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Attorney and Client--Union Programs To Obtain Legal Counsel

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CASE COMMENTS

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The Brotherhood of Railroad Trainmen established a Department of Legal Counsel whereby sixteen attorneys regionally located throughout the United States were selected and recommended to its members involved in railroad personal injury cases. The Virginia State Bar obtained in the state court an injunction restraining these union activities. *Held,* the injunction denied members rights guaranteed by the first and fourteenth amendments. Thus, a union may maintain and carry out a plan for advising members who are injured to obtain legal counsel and for recommending specific lawyers. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 84 Sup. Ct. 1113 (1964).

The instant case rejects a history of decisions adverse to union programs to provide competent and reasonably priced legal services for members injured on the job and accepts the union program as amenable to rights guaranteed by the first and fourteenth amendments. The Court balanced individual rights against state regulation of law practice and noted that "[I]n regulating the practice of law, a state cannot ignore the rights of individuals secured by the Constitution." These amendments, the Court observes, give guarantees of free speech, petition and assembly, and the right to assemble for the lawful purpose of helping and advising one another in asserting "rights Congress gave them in the Safety Appliance Act and the Federal Employers Liability Act. . . ." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, supra* at 1116.

It thus appears that the Court has relaxed the application of established *Canons of Professional Ethics* to group programs. In pronouncing the union program as not being a commercialization of the legal profession, the Court rejected references to the *Canons of Professional Ethics* by the Virginia State Bar proscribing respectively the stirring up of litigation, control or exploitation by a lay agency of the professional services of a lawyer, and aiding the unauthorized practice of the law. See Canons 28, 35, 47.

The principal case on which the Court relies is *NAACP v. Button,* 371 U.S. 415 (1963). In this case, the State of Virginia unsuccessfully attempted to enjoin the NAACP from advising prospective

members to obtain the services of selected attorneys employed by the Association. In pointing to the NAACP case, the Court noted that the organization had amply shown its activities to fall within the protection of the first amendment, but that the state failed to show any substantial regulatory interest in the form of substantive evils flowing from the NAACP's conduct. The dissenting justices in the instant case contended that the NAACP case was inapposite because it dealth with a "form of political expression" to secure constitutionally protected civil rights through the legal process. The dissent further reasoned that "[P]ersonal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims. . . . ." Here the question involves solely the regulation of the profession, a power long recognized as belonging to the state. . . ." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, supra* at 1118-19.

The courts and the bar have long recognized the acute problem concerning the desire of organizations to assure competent representation in a society where the need for legal services is growing and many individuals are unacquainted with the laws and unaccustomed to seeking legal advice. Llewellyn, *The Bar's Troubles, and Poultices and Cures?*, 5 LAW AND CONTEMP. PROB. 104 (1938). However, the judiciary and the bar have always insisted that the solutions conform to the ethical principles formulated in the American Bar Association's *Canons of Professional Ethics.* Apposite Canons 27—forbidding advertising and solicitation 34—proscribing division of fees 35—barring control or exploitation of a lawyer's services by intermediaries, together with the judicially imposed auxiliary prohibition of unauthorized practice of the law by layment are soundly directed against the commercialization of the professional idea.

Historically, the courts have considered the benefits to union members as immaterial so long as (1) a lay intermediary operated in derogation of the attorney-client relationship, or (2) a lay entity employed methods of solicitation for an attorney otherwise ethically available to him. *In re Shoe Mfr's Protective Ass'n,* 295 Mass, 369, 3 N.E.2d 746 (1936). But *cf. In re Thibodeau,* 295 Mass. 374, 3 N.E.2d 749 (1936). The sensitive area has been with the last clause of Canon 35: "[B]ut this employment should not include the rendering of services to the members of such organization in respect to their individual affairs." This provision is obviously in

furtherance of keeping the attorney-client relationship personal, direct, and not subject to any lay intermediary. The Canon does not specifically exclude counsel for a corporation or organization from representing its individual employers provided such employment is not the result of improper solicitation, and provided such relationship is personal and direct and is not paid by the corporation or association. DRINKER, LEGAL ETHICS 162 (1954).

Many believed that the Canon would not prevent labor unions from finding lawyers to advise their member. See *Labor Union Lawyers,* 5 IND. & LAB. REL. REV. 361 (1952). In an Illinois case, where the railroad had settled directly with the employee, the court said that the railroad's defense that the plaintiff's employment had been obtained by fee splitting was "unworthy of the able lawyers who made it." *Ryan v. Pa. Ry.,* 268 Ill. App. 364, 373 (1932). In two other cases, however, *In re O'Neill,* 5 F. Supp. 465, 467 (E.D. N.Y. 1933); *Hildebrand v. State Bar of Cal.,* 36 Cal. 2d 504 (1950), involving the discipline of lawyers, the court censored participation in the plan. In the California case, there was strong dissents in which it was said that the plan "in no way lowers the dignity of the profession," being "nothing more than a proper joining of forces for the accomplishment of a proper legal objective of mutual aid."

The result of the instant case illustrates the immediate conflict between the need for inexpensive, competent legal services and the danger which threatens when intermediaries are interposed between attorney and client. The solution to the problems now presented calls for active participation by the legal profession. Perhaps one remedy would be to hasten lawyer referral plans and the organization of legal aid clinics. 50 A.B.A.J. 841 (1964). With such active participation comes the advantage that the bar association can effectively police activities and arrangements. This would obviate the need for any change in the American Bar Association's *Canons of Professional Ethics.* 64 HARV. L. REV. 1374 (1951). If recommendations concerning the choice of council are made by the union, such recommendations should include a representative group of attorneys. In relation to this concept, Informal Opinion No. 469 of the American Bar Association's Committee on Professional Ethics upholds the ethicality in an employer, association, or union agreeing to pay the legal expenses of a union member so long as the selection of the attorney is left to the employee or member

and so long as he has no responsibility to the employer, association, or union. 2 W. VA. BAR NEWS 161, 166 (1963).

Although the balance of interests in the instant case was resolved in favor of constitutional rights, the courts should be quick to note that a myriad of unsolved problems may now have been engendered because of the general relaxation in the application of the *Canons of Professional Ethics* to the union program. Will divergent interests between organization and members create a risk that the attorney might digress from the undivided pursuit of his client's interests? Will the nature of a case result in the selection of clients whose claims afford the organization an opportunity to retain the confidence of its members through extraordinary recoveries? Will the decision in the instant case necessitate federal legislation? The problems now created can only be solved through sober recognition of a new pattern developed by the court in this liminal area of attorney-client relationships—a pattern based on an extension of constitutional guarantees modifying the previously accepted application of the *Canons of Professional Ethics.* As the law must meet the needs of the people, so must the molds be reshaped accordingly to reestablish a standard of conduct comportable to the legal profession and the well-being of society.

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Criminal Law—Admissibility in Criminal Courts of Evidence Derived from Inadmissible Juvenile Confessions

D was one of two juveniles convicted of robbery by a jury in a federal district court following waiver of juvenile court jurisdiction. On appeal, *D* objected to testimony of a third juvenile who confessed participation in the robbery. *D* claimed this witness's identity was discovered as a result of a confession obtained from one of the *Ds* while in the custody of the juvenile court. *Held,* conviction affirmed. The rule forbidding the use of the confessions or admissions obtained from the accused while detained under juvenile court jurisdiction is intended to preserve the fundamental fairness to the juvenile, not to deter improper police conduct. The relationship between the inadmissible confession and the testimony of the witness was so slight that there was no reason for excluding it. *Edwards v. United States,* 330 F.2d 849 (D.C. Cir. 1964).