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I. INTRODUCTION

The bar has long sought to make legal services readily available to all persons whatever their situation. Thus, the bar has sponsored legal aid societies and lawyer referral systems, and has promoted neighborhood law offices. These methods all meet the bar's traditional individualistic view that the attorney-client relationship should be direct without any third party interference.

However, the lay public, often bewildered by a myriad of unfamilar names in the yellow pages, continues to seek means of securing legal services more cheaply, more efficiently, and more reliably.[1] Group legal services—whereby an organized group procures legal services for its individual members—are one such means.

Certainly an association can employ a lawyer to handle the legal affairs of the association as an entity. However, the employment—and even the recommendation—of lawyers by an organization to represent its individual members in their individual affairs has been strongly opposed by the bar and by the courts. Such action, making the organization a lay intermediary between the lawyer and the individual client, has been characterized as the unauthorized practice of law;[2] and the lawyers employed or recommended by the group have been condemned for violation of the standards of professional conduct.[3] It is the purpose of this note to consider whether this condemnation can stand after the recent decisions by the Supreme Court of the United States in the cases of *NAACP v. Button*[4] and *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*.[5]

II. TYPES OF GROUP LEGAL SERVICES

Group legal services fall into two general categories: first, services designed to effectuate a group purpose, and second, services

1. See, *e.g.*, *Special Committee on Group Legal Services, Rep.*, 35 CALIF. S.B.J. 710 (1960); 34 CALIF. S.B.J. 318 (1959).

2. For a good discussion of the grounds of objections to lay intermediaries, see Judge Roger Traynor's dissent in Hildebrand v. State Bar, 36 CAL. 2d 504, 225 P.2d 508, 518 (1950).

3. Canon 35 of the Canons of Professional Ethics prohibits the exploitation or control of a lawyer's services by a lay intermediary. Canons 27 and 28 condemn solicitation by the lawyer himself, or knowing acquiescense in solicitation by others for him. Canon 47 bars a lawyer from aiding the unauthorized practice of law by any lay agency, personal or corporate.

4. 371 U.S. 415 (1963).

5. 377 U.S. 1 (1964). Supported by an amicus curiae brief of the American Bar Association, Virginia petitioned for rehearing, which petition was denied, 377 U.S. 960 (1964).

designed for the benefit of the individuals. Group-purpose services are services which aid the members of the group as a whole on some common problem, or services provided to individuals which redound directly to the benefit of all the members of the group. Individual-benefit services are those provided for individuals on their separate legal problems, the solution of which will have no significant effect on the legal rights of the rest of the members of the group. Thus, the aiding of individual litigants by the National Association for the Advancement of Colored People (NAACP) in school desegregation cases in order to advance the interests of Negroes as a whole is a group-purpose service. In contrast, the provision of legal services to its employees by a corporation as part of the employment contract is an individual-benefit type of group legal service. Both types of group legal services have been condemned by the courts.

For example, in *People ex rel. Courtney v. Real Estate Taxpayers Association*,[6] a nonprofit corporation, organized to alleviate the inequitable distribution of tax burdens on real estate in Illinois, brought suits in the name of individual members to attack the validity of the taxes. The court held that by employing lawyers to litigate suits for its individual members the Association was engaged in the practice of law; that the relationship of attorney and client did not exist between the members of the Association and its attorneys; that a corporation cannot practice law; and that the nonprofit nature of the Taxpayers Association would not affect the result.

Individual-benefit group legal services have also experienced difficulty in the courts. For example, nonprofit automobile associations have frequently tried to maintain arrangements whereby, in return for annual membership fees, the club paid the legal expenses for members charged with violation of traffic laws. These associations usually either maintained their own legal departments or recommended approved lawyers with the member being allowed to choose any lawyer he wished. Although accepted in England, such arrangements have almost uniformly been declared illegal in the United States as being the unauthorized practice of law by a corporation and the interruption of the attorney-client relationship by a lay intermediary.[7]

6. 354 Ill. 102, 187 N.E. 823 (1933); see Weihofen: *"Practice of Law" by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119 (1934).

7. An arrangement whereby the club members could choose unlisted as well as listed lawyers was approved in *In re* Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936). Numerous other cases, however, have struck down such arrangements whether the lawyers were directly employed by the automobile clubs or not. American Automobile Ass'n v. Merrick, 117 F.2d 23 (D.C. Cir. 1940); People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); People *ex rel.* Chicago Bar Ass'n v. Motorists' Ass'n, 354 Ill. 595, 188 N.E. 827 (1933); *In re* Malclub of America,

III. THE *Button* AND *Railroad Trainmen* CASES

Two recent Supreme Court cases, however, have undermined the existing legal restrictions on group legal services. One case dealt with group-purpose type services, the other with individual-benefit type services.

A. *NAACP v. Button*

In 1956 as part of its massive resistance program to school integration, Virginia proscribed the solicitation of legal business for an attorney by an organization not having a pecuniary right or liability in the lawsuit. The NAACP, licensed to do business in Virginia as a nonprofit association, brought suit to enjoin enforcement of the statute with respect to its activities in encouraging and financing school desegregation suits by Negro parents. Mr. Justice Brennan in the majority opinion declared that the activities of the NAACP were modes of expression and association protected by the first and fourteenth amendments and could not be prohibited by Virginia under its power to regulate the legal profession. "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment. . . . It is thus a form of political expression."[8]

For the purpose of the present inquiry the most important aspect of the *Button* case was not the striking down of this segment of massive resistance to federal law but a digression in Mr. Justice Brennan's opinion. This digression cited several group legal services cases, including the *Courtney* case, and opened the whole question by deviously stating that the court intimated "no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed."[9]

B. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*

In order to protect injured members from being induced by railroad claims adjusters to make inadequate settlements of Federal Employers Liability Act[10] personal injury claims, and to insure competent legal representation in these personal injury suits, the Brotherhood of Railroad Trainmen maintains a list of competent personal injury lawyers, called regional attorneys. When a Brother-

Inc., 295 Mass. 45, 3 N.E.2d 272 (1936); State *ex rel.* Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936); see Weihofen, *Practice of Law by Motor Clubs—Useful but Forbidden*, 3 U. CHI. L. REV. 296 (1936).

8. 371 U.S. at 429.

9. 371 U.S. at 442.

10. 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1958).

hood member is injured on the job, a member of the legal aid bureau immediately urges him not to settle his case without consulting a lawyer and gives him the name of the regional attorney. In the *Railroad Trainmen* case there was no evidence of any financial connection between the regional attorney and the Brotherhood and no evidence of any control over the litigation exercised by the Brotherhood. Mr. Justice Black, writing for the majority, stressed the interest of the union in protecting its members against the claims adjusters and cited the difficulty and need of obtaining competent counsel to oppose the experienced railroad lawyers. He stated that the first amendment guarantees of free speech, petition, and assembly protected the Brotherhood members' right to assist and advise each other in asserting their rights under the Federal Employers Liability Act.

> And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other. . . .[11]
>
> The state can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.[12]

And, according to Mr. Justice Black, Virginia had demonstrated no "appreciable public interest" in preventing the Brotherhood plan.

In his dissent, Mr. Justice Clark distinguished *Button* on the grounds that personal injury litigation is not a form of political expression. He warned, "By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise."[13]

IV. Social Utility of Group Legal Services

Organizations to provide group-purpose legal services such as the Real Estate Taxpayers Association and the NAACP are formed not to engage in profit making activity, but to advance and secure through litigation some common purpose of their members. Thus, the Taxpayers Association was formed to achieve equitable taxation for the real estate property owners of Illinois; the NAACP

11. 377 U.S. at 6 (1964).

12. *Id.* at 7. Brotherhood legal service arrangements had been struck down previously in many state court decisions. *E.g.*, *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); see Hildebrand v. State Bar, *supra* note 2; Doughty v. Gills, 37 Tenn. App. 63, 260 S.W.2d 379 (E.S. 1952); *Student Symposium*, 107 U. Pa. L. Rev. 387 (1959); 11 Stan. L. Rev. 394 (1959).

13. 377 U.S. at 9.

exists to prevent discriminatory treatment of Negroes. Such organizations can advance the interests of their members by lobbying for favorable legislation, by extra-legal coercive activity such as boycotts or civil demonstrations, or by litigation in the courts.

Our judicial system is such, however, that before a group can engage in litigation, before a case can be brought, there must exist an actual "case or controversy" and the prospective litigant must have "standing to sue," that is, he must have a litigable interest. Thus, the NAACP itself, cannot directly challenge the validity of allegedly racially discriminatory laws or directly seek the enforcement in the courts of the legal rights of Negroes. Nor could the Taxpayers Association bring a suit in its own name attacking the constitutionality of the 1929 Illinois tax assessments. The only manner in which these organizations can judicially advance the common aims of their members is by sponsoring litigation by individual litigants. And such litigation is usually beyond the resources of individuals.

> Organizations support legal action because individuals lack the necessary time, money, and skill. With no delays a case takes an average of four years to pass through two lower courts to the Supreme Court of the United States. A series of cases on related questions affecting the permanent interest of a group may extend over two decades or more. . . . Organizations are better able to provide the continuity demanded in litigation than individuals. Some individuals do maintain responsibility for their own cases even at the Supreme Court level, but this is difficult under modern conditions.[14]

The nine suits challenging the validity of the 1929 Illinois tax assessments would have cost an individual 200,000 dollars in attorneys' fees, whereas the average cost to each Association member was a little over fifteen dollars. Litigation is essentially a peace preserving device. Often it is the only means by which a minority group can secure and maintain their rights. These rights may be useless if their only practical means of enforcement is precluded.

Individual-benefit type group legal services such as those sponsored by the automobile clubs and the Brotherhood of Railroad Trainmen also serve useful social functions. Such services provide a means of spreading the costs of legal services among a large group similar to a system of insurance. They may allow an individual to prosecute or defend claims which would otherwise be too costly. For example, in 1931 the average amount of the legal claims handled by the Chicago Motor Club was twelve dollars and thirty-nine cents in civil cases and two dollars and forty-five cents in traffic violation cases, amounts so small that without the service it was not worth while for

14. Vose, *Litigation as a Form of Pressure Group Activity*, 319 Annals 20, 22 (1958).

an individual to retain legal counsel. These arrangements also enable individuals to secure lawyers readily and confidently. The legal aid system devised by the Brotherhood of Railroad Trainmen was designed to ensure that its injured members were made aware of their legal rights and to ensure that they would be able to obtain competent counsel.

Group legal services serve a useful purpose in our society. In the past the courts have stubbornly applied almost indiscriminately to all group legal services rigid, conceptualistic rules designed to prevent the commercial exploitation of the legal profession by profit seeking corporations.[15] In their rigid application of these rules the courts have generally refused to distinguish from the commercial exploitation of legal services the case of nonprofit associations whose sole aim is to secure better and more efficient legal services for their members. The Supreme Court, however, has now drawn such a distinction, and in the *Button* and *Railroad Trainmen* cases it ruled that such activities by nonprofit groups are protected by the first and fourteenth amendments. While the exact extent of these rulings is still uncertain, it is clear that their effect is sweeping and that previously existing legal doctrines and interpretations of codes of ethics must now be drastically reshaped.

V. General Limitations on Solicitation

It is submitted that the *Button* and *Railroad Trainmen* cases do not provide constitutional protection for all solicitation arrangements. A state has a legitimate interest in regulating the legal profession. If a solicitation arrangement involves sufficient evils, the state may regulate and forbid it. Thus a state may constitutionally forbid solicitation in the form of "ambulance chasing." A state should be able to prevent a group from indiscriminately soliciting legal business from the public at large for the sole purpose of enriching particular lawyers. It is therefore submitted that to qualify for constitutional protection, a solicitation arrangement should involve some sort of connection between the soliciting group and the persons solicited in order to raise the arrangement above the level of officious intermeddling and the mere channeling of legal business to enrich particular lawyers.[16]

Thus in the *Railroad Trainmen* case the Brotherhood legal aid

15. Group medical services have been approved in such states as California, Complete Service Bureau v. San Diego Medical Soc'y, 43 Cal. 2d 201, 272 P.2d 497 (1954), which has consistently refused to approve group legal services. See note 1 *supra*.

16. Such a restriction on solicitation would not prevent the formation of legal service cooperatives since the purpose of the cooperative is to provide legal services for its members, not to enrich particular lawyers. There is a community of interest among the members of the cooperative to secure legal services for themselves.

department would not have been allowed to urge non-union members to employ certain lawyers because the necessary community of interest in the arrangement was lacking. In *Button* the court allowed the NAACP to solicit non-NAACP members as clients for NAACP lawyers. Perhaps the distinction here is that in *Button* (a group-purpose case) the litigation itself, as a means of advancing the interests of the group, was a form of political expression and therefore constitutionally protected. In *Railroad Trainmen* (an individual-benefit case), as the dissent pointed out, the litigation itself was not a means of political expression by the group as a whole and therefore constitutionally protected under the rationale of *Button*. Instead what was protected was the right of the group to associate together and recommend lawyers to each other. In any event, the primary purpose of the solicitation in both cases was not merely to channel legal business to particular lawyers for their pecuniary enrichment.

VI. ANALYSIS OF GROUP-PURPOSE LEGAL SERVICES

One of the principal objections to lay intermediaries is that the lay intermediary, rather than the client, may control the litigation and favor its own interests rather than those of the individual client. Or, even if there is no direct control, situations may arise where there is a conflict of interest between the individual client and the lay agency so that the lawyer will be torn by a divided allegiance. Canon 35, therefore, prohibits the control or exploitation of a lawyer's services by a lay intermediary.

Consider, however, the situation where the interests of the association supplying the legal services and the interests of the individual litigant are identical. Here, there are no conflict of interest problems, no dangers of control or divided allegiance. When a group supplies legal services for its members on problems which affect the rights or interests of the membership as a whole, the interests of the group and the individual litigant will substantially coincide. In *Courtney* the interests of the Taxpayers Association and the individual litigant members were the same: to have the 1929 Illinois tax assessments adjudged invalid. In *Button* the Court found that the community of aims and interests between the NAACP and the individual litigants obviated any significant conflict of interest dangers.

Obviously, however, there often exists the possibility that in a particular case the aims and interests of the association and those of the individual litigant might diverge. Thus, the state of Illinois might have offered to compromise with an individual litigant taxpayer his particular tax assessment in order not to have the overall assessment

declared invalid. Or, Virginia might have offered to provide improved schools for Negroes in place of desegregation.

However, in the case where a group is using litigation to advance or protect the interests of the group as a whole, the individual litigant is merely fulfilling a necessary formality. He is merely a figurehead enabling the group to assert its rights in the courts through him. The real party in interest is the group or association. Under a realistic analysis the group is the true litigant. Just as an action by a shareholder against the directors of a corporation for misconduct must be brought in the name of the corporation as the formally aggrieved party; so must an association which forms an entity distinct from its members bring an action in the name of an individual as the formally aggrieved party.

Under this analysis such terms as "divided allegiance" and "control of litigation by a lay intermediary" take on different significance. In case of a divergence of interests between the individual litigant and the group, the primary allegiance of the lawyer should be *not* to the individual client, but rather to the association whose interests the individual client represents. Similarly, the association *should* be allowed to control the litigation which it sponsors for individual clients in order to further the interests of the combined membership. The individual litigant can always withdraw his authorization to have the suit instituted in his name. It would be manifestly unfair, however, for one person, representing the aspirations of a group that has joined together to accomplish what the members could not accomplish individually, to abuse his position, which has been sponsored by the group as a whole, and attempt to reap personal gain with complete disregard for the interests of the group or to dictate personally the course of action the group should take.

A sharp qualification, however, must be made to the above analysis in the situation where the interests of the individual and the group are not identical. To a disadvantaged Negro group it makes little difference, as far as furthering its interests, whether a suit is brought to enjoin the segregation of restaurant facilities in an interstate bus terminal or whether it defends trespass or breach of peace suits brought against freedom riders attempting to desegregate the facilities. In both instances the group is advancing its interests in desegregation. But from the point of view of the individual litigant the situations are quite different. If he loses the suit to enjoin segregation, he may not be able to eat in a desegregated restaurant, but he is generally no worse off than before he brought the suit. On the other hand, if he loses the trespass suit, he may be subject to fine and imprisonment. In the suit to enjoin discrimination the individual

litigant and the group have substantially the same stake in the outcome--desegregation of the restaurant facilities. In the trespass suit, however, the individual litigant has considerably more at stake than the group--possible imprisonment.

In the suit to enjoin segregation, if the interests of the individual and the group or association diverge and the association maintains control of the litigation, the individual litigant loses little. He may have to forego a compromise offer to desegregate certain days of the week, if the association controls the litigation and demands complete and immediate desegregation. But he is only the representative of the group, nothing more; whatever he might have attained would have been through the sponsorship and resources of the group.

In the trespass suit, however, a divergence of interests between the individual and the group can be of more than little consequence to the individual if the association controls the litigation. If the individual defendant is offered a suspended sentence in exchange for a guilty plea, the group's legitimate interest may be to contest the suit in the hope of gaining an acquittal. Clearly, no arrangement should be countenanced whereby the group could control the litigation strategy in this situation. Nor should the lawyer owe anything less to the individual client than undivided allegiance. Here the individual litigant is more than a mere representative of the group; he is more than just a necessary formality allowing the group to achieve their purposes through a suit which it cannot bring in its own name. Here unlike *Button* or *Courtney*, we cannot say that the real party to the suit is the group. The individual litigant stands for the group, but he stands in his own right also. Both the individual and the group have the same general interest in the outcome of the litigation, but the individual's interest is substantially greater than that of the group. He shares the common interest of the group in the outcome of the litigation (achieving desegregated facilities) but he has in addition a substantial personal interest which is not directly shared by the other members of the group (staying out of jail).

A perhaps useful, but certainly imperfect, analogy is the situation where the lawyer for a liability insurance company defends the insured in a personal injury action. Such arrangements are permitted on the grounds of the public policy to encourage liability insurance. The real defendant in the case is the insurance company, but unless there is a direct action statute, the formal defendant is the insured. Of course the interests of the insurance company and the insured could vary substantially. For example, the plaintiff might offer to settle within the policy limits. If the insurance company rejects this offer, preferring to litgate, there exists the possibility that the ultimate

recovery might exceed the policy limits, for which portion the insured would be personally liable. Nevertheless, the ABA Committee on Professional Ethics has sanctioned such representation by the insurance company lawyer.[17] The committee based their decision on the grounds that "the company and the insured are virtually at one in their common interest" and the contractual relationship between the insured and the insurer. On the issue of control, the insurance company "because of its contractual liability and community of interest, shall take charge of the incidents of such defense including the supervising of the litigation."[18]

VII. Analysis of Individual-Benefit Services

Individual-benefit type group legal services are legal services made available by the group to its members concerning their individual legal problems, the solution of which will have no significant effect on the legal rights of the rest of the members of the group. Under the *Button* and *Railroad Trainmen* holdings, an organization apparently may recommend to its members any lawyers it wishes. And undoubtedly the Supreme Court will uphold the general right of persons to associate together to pay their individual legal expenses. These two cases necessitate a complete re-examination of the bar's approach to individual-benefit services. The following suggestions are made concerning these types of services.

Individual group legal service arrangements should be permitted only where the group providing the services is a nonprofit organization. Such nonprofit organizations exist for the mutual benefit of their members, to whom the services are provided. The objections to the commercial exploitation of law by a profit-seeking lay intermediary are too well established to be recounted here.

Furthermore, if the individual client and not the group pays the lawyer (as in the *Railroad Trainmen* arrangement), no sort of financial connection between the lawyer and the organization in the form of fee splitting should be allowed.[19] Otherwise, the organization in recommending a lawyer may be more influenced by the amount of the fee the lawyer is willing to split with it than the competence of the lawyer.

In all individual-benefit legal services the relationship between the lawyer and the individual client should be direct and personal. The

17. ABA, Opinions of the Committee on Professional Ethics and Grievances 591 (1957).

18. *Id.* at 594.

19. Previous to the case of *In re* Brotherhood of Railroad Trainmen, *supra* note 11, the regional counsel in each suit referred to them has paid the expenses of the Brotherhood's legal aid department.

individual client should communicate directly with the lawyer concerning his legal problem. As opposed to group-purpose services, in individual-benefit services the group has no legitimate stake in the outcome of any litigation or the content of any advice given. Thus, the group should exercise absolutely no control over the legal services, and the lawyer's primary—and only—duty must be directly to the individual client.

In any situation where there exists the possibility of a significant conflict of interest between the group and the individual concerning the outcome of litigation or the content of advice, lawyers subject to the control of the group should not be permitted to render the services. The danger, of course, is that the lawyer will favor the interests of the group instead of devoting his undivided loyalty to his client. Thus, it is submitted that in the *Railroad Trainmen* situation the Brotherhood should not be allowed to provide its own lawyers to handle FELA cases for its members. For in such situations a conflict of interest concerning the handling of the personal injury suits might arise; for example, if the Brotherhood decided that it wanted to reduce the amount of recoveries in FELA suits in order to enhance union-employer relations.[20]

Finally, it is suggested that some sort of supervisory control be devised for cooperatives formed to provide legal services in order to assure that the association really is a cooperative arrangement and to prevent unscrupulous promoters from taking advantage of the members, for example through unreasonably high salaries. Also, such cooperatives should be restricted to dealing with their own members.

VIII. CONCLUSION

Too often perhaps the prohibitions embodied in the legal profession's standards of professional ethics are regarded as absolutes—immutable no matter what the circumstances. Perhaps this inflexibility is simply the result of an ardent concern to stringently maintain the high standards of conduct of the profession. Perhaps it is a holdover from the now rapidly being disfavored "conceptualistic theory of law," which views the law simply as a series of formal, logical rules to be applied with no consideration for the underlying policy bases of the rules. Or, perhaps it is in some cases merely the result of the economic self-interest of the profession.

These negative prohibitions of professional ethics are designed, not to impose morality for the sake of morality, not to benefit the lawyers themselves, but to enable the legal profession to more effectively

20. This would not prevent a labor union lawyer from dispensing legal services to members on matters where no such possibility of conflict of interest exists.

and honorably carry out its affirmative duty to provide legal services to the public. As stated so forcefully by Judge Roger Traynor in a previous case involving the Brotherhood of Railroad Trainmen:

> Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of the duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified ouly if such a denial is necessary to suppress professional conduct that in other cases would be injurious to the effective discharge of the profession's duties to the public.[21]

With respect to group legal services the leadership of the bar has lagged. Now by constitutional mandate the Supreme Court has thrown the door wide open to group legal services. It is possible that under the Constitution the Supreme Court may now exercise even more extensive control of professional matters previously assumed to be entirely within the control of the states and the profession. The bar must adopt a forward looking approach to group legal services and their role in our society and fashion new, progressive standards in this area.[22]

21. Hildebrand v. State Bar, 36 Cal. 2d 504, 522, 225 P.2d 508, 519 (1950).

22. For another stand in favor of group legal services see DRINKER, LEGAL ETHICS (1953).