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The Ethical Problem in the Representation of Union Members by Union Attorneys

Roscoe Pound recently defined a profession¹ in these terms:

“By a profession, such as . . . law, . . . we mean much more than a calling which has a certain traditional dignity and certain other callings which in recent times have achieved or claim a like dignity. There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—. . . .”

He further recognized that the legal profession is a public profession; that lawyers are public servants and as a necessary corollary, it is incumbent upon these stewards of the legal rights and obligations of all the citizens to render an accounting from time to time.²

The definition is a good one and it is wise that the responsibility for the legal system is firmly committed to the legal profession for in this precise delegation lies the greatest probability that the trust will be executed. In that respect, the creation and establishment of the organized Bar, emanating from a conscious but theretofore disorganized sense of responsibility, did much to centralize and emphasize the trust attendant to the legal profession.³ The legal profession is its own master, zealously endowed as a thing of intellectual impartiality and an equilibrium of judgment. It is then a final answer that the profession is charged with the responsibility of administering to itself—indeed an onerous task.⁴ It is true, however, that an entire profession may lag behind and thus necessitate the exercise of the inherent and statutory supervision of the judiciary.⁵

¹ POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

² *Id.* at VII.

³ A.B.A. CONST. art. I.

⁴ Address by Mr. Justice Stone, 48 *HARV. L. REV.* 1, 8 (1934).

“But when we know and face the facts we shall have to acknowledge that such departures from the fiduciary principle do not usually occur without the active assistance of some member of our profession, and that their increasing recurrence would have been impossible but for the complaisance of a Bar, too absorbed in the workaday care of private interests to take account of these events of profound import or to sound the warning that the profession looks askance upon these, as things that ‘are not done.’”

Although this criticism was not directed to the problem presently being discussed, its message is nevertheless relevant.

⁵ W. VA. CONST. art. VIII, § 1; W. VA. CONST. art. V, § 1; W. VA. CODE ch. 51, art. 1, § 4A (Michie 1955).

And although a profession may set its own standards, its use of those standards is subject to regulation and its tests to close scrutiny⁶ for there are precautions so imperative that even their universal disregard cannot excuse their omission.⁷ Acknowledging then that the law is a public profession and that as such its responsibility is free from turbidity, is the profession executing its trust adequately? Does it exercise its fiduciary responsibility to all the citizens?

The profession is confronted with a difficult problem when lawyers are employed and paid by corporations, labor unions, and other groups under circumstances wherein the lawyer is called upon to deal with the affairs and handle the legal problems of individual members of that group, not identifiable with the interests of the group as an entity. The possible evils incident to such practice have long been recognized by the American Bar Association⁸ and the various state bar organizations.⁹ As to the propriety of lawyers engaging in activities of this nature Canon 35 seems clear: "A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. . . . A lawyer may accept employment from any organization . . . but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."¹⁰

The dilemma which exists is basically illustrated in a recent Illinois proceeding to determine whether the conduct of a labor organization and of lawyers, who served as regional counsel for its legal aid department, was illegal or unprofessional.¹¹ In that

⁶ *Herman v. Acheson*, 108 F. Supp. 723, 726 (S.D.N.Y. 1952). Codes of ethics adopted by bar associations, of course, have no statutory force. However, they are indicative of and reflect the attitude of the profession as a whole upon those courses of action which they frown upon and interdict, and they are commonly regarded by Bench and Bar alike as wholesome standards of professional ethics.

⁷ *West Virginia State Bar v. Earley*, 109 S.E.2d 420 (W. Va. 1959). In states where Canons have been adopted by rule of the highest court, they may of course be given the full force of law.

⁸ Canon 35, American Bar Ass'n Canons of Professional Ethics, 84 A.B.A. REP. 505 (1959).

⁹ W. VA. CODE Appendix, 103 (Michie 1955); cf. A.B.A., *Canons of Professional and Judicial Ethics—Opinions of Committee on Professional Ethics and Grievances*, (opinions 8 and 98) (1957).

¹⁰ *Statements of Principles With Respect To The Practice of Law Formulated By Representatives of The American Bar Association And Various Business And Professional Groups*, 84 A.B.A. REP. 99 (1959).

¹¹ *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958).

proceeding, regional attorneys located throughout the United States agreed with the Brotherhood of Railroad Trainmen to handle such acceptable personal injury claims as the Brotherhood referred to them at a fixed contingent fee. Each union local appointed a member to investigate accidents and urge injured parties to sign an adhesion contract employing a regional attorney. The regional attorneys bore the program's expense by remitting a pro-rata assessment of gross fees to the Brotherhood. Pending disciplinary proceedings against certain regional counsel, the Supreme Court of Illinois appointed a commissioner to investigate the program since the question raised had not theretofore been considered by the court. On the commissioner's report and on amici curiae briefs it was held, on the basis of a prior decision,¹² that proceedings looking toward the imposition of discipline should not be pursued but that in a stated time the Brotherhood program must be modified to conform to these prescribed standards: union employees could no longer carry contracts for the employment of any lawyer; no financial connection between the Brotherhood and any lawyer would be permissible; the Brotherhood could not fix fees.¹³ It was further held that no lawyer could properly pay a gratuity in connection with the procurement of a case. The decision was based on other decisions condemning similar programs.¹⁴ In a case¹⁵ of more recent vintage the Supreme Court of Nebraska enjoined the same type of activities as were in question in the Brotherhood case. The recent unlawful practice case, *West Virginia State Bar v. Earley*,¹⁶ prohibiting laymen from rendering certain services to unions and their members, brings into sharp focus the problem in West Virginia.

The definition of the practice of law¹⁷ has been used in many cases involving ethical problems and, as if a prelude to the present

¹² *Ryan v. Pennsylvania R.R. Co.*, 268 Ill. App. 364 (1932).

¹³ The decision rejects a union program to protect its members against unconscionable settlements and to procure competent legal service for its members, but makes it clear that if in the future the claims of members are solicited by lawyers, or if the fees charged by lawyers are excessive, the remedy of the Brotherhood would lie by way of complaint to the grievance committee of the appropriate bar association, rather than by way of a competing system of solicitation. 13 Ill.2d at 398, 150 N.E.2d at 168.

¹⁴ *Atchison T. & S.F. Ry. v. Jackson*, 235 F.2d 390 (10th Cir. 1956); *In re O'Neill*, 5 F. Supp. 465 (E.D.N.Y. 1933); *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508 (1950); *Doughty v. Grills*, 37 Tenn. App. 63, 260 S.W.2d 379 (1952).

¹⁵ *State v. Lush*, 170 Neb. 376, 103 N.W.2d 136 (1960).

¹⁶ *West Virginia State Bar v. Earley*, *supra* note 7.

¹⁷ W. VA. CODE Appendix, 99 (Michie 1955); W. VA. SUP. CT. RULES, 128 W. Va. XLX (1947).

discussion, the Board of Governors of The West Virginia State Bar has recently approved a revised definition of the practice of law¹⁸ for presentation to the Supreme Court of Appeals with the recommendation that the definition be approved and promulgated. One of the most significant proposed changes is that the words *natural* or *artificial* be inserted in the following order:

“The relation of attorney and client is direct and personal and a person, *natural or artificial*, who undertakes the duties and responsibilities of an attorney at law is none the less practicing law though such person may employ or select others to whom may be committed the actual performance of such duties.”

It appears to be the purpose of this language to make the definition specifically applicable to corporations, unions and other organizations and groups where such groups or organizations have no specific interest in the legal affairs of an individual member of that body.

While some writers¹⁹ argue for the relaxation of the application of Canon 35 in situations such as those in which labor unions seek to find lawyers to advise their members, there are obvious difficulties in any such relaxation and also a lack of uniformity in the thinking thereon.²⁰ The premise upon which Canon 35 is based is to the effect that the lawyer's duty of undivided loyalty to his client is subjected to the pressure of a conflicting loyalty if the lawyer owes any duty to the intermediary.²¹ The necessity of Canon 35 is supported by various arguments: the financial tie between the intermediary and the attorney creates a risk that the attorney might digress from the uninhibited pursuits of his clients interests,²² possible abuses in the solicitation of clients,²³ commercialization of the profession,²⁴ the possibility that lawyers who were engaged by the intermediaries would use improper means to insure

¹⁸ 11 W. Va. State Bar News 49 (1961).

¹⁹ DRINKER, *LEGAL ETHICS* 167 (1954): “The whole modern tendency is in favor of such arrangements. . . .”

²⁰ Turrentine, *Legal Service for the Lower-Income Group*, 29 ORE. L. REV. 20 (1949).

²¹ Drinker, *The Ethical Lawyer*, 7 U. FLA. L. REV. 375 (1954).

²² In the Matter of Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910): “The relation of attorney and client is that of master and servant in a limited and dignified sense and it involves the highest trust and confidence.”

²³ *Chreste v. Commonwealth*, 171 Ky. 77, 186 S.W. 919 (1916).

²⁴ DRINKER, *op. cit. supra* note 19, at 212.

continued solicitation,²⁵ and finally that the intermediary might be motivated to make a profit.²⁶ These arguments readily demonstrate that the problem is not one free from difficulty.

In problems of this nature, particularly so in cases wherein controversial bodies such as unions are involved, the real issue²⁷ is often clouded by statements consisting of obvious overtones of hostility toward unions.²⁸ Lest that error be committed here, it is suggested that the problem should not be handled with the "conventional wisdom"²⁹ characteristic of the legal profession but that the profession, as feoffee of the rights and obligations of all the citizens, should execute its trust by recognizing the causes of the problem herein discussed. Certain of these causes may be regarded as permanent. One problem is found in the organization of the law itself into fifty separate jurisdictions co-existent with the federal court system and the mass of administrative agencies.³⁰ Another is found in our legal system, erected in large measure on case law on which is superimposed spasmodic, unsystematic and inadequately indexed statutory amendments, producing an incredibly expensive legal operation.

Against this background arises the assertion that the pursuit of rights has become a luxury article.³¹ It has also been suggested that the real argument against Bar approval of labor unions and other groups employing lawyers to advise their members is the loss of income to the lawyers and concentration of service in the hands

²⁵ *Semler v. Oregon State Bd. of Dental Examiners*, 249 U.S. 608 (1935).

²⁶ *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508 (1950).

²⁷ The problem is purely one of an ethical nature and involves a balancing of interests to determine whether Canon 35 should be amended to permit such activity in an effort to provide less expensive legal service.

²⁸ Comment, 11 STAN. L. REV. 394 (1959).

²⁹ GALBRAITH, *THE AFFLUENT SOCIETY* (1958). In Professor Galbraith's book, the phrase, "conventional wisdom" was coined. By this is meant that ideas and ideals are often based on relationships that once were valid but are no longer appropriate under changed conditions.

³⁰ *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952): "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative agencies apart."

³¹ The exact quotation here is: "I don't want the pursuit of rights to become a luxury article." Llewellyn, *The Uncovered Needs for Legal Service*, 16 TENN. L. REV. 641 (1944).

of fewer lawyers.³² Such features do not commend the profession to the public.³³

When squarely faced with the problem herein discussed, the Supreme Court of Illinois, in the *Brotherhood* case,³⁴ surveyed and established the limitations of the ethical relationship between such associations and private attorneys. The decision is basically sound and rests largely upon the asserted dangers inherent in the relationship, but it is not a precise blueprint capable of solving the problem of providing economically feasible legal service to low-income groups. The dilemma yet remains and is of major importance to the Bar. The obligation is clear and the Bar should not hesitate to exercise diligence in recognizing the challenge and in taking positive steps to meet it in the best traditions of the profession. No economic roadblock should make the pursuit of rights by all the citizens an unobtainable asset or a point of ridicule. The service of the profession must be available to all the citizens and only if such service is provided will the Bar discharge the full measure of its trust.

Herbert Shelton Sanger, Jr.

³² DRINKER, *op. cit. supra* note 19, at 167.

³³ Drinker, *op. cit. supra* note 21, at 384. "The attitude or belief by the public that this is the motivating factor in the rulings, degrades the bar in the eyes of the public. It is regarded as a dog-in-the-manger attitude—the bar is trying to keep the public from getting less expensive and better service."

³⁴ *In re Brotherhood of R.R. Trainmen*, *supra* note 11.