Group Legal Services: The Ethical Traditions and the Constitution

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Such a statute would have the effect of greater compliance with the spirit of International Shoe. Any major step toward a completely integrated test for jurisdiction must presumably come from the Supreme Court. It seems to be time for a whole reappraisal of the doctrine of quasi in rem jurisdiction. Property should be considered as one of the contacts in determining whether to exercise in personam jurisdiction. It is certainly arguable that practically, this is what occurs today in states with provisions similar to 320(c). If the property is of any value the defendant "consents" to jurisdiction. A test based on the modern interests analysis would analyze such factors as the value of the property, whether it was income producing and whether it was in the forum through the voluntary choice of the owner. With the contact thus established analysis would proceed to forum non conveniens or forum conveniens considerations.

In the absence of a complete overhaul of quasi in rem jurisdiction, perhaps a commendable step can be taken in that direction by abolishing the practice that carries the doctrine to its conceptual pinnacle—garnishment of intangibles—by laying Harris v. Balk to rest alongside of Pennoyer v. Neff.

GROUP LEGAL SERVICES: THE ETHICAL TRADITIONS AND THE CONSTITUTION

The law is in constant change. As the needs of the people develop, the law must necessarily respond with appropriate measures to satisfy those needs and to secure their enjoyment. This then is the simple formula for the development of law: public need and judicial or legislative response.

88 Judge Learned Hand has emphasized that the issue of whether jurisdiction may be exercised under the International Shoe test is "certainly indistinguishable from the issue of 'forum non conveniens'." Kilpatrick v. Texas & P. Ry., 166 F.2d 788, 790-91 (2d Cir. 1948). See also Latimer v. S/A Industries Reunidas F. Matarazzo, 175 F.2d 184 (2d Cir. 1949).

89 See Traynor, supra note 79, at 663.

90 See, e.g., Uniform Interstate and International Procedure Act § 1.03(a)5) and CPLR § 302, both providing that personal jurisdiction may be asserted as to causes of action arising out of the ownership, use, or possession of real property.


The pressures and complexities of the twentieth century question the significance of the individual in our modern society. Sheer mathematics threatens the availability and protection of fundamental rights and the "pursuit of happiness" means to many little more than a fight for survival and recognition. The need is obvious, the response is not. Yet, some progress has been made. The War on Poverty is being fought on the battlegrounds of the nation's ghettos to relieve the impoverished conditions of the slum dwellers. The champions of this effort realize, however, that a necessary avenue of approach for these socially underprivileged is through the courts of law. Rights are of little consequence unless enforceable. Consequently, the Office of Economic Opportunity¹ (hereinafter cited as OEO), acting as central command in the War on Poverty, has inaugurated a system of neighborhood law office programs throughout the country to assist the indigent by providing free legal services and thereby making more readily available judicial protection and relief.²

There remains, however, a substantially "unfilled need for legal services."³ The OEO programs will at best serve only a fraction of the population; so too with Legal Aid and Public Defender programs; and Bar Association referral plans apparently have not met with popular acceptance. For the majority, the problem of securing competent, reasonably-priced legal services has become acute.⁴ To meet this need, the formation of group legal


²With regard to these efforts in New York, see In re Community Action For Legal Services, Inc., 26 App. Div. 2d 354, 274 N.Y.S.2d 779 (1st Dep't 1966), wherein a unanimous court, although recognizing the importance of such programs, rejected three corporate charters of neighborhood organizations to be financed under the OEO. The court found the lay-controlled organization unworkable since it would not permit the court sufficient control over the legal practice of the organizations. Similarly offensive to the court was the obvious intermingling of social goals with the practice of law. "Recognizing that the law may be a constructive progressive force in the development of a community, and particularly that social goals involve significant lay leadership and lay individual engagement, the interrelation of social goals with the practice of law still must be better and even precisely defined, or if not definable, separated." Id. at 362, 274 N.Y.S.2d at 789.


⁴Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 Colum. L. Rev. 973 (1963). "[I]t is clear that a large amount of legal services needed by the middle classes either is not rendered at all, or is performed by laymen inexpert in the law and free from professional control. . ." Id. at 983.
services plans was a logical step. Trade unions, associations and clubs initiated programs through which they would either hire attorneys or refer their members to attorneys selected by the group to assist each member in his legal affairs. The reasoning of these organizations cannot be questioned:

Why is it that individuals may band together to provide themselves with cheaper insurance, cheaper groceries, higher wages, better prices, easier credit, lower taxes, better health—everything except better or cheaper legal advice and aid?

The American Bar purports to answer this question. Although acknowledging the need for increased availability of legal services, the bar associations agree that the solution must be in accord with the Canons of Professional Ethics. And brandishing the Canons to any attorneys who would become involved with group legal services programs and threatening disciplinary proceedings, the bar associations contend that such group services programs violate Canon 27 (advertising and solicitation), Canon 28 (stirring up litigation), Canon 35 (intermediaries), and Canon

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7 See, e.g., People ex rel. Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935).


9 The Canons of Professional Ethics were adopted in 1908 by the American Bar Association. These Canons have been adopted, in whole or in substantial part, in the various states by rule of court, by act of legislature, or by bar association action. They are reprinted annually in 3 Martindale-Hubbell Law Directory, Prefatory Section. These Canons are presently undergoing revision and tentative drafts are expected in the near future.

10 "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

11 "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so."

12 "The Professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary."
47 (aiding the unauthorized practice of law). The argument concludes that such activities by these groups constitute an unauthorized practice of law and contribute to an intolerable commercialization of the profession.14

The public no doubt has lost confidence as a result of the majority's proscription of group legal services. They hear from the profession's own lips that their primary objective is to provide legal services,15 but nonetheless, the need remains unfilled. They fail, of course, to appreciate the crucial ethical traditions which must be maintained if the profession is to remain a profession.

Yet, the crusade for group legal services has found a strong proponent in the United States Supreme Court. In *NAACP v. Button,*16 the Court approved a plan whereby attorneys hired by the Association would assist members in litigating various actions involving civil rights. The plan drew first amendment protection since, as the majority reasoned, it involved freedom of association and petition to redress. One year later, the protection was extended to a labor union practice of referring its members to selected attorneys.17 And recently, the Court extended this rationale and supported a union plan whereby attorneys hired by the union would assist members in workmen's compensation claims.18

Two things are certain: (1) certain group legal services are here to stay; (2) the Supreme Court has not abrogated the Canons to establish these services. The conclusion is simply that group legal services can be provided without sacrificing the necessary ethics of the legal profession. The two interests can and must co-exist.

The problem becomes one of compromise. In the language of the Court, at what point will the "balance" be struck in favor of protecting the public from harms resulting from a breach of professional ethics? The logic of the arguments pro and con is destroyed by the assertion of extreme cases. This gulf is not conducive to solution. The balance of this note will attempt to

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13 "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

14 American Bar Association, *Unauthorized Practice News* 264 (1964). It should be noted, however, that this position has met with considerable opposition from various state bar associations. See, e.g., Report of Committee on Group Legal Services, supra note 3.


examine the arguments with an eye toward pinpointing where the ethical standard for group legal services lies. It will not argue extremes, but will propose possible methods of making group legal services compatible with the interests expounded by the Canons of Professional Ethics.

The Seven Deadly Sins of Group Legal Services

a) Maintenance, Champerty, Barratry

The rules prohibiting maintenance (helping another prosecute a suit), champerty (maintaining a suit in return for a financial interest in the outcome), and barratry (a continuing practice of maintenance or champerty) developed in early common law and are today included in the penal laws of some jurisdictions. Other jurisdictions enforce the same principles indirectly through their Canons of Professional Ethics. Implementation of these rules is particularly effective against group legal services since the group's obvious purpose is ultimately to assist in the litigation of claims.

The early common law forbade a disinterested third party to maintain suits in order to confuse or annoy political opponents or foes. Almost immediately, however, exceptions developed. If the maintainer proved that his motive was non-malicious or if the outcome of the litigation was in his favor, he would not be punished. The evil to be curbed, therefore, was the abuse of legal process. If the maintainer had not acted maliciously or if the other party had in fact done something wrong, the legal process was not abused.

The firm establishment of this motive-outcome rationale was delayed by the strong popular distaste for litigation. In feudal times, litigation meant trial by battle or ordeal for the litigants. Against this backdrop the question of merit to a particular claim or sincerity in the heart of the maintainer was for all practical purposes a moot question.

The limitation of this broad common-law proscription has been an arduous process and not too surprising is the fact that remnants of this attitude toward litigation are discernible today. Initially, many courts tried to circumvent the indiscriminate application of these rules by analyzing the relationship between the

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20 In New York, for example, the offense of maintenance was deleted in the 1967 revision of the Penal Law. Yet, although the criminal sanction has been dropped, the same principle is enforced via Canons 28 and 30.
21 For a comprehensive historical discussion of these problems, see P. Winfield, The History of Conspiracy and Abuse of Legal Procedure 131-60 (1921).
22 See Radin, Maintenance by Champerty, 24 Calif. L. Rev. 48, 57-59 (1935).
suiitor and the maintainer. Extending the disinterested party rationale, the courts reasoned that if a relationship of master-servant, landlord-tenant or blood relations existed, then the third party was no longer disinterested and his activities in support of the litigation were excused.23 Only when the inadequacies of these exceptions became apparent did the courts begin to study the intent of the maintainer rather than his act. In New York, for example, prior to the recent revision of the Penal Law, the acts of maintenance had to be done "with a corrupt or malicious intent to vex and annoy." 24

At the core of this problem rests the classical distinction in criminal law between an act considered malum in se (a wrong in itself, i.e., inherently or essentially evil) and malum prohibitum (an act is wrong because it is prohibited).25 The former category necessarily involves the element of intent; the latter category is equivalent to strict liability since the prohibited act is wrong regardless of the good faith or sincerity of the actor. This strict liability concept developed in criminal law in response to substantial public demand to curb a particular abuse. No balancing mechanism between possible good or bad results was employed. If such were the case, an intent-oriented mechanism would be necessary to preserve the good and abolish the evil. In this area of maintenance of litigation, the development of the prohibition with its exceptions indicates clearly the potential for good. And when applied to group legal services, this potential is increased markedly. If this potential is to be exploited to the best interests of the public, the motive of the alleged maintainer must become the principal criterion for establishing his liability. Only then can the broad prohibition be replaced without sacrificing either the interests of the public or the ethical standards of the legal profession. As one commentator has already noted, the prohibition is "especially ironic since certain groups are prevented from protecting the oppressed in the name of a doctrine created to prevent oppression." 26

23 This same concept has, of course, been retained in Canon 28 which begins: "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so" (emphasis added). Two very common exceptions to the rules forbidding maintenance and champerty are contingent fee contracts and assignments of choses in action. See Zimroth, supra note 8, at 970. See also Buckley v. Service Transp. Corp., 277 App. Div. 224, 98 N.Y.S.2d 576 (1st Dep't 1950).


26 Zimroth, supra note 8, at 971.
b) Advertising and Solicitation

The professional proscriptions against advertising and solicitation originated in the parlors of the early English barristers. This elite group worked together constantly in an atmosphere of fraternity and cooperation. To insure this communal system, rules of etiquette were necessarily appropriate.

No doubt the operation of the Bar today is beyond comparison with these early legal communities. Interestingly enough, however, is the fact that despite the radical change in the scope of the profession today, these rules of etiquette have persisted and are rigidly enforced via the Canons of Professional Ethics. Largely as a result of the efforts of the bar associations, these Canons have remained inviolate against the advancing pressures of competition and commercialization. In the eye of the bar associations, new dangers facing the profession provide more than adequate justification for their retention. They urge that a permissive attitude toward advertising and solicitation would give open ground to the "ambulance chaser," incite litigation and generally result in a disastrous commercialization of the profession. Yet, the mere fact that conditions have changed so much that the increasing demand for legal services has apparently not been met necessitates a cautious re-thinking of these principles if the profession is to fulfill its sole objective—to serve the people.

The specifics of the problem require ground work analysis of the particular organization with respect to its avowed purpose and more importantly, the actual implementation of its legal services program. If a group offers to its members free or cheaper legal services, this in and of itself does not establish its propensity toward unlawful solicitation and commercialization. Several questions have to be answered: (1) What is the purpose of the particular group; (2) How are the attorneys to be paid; (3) Who is doing the solicitation; (4) What is the scope of the legal services being made available?

The answer to the first question presents a basic formula in evaluating group legal services. If the purpose of a particular group is solely to provide legal services for its members, it necessarily follows that such a group could be expected to more actively solicit membership, viz., professional employment for its attorneys. Conversely, where a group such as a labor union is designed to

28 ABA Comm. on Professional Ethics, Opinions, No. 8 (1925). See In re Weitz, 11 App. Div. 2d 76, 202 N.Y.S.2d 393 (1st Dep't 1960). Canons 27 and 28 have been interpreted, however, to permit occasional, gratuitous recommendations of attorneys. See, e.g., In re Seidman, 228 App. Div. 515, 240 N.Y.S. 592 (1st Dep't 1930).
improve the general welfare of its members (salary, working conditions, pension benefits, etc.), and legal services is only an added inducement or offering, the chance of active solicitation of legal employment is decisively lessened.

The second and third questions are closely related. If the attorney is salaried by the organization and no additional remuneration is available to him based on the number of claims he handles, the sincerity of any solicitation on his part would seem beyond question. If, on the other hand, the profit motive is apparent from the attorney’s solicitations, there is no reason to fear the framework of the group services as a deterrent to any disciplinary proceedings. On the organizational level, the solicitation is not usually the product of a profit motive. The organization consists in effect of the members themselves and, as such, its primary drive is naturally toward the mutual benefits derived rather than actual cash return. Of course, if it should appear that a group is endeavoring to launch a profit-making enterprise by providing group legal services at “bargain prices,” the law should not hesitate to strike down such an operation. Such a situation was undoubtedly contemplated by the Bar when an agency clause was included in Canon 27. The clause provided that improper solicitation could be carried on through a “touter” (agent). This would in effect make the attorney responsible for the solicitation of the organization. Opponents of the group legal services, who refuse to accept the distinction between properly and ill-motivated solicitation, accept this clause as an open opportunity to discipline attorneys; yet, in view of Canon 47, which would accomplish the same end, is it not more reasonable to accept the distinction and conclude that the agency clause of Canon 27 was directed at the possibility of a sophisticated organizational set-up where attorneys would send out district solicitors to “bring home the business”? 29

Probably the most effective way of curtailing the big-business tendencies of group legal services is to limit the permissible scope of such services. As long as the organization’s legal department confines itself to promoting the interests of the client in relation to his membership, the opportunity to improperly solicit will be lessened. If, on the other hand, a labor union, for example, in addition to handling workmen’s compensation and related matters, branches off into areas of probate, criminal law and, in short, handles any legal problem of its members, the opportunity for abuse is unlimited.

Of those who admit that the indiscriminate prohibition against solicitation is un dependedable and inaccurate, many still maintain that

29 Comment, 63 Colum. L. Rev. 1502 (1963). “Once agents or runners are introduced, the reaction of most courts has been that the solicitation is especially objectionable because of the more systematic and flagrant commercialism involved.” Id. at 1505 (footnotes omitted).
the measure is justified by the fact that it incites litigation. No doubt it does. But we have hopefully dispelled the ancient attitude that litigation is something evil in itself and permissible only as a last resort. The courtroom and the hearing have long since replaced the trial arena and the torture chamber, and litigation means to many a welcomed relief from oppression and injustice.30

The threat of "commercialization" is tendered as the final argument in favor of such broad proscriptions of advertising and solicitation. "[F]urnishing, selling or exploiting . . . the legal services of members of the bar is derogatory to the dignity and self-respect of the profession, tends to lower the standards of professional character and conduct and thus lessens the usefulness of the profession to the public. . . ." 31 To take issue with this professional scruple is to invite criticism as to one's sincerity in compromising the dignity of the profession. Nevertheless, the argument seemingly overlooks the needs of society for adequate legal services while seriously compromising the ethics of the individual practitioner. This is not meant to condone neon lighting and other forms of gaudy advertising, but nevertheless, the fact remains that the profession has been commercialized to a degree and yet continues to perform well despite a sometimes sagging reputation.32 If the Bar is seriously concerned with their reputation, they should consider the possibility that outlawing group legal services would do more to injure its reputation than upholding the non-commercial image would help it.33

c) Lay Intermediary, Corporate Practice and the Conflict of Interest

Undoubtedly the strongest surge of criticism of group legal services plans emanates from the fact that the group-intermediary exercises a varying degree of control over its attorneys, and consequently jeopardizes the precious attorney-client relationship.34 It is felt that where conflict arises between the interests of the client and the group, the attorney, conscious that his own welfare is perhaps in jeopardy, will forsake the well-being of his client and

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30 See generally Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 YALE L.J. 574 (1949).
31 ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 8 (1925).
33 Zimroth, supra note 8, at 981.
34 Informative Opinion A of 1950 of the ABA Committee on the Unauthorized Practice of Law, 36 A.B.A.J. 677 (1950).
concentrate his efforts on protecting the interests of the group. Canon 35 emphasizes that the lawyer's responsibilities are individual and forbids any arrangement whereby his services are either "controlled" or "exploited" by any lay agency. For these same reasons, Section 495 of the New York Judiciary Law makes it a misdemeanor for any corporation to practice law.

The problem is no doubt a serious one. Nevertheless, one must question the propriety of so broad an exclusion in light of the well-established need for group legal services. The argument against such services is based on a double premise: first, that there is a conflict between the two interests, and secondly, that the attorney will disregard his client's interest in favor of the group. In regard to the first, the scope of the group's activities are again of crucial importance. The more diversified the interests of the group, the greater the possibility of conflict. In actual operation, however, the majority of group legal services programs have been offered by labor unions. One aspect largely peculiar to these unions is that the compelling reason behind an individual's membership is the unanimity of purpose between the union and the individual member. The members are the union. The chance for a serious conflict of interest here is remote. But even the slightest possibility is a serious one. And when a different type of organization is offering the service the chances are decidedly increased. For example, a popular challenge to the NAACP program focuses upon a Negro man who has been found guilty of murder and now faces the death penalty. On appeal, his conviction might easily be reversed because of a search and seizure violation. Yet the organization might best be served if his attorney were successful in securing a reversal on the more tenuous grounds of equal protection.

35 It is interesting to note the charitable exclusion clause incorporated into the Canon: "Charitable societies rendering aid to the indigents are not deemed such intermediaries." It seems more reasonable to expect such an exception in Canons 27 and 28 since the evils of solicitation and advertising therein proscribed are less likely to manifest themselves within the charitable structure. Yet, on the other hand, there seems to be no corresponding reason to substantiate the exclusion in the Intermediary-Canon. Considering the energetic zeal and dedication distinctly evident in many charitable groups, the evils of conflict and control over the attorney by the organization are by no means minimized.

36 Another utilization of the corporate form as a weapon to threaten the progress of group legal services was attempted by the Virginia Bar in NAACP v. Button, 371 U.S. 415 (1963), wherein it was argued that the NAACP lacked standing to challenge the Canon and statutes involved. To this assertion the Court swiftly replied: "we think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail." Id. at 428.
This situation demands questioning of the second premise, i.e.,
the attorney will disregard his client's interests in favor of the
group. The above portrayal is perhaps more dramatic than real.
As one commentator has pointed out, a casual reading of NAACP
briefs will clearly demonstrate that the client's interests are not
surrendered to the group's need for a particular rationale. Whether this explanation is sufficient to satisfy the opponents of
group legal services is highly doubtful. However, one incontrovertible
fact is apparent. Whether a lawyer allows the attorney-client
relationship to disintegrate at all or whether he favors the interest
of the group when in conflict with his client's, depends not on the
mechanism of the group services program which produced the
client, but rather on his own personal convictions and professional
responsible.

The problems of control and conflict of interest are certainly
not indigenous to group legal services plans. For example, the
insurance company attorney owes a divided allegiance to his clients
and his employer. Consideration also should be given to the small
town attorney who has enthusiastically supported firearms control
legislation and one day finds himself defending a man in a civil
action who has negligently shot someone in a hunting accident.
Plainly, the area of possible conflict encompasses far more than
the relatively small activities of group legal services. And in all
cases it is the character of the attorney that will be the pivotal
factor. The Canons of Professional Ethics must extract from every
attorney the highest degree of personal conviction possible. But
they must not do so at the expense of group legal services.

One optimistic note concerning the future of group legal
services was offered by Professor Drinker in 1953:

It is not believed that the Canon [35] will prevent the labor unions
from finding lawyers to advise their members. The whole modern
tendency is in favor of such arrangements, including particularly em-
ployer and cooperative health services, the principles of which, if applied
to legal services would materially lower and spread the total cost to
the lower income groups. Professor Drinker then concludes with a rather sour note which seems to indicate that Canon 35 (as well as the above mentioned related Canons) has failed to uphold the high level of integrity they were designed to insure. The very presence of such a sugges-
tion necessitates revision. He concludes: "The real argument
against their [group legal services] approval by the bar is believed

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37 Zimroth, Group Legal Services and the Constitution, 76 Yale L.J. 966, 976 (1967).
38 See Note, Group Legal Services, 79 Harv. L. Rev. 416, 422 (1965).
39 H. Drinker, supra note 27, at 167.
to be loss of income to the lawyers and concentration of service in hands of fewer lawyers. These features do not commend the profession to the public."\(^{40}\)

**The Constitutional Approach**

Until relatively recently, cries for revision of the Canons in favor of the acceptance of group legal services fell on deaf ears. Varieties of group plans were regularly struck down in most jurisdictions almost without exception.\(^{41}\) The decision in *NAACP v. Button*\(^{42}\) marked a decisive turning point in the crusade for group legal services. The Association brought suit to enjoin the operation of a Virginia statute which, as amended, extended the State laws against maintenance and solicitation to any agent who retained an attorney in connection with the prosecution of any lawsuit in which it was not a party nor had any potential pecuniary interest or liability.\(^{43}\)

The Association maintained a legal staff of fifteen member attorneys who would assist other members in establishing or protecting their civil rights. The successful implementation of this plan was clearly dependent upon active solicitation of the "right kind" of matters dealing with civil rights. Through speeches, circulars and extensive personal contact, the Association would advise its members of their rights and appraise them of the readily available avenue of remedy through the courts. If successful in soliciting the litigation, the Association would provide a staff attorney and pay him on a daily basis.

The program of the Association clearly came within the ambit of the statutory prohibition. Nevertheless, the Court held that the activities of the Association, its members and legal staff involved the freedom of expression and association as guaranteed by the first and fourteenth amendments of the Constitution.\(^{44}\) These basic freedoms could not be infringed by the Virginia statute's attempt

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\(^{40}\) Id.


\(^{44}\) 371 U.S. at 428-29. See *Comment, 63 Colum. L. Rev*, 1502 (1963).
to regulate the legal profession. In answer to the charge that the NAACP was engaged in the unauthorized practice of law by their unethical solicitation, the Court interjected the traditional "balancing test" between the interest of the public in upholding the standards of the profession and the interest of the individual litigants whose freedom of expression was in jeopardy. The Court was quick to emphasize that "[m]alicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation," and that such an element was not discernible in the NAACP plan. It was then concluded that the state had "failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."  

As welcomed as the Button rationale was to the crusade for group legal services, it did present a problem. The relatively unorthodox atmosphere which served as the background for the Button decision did not lend itself to easy comparison with the more common group plans offered by labor unions and other similar groups. Many concluded that the Button holding was a mere "product of the times," which, by protecting a form of timely political expression, served as an encouraging boost to the country's newly organized civil rights movement. At the crux of the problem was the fact that no precise evaluation of the Court's holding was readily possible. Some activity was protected by the first amendment, but the extent of the protection was uncertain. Was the entire NAACP program of soliciting suits and recommending staff attorneys to their members to be protected? Was solicitation, once considered unethical, now a matter of constitutional right? Perhaps the actual litigation was the protected activity? The tenor of the majority's decision apparently substantiated the latter conclusion. The Court acknowledged the fact that the ancient attitudes regarding litigation, i.e., that it was a necessary evil to be avoided whenever possible, had long since given way to an appreciation of the benefits litigation can secure. For the members of the NAACP, litigation was perhaps their only means of effective expression. If this were an accurate appraisal of the Button rationale was to the crusade for group legal services, it did present a problem. The relatively unorthodox atmosphere which served as the background for the Button decision did not lend itself to easy comparison with the more common group plans offered by labor unions and other similar groups. Many concluded that the Button holding was a mere "product of the times," which, by protecting a form of timely political expression, served as an encouraging boost to the country's newly organized civil rights movement. At the crux of the problem was the fact that no precise evaluation of the Court's holding was readily possible. Some activity was protected by the first amendment, but the extent of the protection was uncertain. Was the entire NAACP program of soliciting suits and recommending staff attorneys to their members to be protected? Was solicitation, once considered unethical, now a matter of constitutional right? Perhaps the actual litigation was the protected activity? The tenor of the majority's decision apparently substantiated the latter conclusion. The Court acknowledged the fact that the ancient attitudes regarding litigation, i.e., that it was a necessary evil to be avoided whenever possible, had long since given way to an appreciation of the benefits litigation can secure. For the members of the NAACP, litigation was perhaps their only means of effective expression. If this were an accurate appraisal of the Button

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45 371 U.S. at 439. "Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." Id. at 443.  
46 371 U.S. at 444. In a dissenting opinion, Mr. Justice Harlan asserted that the conduct protected by the majority's decision is not speech alone, but rather invades the sphere of conduct where "the area of legitimate governmental interest expands." Id. at 454.  
47 See Zimroth, supra note 37, at 985-88. Consider Mr. Justice White's concurring opinion wherein he stated what appeared to him to be the activity protected: "advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation." 371 U.S. at 447.
premise, the reasoning would follow thusly: to organize to solicit and sponsor litigation is not a matter of constitutional right and it may be regulated as long as such regulations do not impede the actual purpose of the organization—to advance rights of individuals through litigation. The right to litigate itself is a matter of constitutional right and as such cannot be regulated unless the state advances a substantial regulatory interest sufficient to upset the balance in favor of protection.

The search for the Button standard appears futile in light of two seemingly contradictory statements by the Court. Speaking for the majority of the Court, Mr. Justice Brennan was quick to point out that group legal services generally were not being judged. Yet, he also seemed to indicate that what the Court did in Button would affect the application of all the rules of legal ethics to group legal services.

Probably the most significant advance for group services came one year after Button in Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar. While this second Supreme Court decision also fell far short of establishing any workable standard, it did highlight a trend which the courts, in analyzing group legal services, would hopefully follow.

The plan employed by the Brotherhood was basically a referral plan. Injured members and their families would be contacted by a representative of the association's Department of Legal Counsel, advised against making any settlement before consulting with an attorney, and finally the member would be referred to a specific attorney chosen by the Brotherhood for his honesty and skill in railroad personal injury litigation. The Virginia State Bar was

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48 371 U.S. at 441-42. See Markus, Group Representation by Attorneys as Misconduct, 14 CLEV.-MAR. L. REV. 1, 13 (1965).
49 371 U.S. at 429 n.11.
51 This was not the first time such a plan was before the courts. See Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); In re Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); Hulse v. Brotherhood of R.R. Trainmen, 340 S.W.2d 404 (Mo. 1960). But see Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950) (Carter, J., dissenting) (Traynor, J., dissenting). Here strong dissents concluded that the Brotherhood's plan did not lower the dignity of the profession, but rather consisted of "nothing more than a proper joining of forces for the accomplishment of a proper legal objective of mutual protection." Id. at 516, 225 P.2d at 515.
52 Under the Brotherhood's plan, the country was divided into sixteen regions under the direction of the Department of Legal Counsel. With the advice of local lawyers and judges the Brotherhood would select a lawyer or firm with a reputation for honesty and skill in the area of workmen's compensation. The union also provided at their own expense a staff to investigate claims and gather evidence to be made available to the injured workman. See Bodle, Group Legal Services: The Case for BRT, 12 U.C.L.A. L. REV. 306, 310-11 (1965).
successful in enjoining the operation of the plan which was shown to constitute unlawful solicitation and the unauthorized practice of law. The Brotherhood admitted that the result of the plan was to channel legal employment to the particular attorneys, but nonetheless contended that the injunction operated to deny them freedom of speech, petition and assembly. The Court agreed, asserting that these first amendment freedoms gave the members the right to gather together for effective assertion of their collective rights. Although reputed as the Court’s first amendment “absolutist,” Mr. Justice Black showed no hesitation in subscribing to the balancing test rationale of *Button* when he observed that “the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan. . . .” 53 The Court concluded by asserting that the Constitution protected the associational rights of the Brotherhood precisely as it does that of the NAACP.

In a rather spirited dissent, Mr. Justice Clark repudiated the Court’s reliance on the *Button* decision asserting that there the NAACP strove to protect a “form of political expression,” made to secure constitutionally protected civil rights.54 No such civil rights were involved in the *Brotherhood* decision. He argued that the substitution of pecuniary gain as the motive of the association’s activities presented an enormous potential for evil which would bring disrepute to the profession.

It would seem that the majority attempted to lessen the gulf created by the factual disparity of the two cases by emphasizing that the rights the Brotherhood sought to protect were “authorized by Congress to effectuate a basic public interest.” 55 By so designating the Brotherhood’s interests, the Court apparently wished to give added prestige to the union’s mission with the hope of analogizing its function to the “fundamental freedoms” sought by the NAACP.

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53 377 U.S. at 8.
54 Id. at 10 (dissenting opinion). In answer to Mr. Justice Clark’s attempted distinction, one must consider first the majority’s statement: “The Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP.” Id. at 8 (emphasis added). Secondly, one must consider the statement of the Court in the *United Mine Workers* decision ([infra]) wherein it was said: “[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. . . . And the rights of free speech and a free press are not confined to any field of human interest.” 389 U.S. 217, 223 (1967). It would appear that these two statements underscore the difficulty of ascertaining precisely what activity was protected by the three decisions, i.e., the right to associate or the right to free speech through litigation.
Despite the Congressional endorsement of these rights so precious to the Brotherhood, it appears that the popular surprise over the Court's acceptance of the union's plan "in light of Button" was well warranted. The Brotherhood case, like its immediate predecessor, provided no standards with which to evaluate various group plans, and the applicability of the Canons to these problems was still very much in question. However, in light of the fact that the Court in these cases has emphasized the protected right of members to associate to secure common rights, it would seem that the logical extension of this protection left little room for the ethical checks the Canons were by design meant to insure. Consequently, the decision weathered serious criticism from the Bar, much of which was unfortunately misinterpreted by laymen.

The most recent Supreme Court endorsement of a group plan can be found in United Mine Workers of America v. Illinois State Bar Association. The particular plan employed by the union combined aspects found in both the NAACP's program and that of the Brotherhood. The UMWA employed attorneys to assist its members in claims arising out of the state's Workmen's Compensation Law. In vacating the Illinois decree which enjoined the union from carrying on these activities on the ground that it constituted the unauthorized practice of law, the Court held that the first and fourteenth amendments gave the union the right to hire attorneys on a salary basis to assist its members in the assertion of their rights. Mr. Justice Black, again writing for the majority, noted that the right to peaceably assemble and petition for redress of grievances is inseparably connected in origin and purpose with the first amendment rights of free speech and free press.

In so holding, the Court had to contend with the arguments advanced by the Illinois Bar and accepted by that State's highest court. As might be expected, the Illinois court easily distinguished the Button holding on the ground that that decision was limited to sanctioning a form of political expression. In answer to this contention, Mr. Justice Black aptly replied that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes,

58 376 U.S. at 5-6 (recognized in the Federal Employers' Liability Act and the Safety Appliance Act).
59 Id. at 222.
with small ones, are guarded. . . . And the rights of free speech and a free press are not confined to any field of human interest.” 

In distinguishing the Brotherhood case, the Illinois Bar argued that because the UMWA plan called for attorneys employed by the union, the possibility of control was appreciably greater than with the Brotherhood’s referral system, and consequently, the temptation to sacrifice the client’s interest was accordingly stronger. The Court rejected this argument, noting that in both situations the economic welfare of the attorneys was dependent upon the good will of the union, “and if the temptation to sacrifice the client’s best interests is stronger in the present situation, it is stronger to a virtually imperceptible degree.”

In applying the balancing rationale to this third plan, the Court studied several aspects of the plan in an effort to gauge the extent of possible conflict. The attorney’s contracts for employment explicitly disclaimed any control by the union over the attorney and emphasized the obligations presented by the attorney-client relationship. The individual members were under no obligation to accept the union counsel and, once accepted, the client made all decisions regarding settlement offers and pending litigation. Moreover, any resulting settlements or awards were paid directly and entirely to the client. Finally, the Court was not deterred by the fact that the rather routine processing of workmen’s compensation cases did not really require the attorneys to give their personal attention to each client. The important fact, as the Court pointed out, was that the attorneys were available for conferences with their clients should a particular situation warrant. After reviewing the entire plan, the Court did not reject the theoretical possibility of conflicts or abuse, but emphasized that in the many years the UMWA plan had been in operation, they were unaware of “one single instance” of abuse or conflicting interests. They concluded that these rather speculative dangers certainly did not warrant the broad proscriptions leveled by the Canons of Professional Ethics.

62 389 U.S. at 224. As the Court pointed out, it is interesting to note that although the Illinois Supreme Court considered the possibility of conflict as at best “conceivable,” it declared that any financial connection between the union and the attorneys was illegal. 35 Ill. 2d 112, 118, 219 N.E.2d 503, 506 (1966), quoting In re Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958).
63 389 U.S. at 220-21.
64 The lone dissenter, Mr. Justice Harlan, renewed his position previously taken in Button, wherein he agreed with the Court’s use of the “balancing” approach, but took issue as to its exact application. He asserted that the activity protected was not purely speech, but rather came within the sphere of conduct and, as such, the state’s interest in regulation could be expanded. Id. at 223.
Conclusion

Having reviewed the constitutional development of group legal services up to the present, one question must predominate: what generally is the status of group legal services today? The *Button-Brotherhood-United Mine* trilogy evidences the Supreme Court's determination to discard the Canon's indiscriminate prohibition of all group legal services plans. Yet, considering the many forms group legal services plans may take, the trilogy's relatively limited sphere of application makes any general conclusion impossible. Even within this factual sphere, the Court is obviously delinquent in setting standards for the three groups to follow which could then be made analogous to group legal services in general. The only alternative available to establish basic criteria for group services in general seems to necessitate extracting from the three plans factors common to all with the hope that some standards would then appear discernible.

All three plans provided legal services to the members as an additional feature or part of the overall services. In other words, the organization did not exist solely to provide group legal services. In each case the legal aid was available to enforce or protect rights realized as a result of membership. None of the plans in any way jeopardized the attorney-client relationship, i.e., each client had his own attorney who was made readily available to him. Each plan allowed the members absolute freedom to choose his attorney (union or non-union) and to make all decisions concerning his claim. And finally, no specific instances of actual conflict or abuse were apparent from the operation of the three programs.

Can we use these common factors to develop general evaluating criteria for group legal services? It is highly doubtful. A requirement that group plans be offered by organizations as an added feature only ignores the fact that the contribution of charitable legal aid programs, such as Legal Aid or similar plans organized under the OEO, has already been recognized. There is no reason why such "sole-purpose" plans have to be exclusively charitable. Could not a legal insurance program be implemented with enough safeguards so as to secure its beneficial performance? Could not the UMWA be permitted to offer its members legal services beyond the confines of workmen's compensation? Clearly, if we adopt the factors common to the three decisions as standards, these questions could not even be asked, much less answered. We are still without standards. An interesting question now arises. Could not the Supreme Court challenge the Bar for the same lack of standards? The Court might argue that the standards for determining breaches of the Canons of Ethics have become inappropriate and impervious to the developing needs of society.
Our canons of ethics for the most part are generalizations designed for an earlier era. However undesirable the practices condemned, they do not profoundly affect the social order outside our own group. We must not permit our attention to the relatively inconsequential to divert us from preparing to set appropriate standards for those who design the legal patterns for business practices of far more consequence to society than any with which our grievance committees have been preoccupied.\(^6\)

It appears now that perhaps the Court's omission of standards was deliberate. By so doing the Court will hopefully force the hand of the Bar Associations to set their own standards. The Bar would undoubtedly be better off to concede this battle lost and align itself with the ideal of providing maximum services to the public while insuring the maintenance of strict ethical standards. In the past, the Bar's zeal has resulted in not only proscribing particular undesirable conduct, but also in eliminating any possible opportunity for such conduct to arise. It must now concentrate specifically on the evil to be curbed, thinking in terms of motive rather than act, of actual abuse rather than potential abuse.

There is no alternative. If left to follow the rationale developed in the *Button* trilogy, the broad prohibitions of the Canons could entirely fall victim to the same force that endorsed the three plans. The three endorsements given group legal services will undoubtedly lead to considerable development of a variety of plans. These "planners" will be looking for guidance as to what services they can offer. The American Bar cannot afford to refuse this guidance. For unless strict ethical standards are rejuvenated and made applicable to group legal services through revision, it is doubtful whether any extension of the availability of legal services can properly satisfy this serious, unfilled need.

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