitioner must be a duly enrolled and practicing attorney according to the rules and regulations of the Supreme Court of Kansas. Attorney participants from other states and Canada are eligible for reimbursement provided they are licensed or enrolled in the jurisdiction of their practice and agree to the terms and conditions of the provider contract. Thus the plan's concept is "open panel" in nature.

Subscribers, composed largely of groups will contract with the corporation. The corporation agrees to make contracts with participating attorneys (described above) to provide legal services to its members and families in accordance with the provisions of the subscriber's contract. The corporation does not in any way select the attorney, warrant his work product or regulate him in his work.

Rates initially will be $6.75 per month per individual or $8.25 per month for families. Prepaid legal services included in the subscriber's coverage fall under four major categories of benefits:

1. Advice and Consultation - $100.00 per year, $25.00 per interview, $10.00 deductible per case.

2. Office Work - $350.00 (conferences, negotiations, investigations, title examinations, letter writing, document draft), $10.00 deductible per case.

3. Judicial and Administrative Proceedings - $750.00 per year, court costs, witness fees, attendance at trial, preparation and filing of pleadings and briefs. $25.00 deductible per case.

4. Major Legal Expense - 80% of (not exceeding) $2,000.00) beyond the provisions of category No. 3 above.

Areas of practice not covered as a prepaid service include the following:

1. Patents or copyrights;
2. Contingent fee cases;
3. Fines, penalties or judgments;
4. Tax returns;
5. Class actions;
6. Amicus Curiae;
7. Probate of solvent estates;
8. Certain.

The question, as earlier stated, is whether this operation when viewed within the foregoing factual context constitutes the transaction of the insurance business and thus subjects it to the pertinent provisions of the insurance code.

K.S.A. 40-201 provides:

> "For the purposes of this article the term 'insurance company' shall, unless otherwise provided, apply to all corporations, companies, associations, societies, persons or partnerships writing contracts of insurance, indemnity or suretyship upon any type of risk or loss: Provided, however, That this definition shall not be held to include fraternal benefit societies as defined in section 40-701 of this code or hospitals or hospital associations which have been in operation ten years or more."

K.S.A. 40-214 provides:

> "It shall be unlawful for any person, company, corporation or fraternal benefit society to transact the business of insurance, indemnity or suretyship, or do any act toward transacting such business, unless such person, company, corporation or fraternal benefit society shall have been duly authorized under the laws of this state to transact such business and shall have received proper written authority from the commissioner of insurance in conformity with the provisions of the laws of this state relative to insurance, indemnity and suretyship, and further, it shall be unlawful for any insurance company to effect con-

> tracts of insurance in this state on the life or person of residents of this state or on property located in this state except through persons duly licensed in accordance with the insurance laws of this state and subject to the provisions of section 40-245 of the General Statutes of 1949: Provided, however, That neither the enrollment of individuals under a group policy nor the inclusion of insurance in a credit transaction under an arrangement for its purchase by the creditor in compliance with the applicable provisions of the Kansas sales finance act or the Kansas consumers loan act shall constitute the effecting of a contract of insurance.
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> "It shall be unlawful for any insurance company organized under the laws of this state to do business in any other state or territory of the United States without being first legally admitted and authorized to do business under the laws of such state or territory, and the insurance commissioner may revoke the license of any insurance company organized under the laws of this state and doing business in another state or territory without being first authorized so to do, and may require said company to pay the taxes upon the business so unlawfully written to the state or territory in which the business was written as provided by the laws of said state or territory."

Aside from the foregoing statutory declarations we find no authority which specifies elements which may be utilized with great precision in ascertaining what organizations are engaged as insurance companies or whether contracts or promises are contracts of insurance. Factual considerations on a case by case basis have led to varying results in jurisdictions which have dealt with the issue.

In the most recent Kansas Supreme Court opinion, State ex rel. v. Anderson, 195 Kan. 649, 408 P.2d 864 (1965), the Court relied upon Jordan v. Group Health Assn., 107 F.2d 239, in holding that a cemetery corporation offering a plan providing for cancellation of the balance owing on a cemetery purchase in the event of death was not insurance. This office has also drawn heavily upon this case in providing opinions relative to health maintenance organizations. In Jordan the court was confronted with a group health association incorporated as a non-profit relief association organized to furnish medical service and supplies in variable degrees to its members who made regular limited payments in exchange for the corporation's arranging for medical and surgical services to be rendered by independent practitioners. The question considered was the superintendent's contention that the plan be regulated under the District's insurance

code. The Court surveyed the factual background and its conclusion thusly at page 243:

> "The effect of the agreement or arrangement is to make available to members, if they wish to receive them, the services of the physicians contracted for by Group Health; but it is specifically provided that (1) Group Health cannot and will not regulate or control the physician in his work--he is left free, in fact required, to exercise his own judgment entirely independently as to diagnosis and treatment; (2) the only obligation which Group Health assumes towards its members is to make contracts, of the character described, with physicians and others--there is no agreement or binding obligation to provide the service or see that it is supplied; the undertaking is to contract for the rendition of the services by independent contractors, not to supply them at all events or contingently; (3) further, the Trustees may determine or modify the extent of service so made available (presumably as to all members collectively) at any time on fifteen days' written notice; (4) the Medical Director may determine the extent of the services which will be available to members in each individual case; (5) the corporation does not guarantee that any of the services will be rendered, or that any contracting physician will perform his contract to supply them; (6) the corporation assumes no liability for his failure to do so or for any act of omission or commission by him in doing so or for any breach of his contract; and (7) finally, Group Health assumes no liability, if for any reason it becomes unable to procure any or all such services when called upon to do so, or to indemnify the member for failure of the physician to keep his agreement or perform it properly, and its only obligation in such a case is 'to use its best efforts to procure the needed services from another source.' This is the basic contract relating to the primary service. In addition, Group Health arranges for limited hospitalization, by what specific terms does not appear, and itself furnishes facilities and services in connection with its clinic, all of which are merely incidental to the primary services and must stand or fall with them.
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> "Tenuous the obligation may be, but that does not render it illegal, or make of it a contract of insurance or one of indemnity. Correlatively tenuous is the member's responsibility to Group Health. The attenuated character of the literal obligation on both

> sides is pertinent here, not to its essential fairness or to any question of sufficiency of consideration or mutuality of obligation (no member now questions it), but to the issue or issues before us, namely, whether the agreement is a contract of insurance or one "for the payment of indemnity on account of sickness or accident." In our view it is neither.

The similarity between the mode of operation described above and that proposed by "Prepaid Legal Services, Inc.," herein is unavoidable. We see few substantive conceptual distinctions between the two short of the ultimate service which is to be delivered to the subscriber. Even here, we note, that medical service delivery and legal service delivery are similar in many ways. Both are historically professional services performed by practitioners regulated under state laws and stringent ethical codes. Both professions as well as the consuming public have recognized the necessity for delivery systems which avail the service to more persons and at predictible costs.

In our review of Jordan, supra, we note the following at page 246:

> "This is not assumption of risk or hazard. It has not the sound or the sense, technically or in lay conception, of 'insurance' or of 'indemnity'. If it resembles anything, the analogy is rather to 'agency' or representative action, or to that of an intermediary of more independent status. The contract is, in fact, unique. It does not fit neatly into established categories of 'agency', 'guaranty', 'insurance', 'indemnity' and the like."

With regard to the foregoing we conclude that the same observations can be made of the plan proposed by Prepaid Legal Services, Inc. Accordingly, it is the opinion of this office that the provisions of the presently existing Insurance Code do not apply to the organization.

We are hopeful that the foregoing will be of assistance.

Sincerely yours,

VERN MILLER
Attorney General

VM:DRH:jsm

cc: Honorable Fletcher Bell
Commissioner of Insurance
State Office Building
Topeka, Kansas 66612

J. Richards Hunter
President, Kansas Bar Assn.
601 Wolcott Building
Hutchinson, Kansas 67501

Dale W. Bruce
Davis, Bruce, Davis & Winkler
1022 Union Center Bldg.
Wichita, Kansas 67202

Dale B. Stinson, Jr.
Stinson, Wisdom & Lasswell
R. H. Garvey Bldg. - Suite 430
300 West Douglas
Wichita, Kansas 67202

Ray Hodge
Beaty, Hodge & Wood
435 N. Broadway
Wichita, Kansas 67202