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## GROUP LEGAL SERVICES FOR TRADE ASSOCIATIONS

*Richard D. Copaken\**

THE ethical standards which have traditionally governed the legal profession recently have come into conflict with an expanding conception of free speech and association. In a 1963 landmark decision, *National Association for the Advancement of Colored People v. Button*,<sup>1</sup> the Supreme Court held Virginia's champerty and maintenance laws unconstitutional under the first and fourteenth amendments insofar as they prevented the National Association for the Advancement of Colored People (NAACP) from soliciting persons to serve as plaintiffs in desegregation litigation and from providing them with counsel in these cases. In announcing this dramatic new limitation on the regulation of the legal profession, the Court recognized that the private lawsuit may well be, in substance if not form, a vehicle for the achievement of group political objectives:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.<sup>2</sup>

The Court deliberately chose to read the first and fourteenth amendments expansively to protect a broad class of orderly group activity, including "vigorous advocacy" as well as "abstract discussion."<sup>3</sup>

In *Brotherhood of Railroad Trainmen v. Virginia (BRT)*,<sup>4</sup> the Court extended the reasoning of *Button* to protect a plan by which

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1. 371 U.S. 415 (1963).

2. *Id.* at 429. Pound observed that the conflict between the "individualist spirit of the common law" and the "collectivist tendencies of today" represents a cause of dissatisfaction which is peculiar to our Anglo-American legal system. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* xxiv (1953). Perhaps the Court's candid recognition in *Button* of the primarily group-serving function of NAACP-sponsored private lawsuits is a healthy step in the direction of eliminating this cause of dissatisfaction. Professor Henry M. Hart suggested in a lecture to his Harvard Law School class on federal courts and the federal system that the reapportionment decisions represent, for better or for worse, a substantial shift in the law of standing—where it once was required that plaintiffs have a personal interest to invoke the power of the court, the voluntary representation of political group interests is now deemed adequate. Lecture Notes, Nov. 5-12, 1965.

3. 371 U.S. 415, 429 (1963).

4. 377 U.S. 1 (1964).

the Brotherhood, a labor union, recommended to members injured in railway accidents particular attorneys who specialized in Federal Employers' Liability Act (FELA) cases. Thus, associational rights deriving from pocketbook interests were afforded the same protection as associational rights to achieve political objectives.

In 1967, the Court had an opportunity to reassess this extension of the constitutionally protected right of association. *Mine Workers v. Illinois Bar Ass'n (UMW)*<sup>5</sup> confronted the Court with the same issue which it had faced in *BRT*, albeit stripped of any peculiarly federal legislative interest. Whereas the *BRT* channeled individual members' FELA claims to selected attorneys, the *UMW* employed a salaried attorney to represent individual members' workmen's compensation claims before the state Industrial Commission. The Supreme Court of Illinois held that the *UMW* had engaged in the unauthorized practice of law, distinguishing *BRT* on the ground that the mere channeling of legal work to selected attorneys was less destructive of the traditional attorney-client relationship than the direct financial arrangement employed by the *UMW*. *Button*, where attorneys were paid directly by the NAACP, was distinguished on the ground that the associational interests protected there were qualitatively different—a form of political expression more important than the bodily injury complaints of the mine-workers. Moreover, the Illinois court noted that in *Button* there had been a dearth of local lawyers willing to handle civil rights litigation and that the state court decree overturned by the Supreme Court had proscribed not only the NAACP's direct salary arrangement but also any arrangement by which prospective litigants were advised to seek the assistance of particular attorneys.

The Supreme Court refused to accept these limiting distinctions; instead, the Court asserted its intention to give the broadest possible constitutional sweep to its two prior decisions:

We do not think our decisions in *Trainmen* and *Button* can be narrowly limited. We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

.....  
We think that both the *Button* and *Trainmen* cases are controlling here.<sup>6</sup>

The Court took cognizance of the distinction between the "po-

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5. 389 U.S. 217 (1967).

6. 389 U.S. at 221-22, 223.

litical matters of acute social moment" at stake in *Button* and the economic interest asserted by the mineworkers, but it found this distinction identical to that which it had rejected in *BRT* as irrelevant under the first amendment. Moreover, the Court found it equally irrelevant under the first and fourteenth amendments that the litigation in *BRT* involved federal statutory rights, while the plan in *UMW* was utilized to further state-created rights:

Our holding in *Trainmen* was based not on state interference with a federal program in violation of the Supremacy Clause but rather on petitioner's freedom of speech, petition, and assembly under the First and Fourteenth Amendments, and this freedom is, of course, as extensive with respect to assembly and discussion related to matters of local as to matters of federal concern.<sup>7</sup>

The Court in *UMW* conceded the broad power of the states to regulate the practice of law but concluded that this power is qualified by the first amendment right of association; the dangers of "baseless litigation and conflicting interests" were "too speculative" to justify the broad remedy invoked by the state. Thus, where the Court views the dangers to the public as less speculative, relatively broad state proscriptions still might be valid. Indeed, even the dangers which the Court deemed speculative in *UMW* might justify more narrowly defined regulation which imposes less restraint on the right of association.<sup>8</sup>

*UMW* is significant primarily because it provides an indication of the Court's willingness to follow the logic of *Button* and *BRT* wherever it reasonably may lead.

One indisputable conclusion can be drawn from these three decisions. Certain of the current Canons of Professional Ethics—particularly canon 47, prohibiting attorneys from aiding the unauthorized practice of law; canon 35, directed against the intervention of lay intermediaries between attorney and client; and canons 27 and 28, proscribing solicitation and the stirring up of litigation by attorneys or their agents—must now be qualified by the first amendment associational rights of the public. These canons are modeled

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7. 389 U.S. at 224 n.5.

8. Justice Harlan's dissenting opinion did not quarrel with the need for such a balancing of interests in resolving this first amendment question, but the Justice took issue with the way in which the majority struck the balance:

Since the finding that the union plan presents dangers to the public and legal profession is not an arbitrary one, and since the limitation upon union members is so slight, in view of the permissible alternatives still open to them, I would hold that there has been no denial of constitutional rights occasioned by Illinois' prohibition of the plan.

389 U.S. at 233.

on a traditional conception of the attorney-client relationship which may no longer be appropriate.

Fundamental ethical principles have continuing validity; but, if the specific articulations of these principles in the Canons do not keep pace with the changing premises from which they are derived, they can cloud the profession's perception of those public needs which the profession is obligated to serve. It took the powerful current of the civil rights movement to correct the warp that had developed between the Canons, which are based upon an historical view of the public interest, and the actual changed character of that interest.

Freed by *Button*, *BRT*, and *UMW* from an acceptance of the Canons as absolute, the courts and the profession can now respond to new pressures from many directions. The developing recognition of the need to provide adequate legal services to the indigent has challenged the legal profession to reshape its traditional conceptions of the attorney-client relationship. The needs of union members had also long been unsatisfied by the legal profession acting in its orthodox, highly individualized role. To the extent that such needs have been met, it has been by a form of group legal services the existence and possible harmful consequences of which the profession has either largely ignored, as in the case of legal aid to indigents, or uncritically decried as violative of the Canons, as in the case of services provided union members. A reawakening of the profession to the needs of the public, coupled with a recognition that new concepts of service may be necessary if these needs are to be met, can certainly be a healthy development. Nevertheless, it would be unfortunate if the profession, in its zeal for reform, should overlook the dangers at which the Canons were originally directed, which may continue to exist, or the values which the Canons sought to perpetuate, which may have continuing vitality. Bold experimentation is called for in this period, but perspective is equally necessary.

In *Button*, *BRT*, and *UMW* the Court seems largely to have ignored or cavalierly discounted as too speculative the possibility of harm to the public which might be caused by violations of the traditional Canons. Perhaps this was due to the overwhelming importance of specialized group legal services in these cases. One way to achieve perspective in delineating the proper scope of *Button*, *BRT*, and *UMW* is to analyze the impact of these cases where the justification for their extension is apparently the weakest. The legal representation of the affluent members of trade associations, organized primarily for economic purposes, presents one such context in which the need for *group* legal services is not obvious. Fur-

thermore, such representation constitutes a substantial portion of the practice of many major law firms today. Consequently, there is a significant need for useful guidelines here, where the applicability of *Button*, *BRT* and *UMW* is least clear. This Article will examine the goals of the Canons of Professional Ethics in this trade association context, noting the pre-*Button* limitations on the representation of members of such associations, and analyzing the possible impact of the three cases on the development of group legal services in this area. Hopefully, the perspective gained from such an examination may prove useful in the difficult task immediately confronting the legal profession: reformulation of the Canons to bring them into conformity with *Button*, *BRT* and *UMW* while minimizing, on the one hand, the loss of those traditional conceptions which have continuing value and validity, and maximizing, on the other, the utility of the Canons as general guidelines to ethical conduct.

### I. BEFORE BUTTON: THE TRADITIONAL VIEW

The attorney's role is circumscribed by duties and obligations emanating from four authorities: statutes, common-law decisions and the inherent power of the courts to regulate the practicing bar, the Canons, and the customs and practice of the bar.<sup>9</sup> The focus here will be upon the regulatory purposes and effect of the Canons, which are given the force of statutory law in many jurisdictions,<sup>10</sup> and which "are commonly regarded by bench and bar alike as wholesome standards of professional ethics" even in those jurisdictions where they have no statutory force.<sup>11</sup>

Drinker attributes the development and adoption of Codes of Ethics in this country, beginning with the Alabama Code in 1887, to the concerned reaction of thoughtful leaders of the bar to the "growing commercialism all over the country."<sup>12</sup> The competitive marketplace may produce the lowest price for the consuming public, but in the context of legal services this benefit was felt to be outweighed by the accompanying reduction of ethical standards to the lowest common denominator. Trust is at the heart of the attorney-client relationship, and it was felt that the public could not place its trust in a profession that was governed only by the law of competition.

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9. See H. DRINKER, LEGAL ETHICS 22 (1953) [hereinafter DRINKER].

10. See, e.g., S.D.N.Y. GEN. R. 5(c); cf. CAL. BUS. & PROF. CODE §§ 6068(e), 6076, rules 5 & 7 (West 1962).

11. *Herman v. Acheson*, 108 F. Supp. 723, 726 (D.D.C. 1952).

12. DRINKER 24-25 (1953).

Currently, the pendulum seems to be swinging back to the lessons of the competitive marketplace. The highest ethical standards cannot meet the needs of the public if deviation from laissez-faire competitive ideals also forces the price of adequate legal services to rise beyond the reach of large segments of the public. Much of the current controversy over group legal services can be viewed as an effort to strike some balance between the allocation of our legal resources which the marketplace would dictate as most efficient and the ethical ideal of the highly personalized attorney-client relationship, accompanied by undivided loyalty, which the present Canons demand.

Before this balance can be attained, we must pinpoint and assess the continuing value of the goals and restrictions imposed by the traditional Canons. An illustration may help to focus this analysis. When an individual member requests legal advice from his trade association, how far can the law firm representing the association go in helping to frame such advice? What kind of advice can be given before the association finds itself engaged in the unauthorized practice of law? Before the law firm finds itself guilty of aiding such unauthorized practice in violation of canon 47 or other canons? What kind of *unsolicited* advice can the trade association give to members and nonmembers, and to what extent can the law firm representing the association participate in the framing of such advice?

#### A. Canon 47: Aiding the Unauthorized Practice of Law

There are two major problems relating to the unauthorized practice of law which should be kept distinct for purposes of analysis. The trade association may give advice in such a way as to itself be guilty of unauthorized practice of law. In addition, attorneys who knowingly assist such conduct violate canon 47:

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.<sup>13</sup>

Generally, the courts of each jurisdiction, in the exercise of their inherent supervisory power over the legal profession, determine what constitutes the practice of law.<sup>14</sup> However, definitions

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13. *Id.* at 325. This canon was adopted by the American Bar Association (ABA) on September 30, 1937. *Id.*

14. The inherent power of the judiciary in this area may not be exclusive. Although, as a matter of long-standing tradition, the judiciary has regulated the entire practice of law, the courts may accede to concurrent legislative regulation, particularly with regard to activities outside the courtroom, as a matter of law or comity. *See*

of the practice of law are often so general that they are of little value in determining, in difficult cases, what kind of advice will amount to the unauthorized practice of law when rendered by a trade association.<sup>15</sup> It has been suggested that the absence of a more precise statutory or court-made definition is both intentional and necessary because of the dynamically expanding nature of legal practice.<sup>16</sup> Perhaps the best way to define what kind of advice constitutes the practice of law is to look at the particular problem upon which advice is sought, and to determine how much legal training and skill is required to solve it.<sup>17</sup>

Toward that end, one distinction commonly made is between *specific* advice, relating to an individual problem, and *general* advice, as is typically available in books and periodicals. Most cases which condemn the giving of specific advice as the unauthorized practice of law have involved other conduct of a legal nature as well, such as the preparation of legal documents.<sup>18</sup> However, two fairly recent cases raise the narrower issue. *Oregon State Bar v. John H. Miller & Co.*<sup>19</sup> was the first state supreme court opinion on the question of whether a corporation can engage in estate planning. The Oregon trial court had enjoined the defendant company from engaging in most of its estate planning activities, but permitted it to give advice concerning the tax consequences of life insurance. The Oregon Supreme Court forbade even the latter practice, because such advice necessarily contained substantial legal content. In *Green v. Huntington National Bank*,<sup>20</sup> an Ohio intermediate appellate court held that a bank's estate planning service, and the advertising thereof, constituted the unauthorized practice of law because it involved providing "specific legal information in relation

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Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960).

15. See, e.g., *State v. C. S. Dudley & Co.*, 340 Mo. 852, 858-59, 102 S.W.2d 895, 898-99 (1937).

16. Murphy, *Practicing Law in the District of Columbia*, 26 UNAUTHORIZED PRACTICE NEWS 276 (1960).

17. See, e.g., *People v. Schafer*, 404 Ill. 45, 53, 87 N.E.2d 773, 777 (1949); *Oregon State Bar v. John H. Miller & Co.*, 235 Ore. 341, 385 P.2d 181, 182 (1963). It should be noted that the absence of compensation will not be relevant to the danger to the public from acts of the unskilled. *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 41 Wash. 2d 697, 699, 251 P.2d 619, 621 (1952).

18. See, e.g., *New York County Lawyers' Ass'n*, 181 Misc. 632, 43 N.Y.S.2d 479 (Sup. Ct. 1943).

19. 235 Ore. 341, 385 P.2d 181 (1963).

20. 3 Ohio App. 2d 62, 209 N.E.2d 228 (Franklin County Ct. App. 1964), *modified*, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965).



to specific facts."<sup>21</sup> The bank's activities had been solely advisory, and throughout the bank's estate plan advice were numerous statements suggesting that the customer consult his own attorney. Furthermore, the court suggested in dictum that its decision would have been the same regardless of the quality of the services actually rendered. On the other hand, it has been held that the dissemination of *general* legal information by lay agencies does not constitute the unauthorized practice of law, especially where coupled with advice to consult an attorney if a specific problem arises.<sup>22</sup>

Even if we ignore the thorny problem of how accurately to distinguish between specific and general advice, we must still determine the interest which the distinction serves before we can rationally assess its validity. The need for such an analysis becomes evident as one considers that the imperatives of the first amendment and restrictions upon the giving of legal advice come more clearly into conflict as the advice in question becomes more general. It is possible that the distinction between general and specific advice is sustained by this consideration: the need for legal expertise increases as a function of the specificity of the advice given; conversely, as the advice becomes more general, and thus increasingly a product of those broad principles known and assented to by all, so will the need for legal expertise on the advisor's part be diminished. A related consideration is the increased likelihood that a client will rely upon specific advice geared to his particular situation rather than upon general textbook information. One should not, however, underestimate the foolhardy, do-it-yourself spirit of many members of the public.

Unhappily, these considerations may not be the only forces behind canon 47. Although efforts to define the practice of law may be justified by the need to protect the public from the practice of law by unqualified persons, the parallel objective of maintaining a closed-guild monopoly on all the available legal business may also underlie the willingness of the American Bar Association (ABA) to proscribe the aiding of such unauthorized practice by its membership. These two motives often reinforce one another because it is generally in the interest of both the public and the legal profession that advice on legal matters be given only by qualified attorneys acting individually. However, on occasion, the anticompetitive con-

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21. *Id.* at 129, 209 N.E.2d 230.

22. *See, e.g.*, *State Bar Ass'n of Connecticut v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958); *Cain v. Merchants Nat'l Bank & Trust Co.*, 66 N.D. 746, 268 N.W. 719 (1936).

sequences of such a restriction are so substantial, and the danger that the advice will be incompetent is so negligible, that the public interest may part company with the vested interest of the profession.<sup>23</sup> This was illustrated in *Button* where the Negro plaintiffs might have been deprived of *any* legal advice or representation if the prohibition against performance of such services by attorney agents of the NAACP had been permitted to stand.

Several other arguments have been advanced to restrict effective group legal service programs. It is generally held that since a corporation cannot practice law directly, it cannot do so indirectly by using lawyers as agents.<sup>24</sup> One reason given for this view is that a corporation, being other than a natural person, cannot be as effectively controlled by the court as an actual attorney. However, if an association or corporation is required to act through attorney-agents, it is submitted that the court's power to control such agents as officers of the court should be sufficient to protect the public against advice lacking in legal skill or knowledge. Another argument consists of the baldly asserted non sequitur that "[a]s the lawyer cannot share his professional responsibility with a layman or lay agency, he cannot properly share his professional emoluments with them."<sup>25</sup> Of course the same nondelegable nature of the attorney's responsibilities does not prevent him from properly sharing his professional emoluments with his landlord, secretary, and others who similarly aid him in his work, all without dilution of his responsibility. At any rate, before *Button* a trade association would have been guilty of the unauthorized practice of law in most jurisdictions if it had given its members specific advice calling for a substantial degree of legal expertise on matters of individual concern. Presumably, attorneys who had aided the association in framing such advice or who had served as the association's agents in disseminating such advice would have violated canon 47 by having aided the unauthorized practice of law.

### B. Canon 35: Intermediaries

Canon 47 is concerned primarily with the danger of public reliance upon advice that is lacking in legal skill or knowledge, but other considerations are pertinent to any group legal service plan under which an association provides legal advice to its members:

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23. See DRINKER 162-67.

24. *E.g.*, *People v. Merchants Protective Corp.*, 189 Cal. 531, 209 P. 363 (1922); *In re Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910).

25. ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, No. 8, at 71, 75 (1925) [hereinafter OPINIONS].

even if the association provides such advice only through highly skilled and knowledgeable attorney-agents, the danger of conflicting interests between the association and its members remains. Canon 35 is primarily concerned with this danger:

The professional services of 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. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their *individual* affairs.<sup>26</sup>

An identity of interest between an association and any particular member cannot be assumed.<sup>27</sup> This point might appear so obvious as to require no citation but for the fact that this indefensible assumption seems partly to underlie the Court's decision in *Button*.<sup>28</sup> Since a member usually joins an association because of its ability to further interests he shares with other association members, conflicts of interest between member and association may arise only in subtle ways; however, this very subtlety may aggravate the danger of intervention by the association between the member and the attorney upon whose undivided loyalty the member relies.

Contrary to the implication of *Button*, the mere absence of any pecuniary factor does not eliminate the possibility of such conflicts. A Negro member of the NAACP, for example, may share with other members an interest in the achievement of desegregated education. However, it might be in the particular member's best interest to seek administrative accommodation or token integration to enable *his* high school youngster to attend a better school; at the same time, it might well be in the best interest of the NAACP to seek, through this particular member, more protracted litigation aimed at complete desegregation, even if such litigation probably would not culminate successfully until after the particular member's child

26. DRINKER 322 (emphasis added). This canon was adopted by the ABA on July 26, 1928, and amended Aug. 31, 1933. *Id.* at 309.

27. See, e.g., *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Machinists v. Street*, 367 U.S. 740 (1961).

28. *NAACP v. Button*, 371 U.S. 415, 442-43 (1963).

had finished his schooling. It might not be difficult for an NAACP attorney to persuade the member that his best interests were really tied to the long-range interests of the Negro community as a whole, as indeed they might be. But is such an attorney capable of objectively aiding his client to disentangle his particular interests from those of the group as a whole? Will such an attorney even be in a position to tell the difference? We can translate these considerations into the framework of our inquiry simply by noting that similar conflicts of interest inevitably must exist between trade associations and their members.

The distinction in canon 35 between the permitted representation of an association as an entity and the proscribed rendering of legal services to members of the association in respect to their individual affairs is responsive to the danger of conflicting interests. The canon provides clear practical guidance to both the association attorney and the individual member. The former owes his undivided loyalty to the association; consequently, when a member becomes aware of a possible conflict of interest between himself and the association, he should be on adequate notice of the need to employ his own attorney. Of course, lay association members cannot always be expected to exhibit great sensitivity to potential conflicts of interest. Happily, however, the clarity with which the attorney's duty to the association stands forth, were he to adhere steadfastly to canon 35, should serve to enhance the attorney's own perception of such potential conflicts and possibly lead him to issue an appropriate warning to the member. Thus, the balance is properly struck, with the primary burden on the attorney, who is able to bear it.

The canon 35 distinction between representing the association and representing its members on individual matters is also responsive to another concern—the need for a direct and personal relationship between attorney and client. The existence of such a relationship gives some assurance that the attorney will have access to all the information necessary to the formulation of sound legal advice. To the extent that an attorney employed by an association limits his advice to matters affecting the association as an entity, he will have access to all the necessary information in his relationship with his employer. Only when the association attorney attempts to advise members on individual matters does the intervention of the association undermine the direct personal relationship between attorney and client and pose a serious problem of breakdown in vital communication. Of course, in the context of a trade association composed of corporate members, it may make little sense to speak in terms

of a close *personal* attorney-client relationship, although the concern for *directness* is still valid.

A series of opinions of the ABA Committee on Professional Ethics and Grievances elaborate upon the canon 35 distinction. Opinion 8<sup>29</sup> disapproved of the conduct of lawyers who helped an auto club advise its members about their *individual* affairs. However, this opinion prefaced its condemnation with the observation that the attorneys were not rendering advice on questions of *collective* interest to the membership as a whole, implying that such advice might not have been proscribed. Focusing on the fact that the advice would relate to individual rights, opinion 270<sup>30</sup> condemned a proposed newspaper column giving legal advice in a question and answer format as violative of canon 35 and canon 40,<sup>31</sup> even though the attorney-author was to remain anonymous, thereby avoiding any problem of solicitation; only questions of general public interest were to be answered; the reader was to be cautioned to consult his own attorney rather than rely on the published answer; and, the columnist was to write with the approach of a lecturer rather than that of an adviser on legal rights. Obviously, concern with the need for a personal and direct attorney-client relationship was very great in this opinion. Opinion 98<sup>32</sup> similarly found it to be professionally improper for a lawyer to give legal advice through a question and answer column in a state bankers' association bulletin in response to the inquiries of individual member banks. Opinion 168<sup>33</sup> subsequently limited opinion 98 by stating that it is ethically proper for the general counsel of a trade association to render legal opinions upon problems common to all members for distribution among the membership, even when the opinion is in response to an inquiry from an individual member. This opinion recognized the growing need for the economies of scale obtainable only through some form of group legal service but continued to emphasize the need for a direct attorney-client relationship where members seek advice on individual problems.<sup>34</sup>

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29. OPINIONS 73 (1925).

30. OPINIONS 560 (1945).

31. "A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights." DRINKER 323 (1953). This canon was adopted by the ABA on July 26, 1928. *Id.* at 309.

32. OPINIONS 214 (1933).

33. OPINIONS 341 (1937).

34. OPINIONS, No. 168, at 342 (1937):

The vast majority of business men cannot afford to retain law firms in their constant employ in order to be continually advised upon all these problems [anti-trust laws, Robinson-Patman Act, and other aspects of increasing state and federal

Opinion 273<sup>35</sup> reviewed and reaffirmed opinion 168 in deciding that it is ethical to give general legal advice on matters of common group interest to members of a manufacturers' association through the association's trade bulletin. The opinion noted that while the fact that advice was prompted by individual members might indicate that the problem primarily concerned them individually, this "would not be conclusive, since, as in *Opinion 168*, individual members might ask questions of general interest."<sup>36</sup>

Even prior to *Button*, therefore, a trade association could properly advise a member on an individual matter so long as such advice was limited to issues of collective interest to members of the association and so long as the member was urged to seek the advice of his own attorney in the application of such general advice to his particular problem. So limited, it seems to be immaterial whether the advice was directed to members or nonmembers<sup>37</sup> or whether it was solicited or unsolicited, even though solicited advice carries with it a greater danger of being construed as directed to individual affairs only. It is conceivable, however, that advice rendered by a trade association could be of sufficient collective interest to the association membership to satisfy the distinction drawn by canon 35 and yet still be specific enough and require enough legal skill in its formulation to be deemed the unauthorized practice of law. Lawyers who frame such advice may therefore violate canon 47 even though their conduct is permitted under canon 35 and the opinions thereunder.

Canon 35's specific exemption of charitable societies which render legal aid to indigents demands examination.<sup>38</sup> Such agencies, of necessity, advise indigents "in respect to their individual affairs." Consequently, to the extent that the distinction between general advice on matters of collective group interest and specific advice on individual problems represents a different degree of danger to the public, such group legal services for indigents would seem to pose

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regulation of business]. Hence the cooperative association such as the one here described. The giving of advice upon subjects affecting the group is a proper function of a lawyer, protecting its members from prosecution, penalty and loss and at the same time interpreting the law and encouraging its due observance.

This is to be clearly distinguished from the purchase by the association of advice for an individual member concerning his own peculiar problems and without the full and free disclosure of the factual situation essential to the proper relation of attorney and client.

35. OPINIONS 570 (1946).

36. OPINIONS, No. 273, at 573 (1946). See also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & THE NEW YORK COUNTY'S LAWYERS' ASSOCIATION, COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS ON PROFESSIONAL ETHICS, No. 804, at 495 (1956).

37. See discussion of canons 27 and 28 in text accompanying notes 39-57 *infra*.

38. This exception to the law of maintenance is of very long standing. See 4 W. BLACKSTONE, COMMENTARIES, ch. 10, at 134 (12th ed. 1795).

the greatest possible danger. A cynic might suggest that because of the absence of legal fees for such work the profession has ignored the possible dangers to clients of legal aid societies. More probably, because representing indigents obviously entails an economic burden, rather than a profitable opportunity, the organized bar has been able objectively to evaluate the necessity for these services and has decided that the economies of scale essential to satisfying the needs of this segment of the public outweigh the dangers of conflicting interests, incompetent advice, and interference with direct attorney-client relationships. This balance is more easily struck, since the last two dangers can be minimized by requiring legal aid societies to act only through qualified attorney-agents who confer personally with the indigent clients they represent. Perhaps the formal identification of this exception in canon 35 will ease the transformation of the canon into a new guideline capable of encompassing the additional exceptions created by *Button*, *BRT*, and *UMW*, where the need for some form of group legal services seems similarly to overbalance their potential for harm.

C. *Canons 27 and 28: Solicitation of Professional Employment and Stirring up Litigation, Directly or Through Agents*

Running throughout the other canons and opinions rendered thereunder is a general conception of the essential dignity of the legal profession. This view—that the attorney's role in society can be filled properly only by those who merit the respect of the public and of their fellow lawyers by remaining selflessly aloof from the manipulative devices of the competitive marketplace—is expressed most directly in canon 27, which condemns advertising and other forms of direct or indirect solicitation of professional employment,<sup>39</sup> and in canon 28:

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. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of actions and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to

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39. DRINKER, §16. This canon was adopted by the ABA in 1908 but has undergone frequent revision and was last amended in 1963.

remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.<sup>40</sup>

These prohibitions would be ideal in a small town where everyone knows the reputation of the few solo-practitioner attorneys who serve as general family and business advisers; this is especially so if we further postulate well-informed citizens, aware of their rights under the law or, at least, aware of the need to seek legal advice in appropriate circumstances, and on a close enough personal basis with the town's attorneys to feel free to seek such advice. In such a town, strict observance of canons 27 and 28 would not only assure the lawyers some measure of community-wide respect, but it would also lower the costs of legal service by eliminating those amounts which might otherwise be spent on advertising and sundry solicitation activity. Furthermore, the legal talent of the community would be put to its best use—providing legal services—rather than being wastefully diverted into business-getting efforts. To the extent that there is complete dissemination of accurate information on the qualifications and experience of the town's lawyers and to the extent that attorney selection is based rationally on this information, excellence would be encouraged, for the best attorney would attract the best or most lucrative work in the greatest volume without the distorting effect of solicitation.

Unfortunately, this hypothetical town has no real counterpart today. Even in the smaller towns, long recognized as the model for the canons dealing with "business-getting,"<sup>41</sup> the poorer residents are less likely to be aware of their legal rights than their more affluent neighbors; people on the wrong side of the tracks generally do not form the close personal relationships with attorneys that would permit them comfortably to seek advice. In a more realistic context, therefore, while enforcement of canons 27 and 28 might enhance respect for the profession, it would remove only the crassest forms of solicitation, leaving the more subtle devices of utilizing family ties, entertaining, and trading on political influence. These techniques

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40. DRINKER 319. This canon was adopted by the ABA on August 27, 1908, and amended slightly in 1928. *Id.* at 309, 319.

41. Llewellyn, *The Bar's Troubles and Poultices—And Cures?*, 5 LAW & CONTEMP. PROB. 104, 115 (1938).



also have great potential for distortion of rational attorney selection on the basis of reputed merit. Thus, the cost of enforcing these canons is unequal justice in the form of more unrighted wrongs against the poor and ignorant than against the rich and informed.

Moreover, the idealized small town is totally inappropriate as a model for today's densely populated urban centers, where anonymity is a fact of life. Generally, only the major consumers of the highest priced legal services, who have great economic interests at stake, are able to make a fully informed, rational selection of legal counsel. The vast majority of middle and lower income individuals, as well as many small businesses, cannot afford the best-known lawyers in town and must make their selection from among the less well-known on the basis of fragmentary information and word-of-mouth recommendations which may be no more conducive to rational choice than are open solicitation and advertising. Indeed, one wonders if the latter would not actually be more likely to result in an informed and rational selection. Perhaps our general faith in competition would be borne out in this context also. It is at least arguable that, in an urban center, any enhancement of public esteem for the bar achieved by enforcement of canons 27 and 28 may be more than offset by the experience of those who, because of their inability to acquire adequate information, either fail to retain any counsel or select an attorney who turns out to be unqualified to handle their particular problems. Of course this lottery aspect of attorney selection is compounded by the inability or unwillingness of the organized bar to set up objective tests for specialty designation.<sup>42</sup>

Even the assumed premise underlying canons 27 and 28—that it is improper for attorneys to assert commercial self-interest—may no longer be valid. When the professions were the exclusive province of upper class men of independent means, *noblesse oblige* may have been a reasonable normative expectation.<sup>43</sup> However, as education has become more universally available, many people enter the professions with no other means of support. Furthermore, the current trend toward larger law firms has had the effect of placing many attorneys in an employee relationship, severely straining the cherished image of professional independence epitomized by the solo practitioner. Canon 35 admonishes attorneys not to permit their professional services to be exploited by lay agencies, but this pro-

42. Report of the Committee on Recognition and Regulation of Specialization Law Practice (unpublished 1963) cited in Schwartz, *Forward: Group Legal Services in Perspective*, 12 U.C.L.A.L. REV. 279, 294 (1965).

43. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 51-55 (1953) (history of remuneration of advocates in ancient Rome).

scription sounds rather hollow in light of the widespread utilization of hired associates by large law firms today. There has been growing recognition in other disciplines of a similar change in the character of the professions. Teachers have unionized;<sup>44</sup> medical doctors have brought down the government of Belgium by a threatened strike for higher wages;<sup>45</sup> and, the Reverend William H. DuBay has even attempted to unionize his fellow priests for several purposes, including establishment of "a 'professional salary' for priests that would eliminate their 'dependence on the wealthy.'"<sup>46</sup>

The relationship between the changing nature of the legal profession and the anti-solicitation canons is somewhat paradoxical. As the status of an attorney in a big firm approaches that of an employee, dependent for his livelihood upon a salary and bonus, his assertion of some element of commercial self-interest seems increasingly reasonable. However, in the big firm there is specialization in the business-getting function as in all others, and the typical associate is under little or no pressure in this regard. On the contrary, he is generally urged to concentrate his efforts on serving clients which the partners have attracted. Therefore, during the time that an attorney is an associate employee of a large firm, the public is usually insulated from his direct assertions of economic self interest by the intervention of the firm itself. When the attorney graduates to the managerial role of partner, although he would stand to benefit more directly from solicitation, he generally will have little need to engage in such conduct: he will be more independent in a personal financial sense; he will inherit an established clientele with a natural rate of expansion, both in terms of the growth of smaller clients into larger ones and in terms of the attraction of new clients through the recommendation of old ones; and, to the extent that big firms tend to service only the bigger and better-informed clients, the direct forms of solicitation proscribed by the canons would be less effective than the more subtle forms which are properly available.

Thus, the antisolicitation canons seem to have the greatest disadvantageous impact upon the solo practitioner or smaller firm, and

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44. N.Y. Times, March 12, 1966, at 1, col. 5.

45. N.Y. Times, Feb. 5, 1966, at 1, col. 7. See also N.Y. Times, Jan. 14, 1965, at 12, col. 5 (4,000 doctors and medical students strike over pay and working conditions in Mexico); N.Y. Times, March 9, 1965, at 11, col. 1 (doctors strike threat in Great Britain recedes when Prime Minister Wilson announces that government will distribute \$15.4 million in pay increases); N.Y. Times, April 12, 1965, at 8, col. 7 (20,000 doctors in Italian public hospitals strike for higher pay and improved conditions).

46. N.Y. Times, Feb. 23, 1966, at 25, col. 1. For a discussion of the reaction to Father DuBay's proposal, see N.Y. Times, Feb. 27, 1966, § 4 (The News of the Week in Review), at 8, col. 1.

upon the least well-informed elements of the public. The smaller firm, carried to the logical extreme in the solo practitioner, defies the trend toward an initial employee status. Active solicitation would be most tempting to the small firm or solo practitioner whose economic self-interest can be directly satisfied by attracting more legal work. At least initially, the small firm or solo practitioner has no self-generating client base. Furthermore, because the potential clients of these smaller units of practice are generally smaller and less well-informed, solicitation might prove most effective. One ironic consequence of the continued enforcement of the traditional antisolicitation canons, therefore, would seem to be an acceleration of the growth of large firms and the demise of the small firms and solo practitioners which served as the model for these canons.

Entirely apart from considerations relating to the maintenance of public respect for the legal profession, the antisolicitation canons may serve an independent public interest by limiting the demands upon our legal and judicial resources. Professor Hart has described the pyramidal nature of our appellate system, noting that only a small fraction of those conflicting human interactions and decisions at the base, which could give rise to litigation, actually end up in the courts, and only a small percentage of these litigated issues ever reach each succeeding appellate level of the pyramid. Hart suggests that even the relatively few cases that reach the highest level of the pyramid impose a severe strain upon the limited judicial resources of the Supreme Court, which must depend upon the comprehensibility and persuasiveness of its reasoning for any meaningful impact upon the countless private decisions made at the base of the pyramid.<sup>47</sup> Perhaps this whole system can function only if litigated conflicts are restricted to those which sufficiently interest the affected parties to spur them out of the inertia of repose into actions which they initiate themselves, without the added stimulus of prodding attorneys desirous of increasing the demand for their services.

However, there certainly are recognized exceptions to this general framework, as, for instance, where Congress specifically chooses to rely upon and encourage private lawsuits as a means of enforcing federal policies. In *Magida v. Continental Can Co.*,<sup>48</sup> the district court, with obvious distaste, awarded attorney's fees after the Court of Appeals for the Second Circuit had held that the rights of the company and its stockholders cannot be thwarted by proving that the true party in interest in a 16(b) insider trading suit was plaintiff's

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47. Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959).

48. 176 F. Supp. 781, 783 (S.D.N.Y. 1956).

attorney, who had instigated the suit in order to obtain a fee in violation of New York penal provisions.<sup>49</sup> The district court noted that Congress apparently "regards public policy against proved and repeated violations of fiduciary responsibility by corporate officers at the expense of the public more detrimental to public good than the violation of generally accepted ethics by attorneys."<sup>50</sup>

Even in the absence of such a congressionally articulated countervailing policy, one could criticize the notion of limited judicial resources as suggesting that the ignorant be perpetually discriminated against by silencing the one informed group that might have a vested interest in dispelling their ignorance. Clearly, failure to litigate an unknown right does not indicate insubstantiality of interest. If a better-informed public would cast an unbearable burden upon our present judicial resources, perhaps the best solution would be for us to shore up our judicial resources rather than to inhibit those forces that would otherwise tend to create a greater awareness of rights.<sup>51</sup> Furthermore, not every newly discovered right will necessarily lead to litigation and added strain on the courts. Attorneys probably will have the greatest incentive to inform others of their rights when this information is more likely to lead to a private settlement than to a trial.<sup>52</sup>

The doctrines of barratry, champerty, and maintenance—the forerunners of canons 27 and 28—arose in feudal England when lords and large landowners bought up contested claims against each other or against commoners to harrass those in possession and to increase their holdings. The primitive procedures and record systems of those times were an invitation to false claims by the powerful against the weak.<sup>53</sup> However, Radin suggests that roles have been reversed in modern times: "If in medieval England, powerful men oppressed their weaker fellow subjects by maintaining suits against them, in modern society powerful people are more likely to achieve their ends by daring their victims to maintain suits."<sup>54</sup> In 1921, Pound warned us that by discouraging litigation we run the danger of encouraging wrongdoing.<sup>55</sup>

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49. N.Y. Penal Law § 274 (1944).

50. 176 F. Supp. at 783.

51. See N.Y. Times, March 6, 1966, § 1, at 1, col. 1, for the report of a novel effort to enlarge the New York State judiciary by a suit based on the Supreme Court's "one man-one vote" principle.

52. In a personal interview, a partner in a large midwestern law firm informed the author that litigation is the least remunerative of their various departments and is maintained only to satisfy the expectation of their clients for continuity of service.

53. *Hovey v. Hobson*, 51 Me. 62, 64 (1863).

54. Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 77 (1935).

55. R. POUND, *SPIRIT OF THE COMMON LAW* 134 (1921).

The antisolicitation canons seem less open to criticism in the trade association context. Opinions 168 and 273, discussed earlier,<sup>56</sup> clearly contemplate that attorneys employed by trade associations will be permitted to inform association members of their legal rights and duties as they affect the whole group. These generally corporate members are also likely to have their own counsel to advise them on individual matters. Such well-informed association members possess knowledge of their rights and the ability to protect their interests; the same cannot be said of those for whom the antisolicitation canons may foreclose the only effective means of enlightenment about rights and legal action. Also, the arguments in favor of canons 27 and 28 are strongest in this same trade association context. Solicitation which merely gives the poor and the ignorant an even break by apprising them of unknown rights may enhance rather than detract from respect for the legal profession; on the other hand, solicitation among the affluent members of a trade association, beyond what is already implicitly permitted by canon 35 and the opinions thereunder, would represent a contest for business which, although praised as free competition in other commercial contexts, might well be viewed by the public as unbecoming and greedy when carried on by lawyers.

Even so, a trade association attorney might be justified in sending nonmembers information if this should become tactically important in the proper representation of the collective interests of the association. There is a danger, however, that such action might be considered stirring up litigation. Opinion 9<sup>57</sup> proscribed the conduct of an attorney who sent to presumptive nonclient claimants against the Mexican government a circular letter informing them of important developments with respect to their claims, but this prohibition would not necessarily control in a case where such information is sent by a trade association which has a valid interest in seeing these claims collected.

Problems of direct solicitation can be avoided by omitting the association attorney's name from all advice rendered to trade association members and to nonmembers. As long as the advice is limited to general matters of collective interest to the association as a whole, there would seem to be no problem of indirect solicitation, even if the association advertised the availability of such legal advice as a membership inducement, unless a particular jurisdiction considered such advice to be specific enough and require sufficient legal skill in its formulation to constitute the unauthorized practice of law.

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56. See text accompanying notes 35-37 *supra*.

57. OPINIONS 76, 78 (1926).

II. THE IMPACT OF *BUTTON*, *BRT*, AND *UMW*

Although *Button* protects association and group legal services for the purpose of promoting civil rights, and *BRT* and *UMW* extend this protection to association for the purpose of promoting members' pecuniary interests, all share a common thread: they are seen by the Court as noble efforts on the part of the exploited to gain, through organization, the strength they must have if they are to obtain that which is rightfully theirs. Perhaps there is a hierarchy of first amendment rights, and only those with an equivalently poignant claim will be constitutionally protected against state regulation, despite the Court's frequent statements to the effect that the marketplace of ideas welcomes the unpopular and iconoclastic as well as the morally righteous. Although some decisions inhibiting the associational rights of unpopular and "morally reprehensible" groups are grounded on the greater danger to society they in fact pose,<sup>58</sup> at least one such case cannot be so explained. In *Konigsberg v. State Bar*,<sup>59</sup> the Court chilled the associational rights of potential members of the Communist Party by upholding Konigsberg's exclusion from the California Bar for refusing to answer questions about possible membership in the Communist Party. Konigsberg had explicitly and uncontrovertedly stated that he did not believe in the forceful overthrow of the United States Government, and consequently the danger to society was far from immediate.<sup>60</sup> It is unclear how the different treatment afforded the two extreme groups, saints and sinners, may extend to the many gradations in between. There are obvious and serious dangers in any such subjective distinction, based as it must be on the personal value systems of the Justices, especially in the context of a difficult first and fourteenth amendment balancing test which invites self-deceptive rationalization. Nevertheless, a pragmatist in search of the boundaries of *Button*, *BRT*, and *UMW* could not ignore this potential limiting factor. Although the first amendment would seem to protect the rich and the poor alike, the Court may be less solicitous of the associational rights of the affluent

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58. See, e.g., *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928) (Knights of the Ku Klux Klan).

59. 366 U.S. 36 (1961).

60. 366 U.S. at 38 n.1 (majority opinion), at 60 (Black, J. dissenting). Compare *NAACP v. Alabama*, 357 U.S. 449 (1958) (manifesting an undeniably greater solicitude for the associational rights of NAACP members); *Uphaus v. Wyman*, 360 U.S. 72 (1959) (upholding the interest of the state in the investigation of potential subversive activities through a legislative investigating committee as outweighing individual rights in associational privacy) with *Jordan v. Hutcheson*, 323 F.2d 597 (4th Cir. 1963) (upholding jurisdiction of federal court to enjoin a state legislative committee from investigating NAACP attorneys when such investigation intrudes upon the constitutionally protected associational rights of the attorneys carved out by *Button*).

and relatively powerful members—neither saints nor sinners—of a trade association organized for economic purposes than it has been for the less affluent, weaker, and perhaps more “saintly” members of the NAACP and labor unions.

#### A. *Reaction of the Organized Bar*

At least some thoughtful attorneys, even before *UMW* was decided, viewed *Button* and *BRT* as permitting all forms of group legal services. After an exhaustive two-year study, the Committee of the California Bar on Group Legal Services published a progress report<sup>61</sup> on July 30, 1964, which considered and rejected the suggestion that group legal service arrangements should be limited to nonprofit associations, where legal services are provided only for matters of peculiarly common concern, and where lawyers' fees are paid by the individual member-client. This committee, claiming that it had taken the public interest as its only polestar, found a substantial unfilled public need for legal services and concluded with the recommendation that the Canons be modified to permit every form of group legal service plan, specifically mentioning trade associations as illustrative of organizations for which such group legal service plans would be appropriate.

However, this view was not unanimous. The ABA Standing Committee on Unauthorized Practice rejected the final conclusion of the California Progress Report at its regular meeting in Atlanta on October 4, 1964.<sup>62</sup> In a letter to state and local bar associations following the Supreme Court's denial of rehearing in *BRT* on June 1, 1964, the ABA reaffirmed its support of the Canons of Professional Ethics *in their present form* and suggested that each association advise its membership that, so far as the conduct of individual lawyers is concerned, *BRT* does not give a “license to solicit” and that soliciting or any other violation of the Canons would, as before, result in disciplinary action.<sup>63</sup> This letter was followed by a resolution strongly reaffirming the ban on solicitation passed by the Board of Governors and the House of Delegates at the ABA's midwinter meeting, held in New Orleans in February, 1965.<sup>64</sup>

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61. *Committee Report on Group Legal Services*, 39 J. ST. B. CALIF. 639 (1964).

62. 30 UNAUTHORIZED PRACTICE NEWS 265 (1964). See Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A.L. REV. 438, 452-56 (1965), in which the author attempts to dichotomize groups into organizations which provide services to and organizations which obtain services for their members, suggesting that *Button* and *BRT* have no direct bearing on the latter category which, according to Cheatham, would include trade associations.

63. 30 UNAUTHORIZED PRACTICE NEWS 365 (1964-1965).

64. *Id.*

Nor was the California Committee itself undivided on this question. Specific arguments against the committee's broad view were made in minority reports by Arthur H. Connolly, Jr.<sup>65</sup> and Frank Simpson, III.<sup>66</sup> Mr. Connolly saw the majority report as impaled on the horns of a dilemma—either a double standard would result under which lawyers not affiliated with groups would be required to adhere to the traditional strict Canons while their group-affiliated brethren would enjoy the benefits of advertising, solicitation, and channelling, or the prohibitions against advertising and solicitation would have to be removed as to the entire bar, a move the committee did not seem prepared to suggest. Mr. Simpson perceptively noted that not all forms of group legal services run afoul of the present Canons. He did not find the evidence persuasive on the more refined question of whether the functional utility of those types of group legal services presently forbidden was sufficiently compelling to require changes in the rules of professional conduct.

The full, thoughtful reaction of the organized Bar to *Button*, *BRT*, and *UMW* is only now beginning to be heard. Mr. Louis Powell, when president of the ABA, appointed Edward L. Wright of Little Rock, Arkansas, to chair a special committee on the re-evaluation of the Canons. Mr. Powell also appointed Mr. William McCalpin of St. Louis, Missouri, to serve as chairman of a special committee on the availability of legal services.<sup>67</sup> Mr. McCalpin's committee recently released its recommendation and report. Action is expected to be taken on it at the 1968 Annual Meeting of the ABA's House of Delegates. The committee construed its mission as limited to the formulation of recommended policy, and it did not attempt to translate this policy into specific amendment of existing Canons. This latter task, presumably, is the one which confronts Mr. Wright's committee.

The main thrust of the recommendation and report is to suggest, in general terms, that there should be a presumption in favor of permitting individual members of common-interest groups<sup>68</sup> to receive

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65. Connolly, *Minority Report I, Committee Report on Group Legal Services*, 39 J. ST. B. CALIF. 639, 737 (1964).

66. Simpson, *Minority Report II, Committee Report on Group Legal Services*, 39 J. ST. B. CALIF. 639, 730 (1964).

67. See Powell, *The President's Page*, 50 A.B.A.J. 1005 (1964). For an illustration of Mr. McCalpin's views, which seem to have been more flexible and receptive to innovation in the use of group legal service pleas to satisfy the unmet needs of the public than the official hard line previously adopted by the ABA, see McCalpin, *The Bar Faces Forward*, 51 A.B.A.J. 548 (1965).

68. In its report the committee clearly indicated that its recommendation contemplated group legal services for "trade and industry associations" and other "groups of individuals and/or corporations sharing common economic interests . . ." ABA, RE-



legal services rendered by lawyers obtained either by the group or by some other agency interested in securing such services for the members, if safeguards can be imposed to protect essential public interests. The committee considered these essential public interests to be: (1) the independent exercise of the lawyer's professional judgment; and (2) the preservation of the practice of law as a profession. Conflicts of interest and third-party control were recognized as the operative reagents in group legal service arrangements most likely to corrode these values. The committee recommended five minimum safeguards:

(1) The lawyer participating in any group arrangement shall himself in all respects be governed and bound by the Canons of Ethics;

(2) The advertising and solicitation activities of the entity providing the services of the lawyer shall conform to professional standards applicable to all lawyers with respect to misrepresentation and overreaching;

(3) If the group exists or is operated primarily for the purpose of providing to its members the services of a lawyer, the charges collected by the group from its members whether in the form of dues or otherwise shall not in the aggregate exceed the compensation paid by the group to the lawyer plus the reasonable cost of administering the group arrangement;

(4) There shall be a written contract of employment between the lawyer and the group or entity providing his services which contract shall substantially embody the provisions of paragraphs (1), (2) and (3) hereof, shall provide that in the event of any breach of such provisions the lawyer shall terminate the contract and his relationship with the group or entity, that the lawyer (despite his relationship to the group) shall be unqualifiedly independent of any obligation to anyone other than the member of the group whom he serves, that his obligation shall in all events be directly and solely to the member of the group whom he serves and that neither the group nor any other member thereof shall interfere or attempt to interfere with the lawyer's independent exercise of his professional judgment and such contract shall be filed with the appropriate agency having the responsibility for regulating the conduct of the lawyer participating in the group arrangement; and

(5) The participating lawyer shall not have taken any part not justified by his prior relationship with the group in promoting either the creation of the group itself or the establishment of its legal services program and shall not have solicited his own employment with the organization.<sup>69</sup>

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PORT OF THE SPECIAL COMMITTEE ON THE AVAILABILITY OF LEGAL SERVICES 8 (1968) [hereinafter COMMITTEE REPORT].

69. ABA, RECOMMENDATION OF THE SPECIAL COMMITTEE ON THE AVAILABILITY OF LEGAL SERVICES 2-3 (1968).

In light of the status of the present Canons, the first safeguard listed begs the questions dealt with in this Article. The attempt to retain the flavor of the present Canons is understandable, however, in light of the quiet revolution this committee has undertaken.

Although only general observation can be made about these recommendations, it is worth remarking that the five safeguards seem suffused with a nostalgia for the *ancien régime* as it existed before *Button*, *BRT*, and *UMW*. There is thus a grudging refusal to face squarely the peculiar problems of those varieties of group legal service arrangements which, although proscribed by the Canons, are arguably protected by the Supreme Court. Point five is illustrative: Why should an attorney not be permitted to seek employment with a group legal service program when he is permitted to seek employment with a large firm?

Moreover, the committee's report is perhaps to glib in assuming that the measures it proposes will be adequate even as minimum safeguards to protect against serious conflicts of interest; the report can be criticized for failing to perceive or deal with the serious consequences that might flow from rather subtle conflicts of interest. The report does, however, attempt to deal with a collateral problem: the dilemma between permitting solicitation by all lawyers and, on the other hand, discriminating between lawyers who are affiliated with groups and those who are not. The committee resolves this dilemma by recommending both "a limited relaxation of . . . [solicitation] bans where the public may be served"<sup>70</sup> and even-handed enforcement of the second of the safeguards listed above.

The report may be overly concerned with third-party profit as an influence destructive of the lawyer's independence of professional judgment, for it fails to consider the possible contribution "profit" might make in the sphere of legal services by fulfilling its traditional resource-allocative, efficiency-rewarding function. On the other hand, the committee may have been insufficiently concerned about the more subtle forms of administrative control inherent in any large organization which operate quite apart from the profit motive.

It may be impossible to adjust the regulation of group legal service arrangements to respond to the differences between group legal service recipients, who may vary greatly in both sophistication and capacity for self-protection against conflicts of interest. But, whether impossible or not, the problem is a real one which apparently received no attention from the committee.

The committee found the answer to the question of whether

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70. COMMITTEE REPORT 23.

there is an unmet need for group legal services in the repeated efforts of extraordinarily diverse groups of the lay public to secure legal services on bases other than those which the profession traditionally has provided. The report does perform an important public service by assisting the organized bar in accommodating gracefully to long-ignored realities. Not the least important contribution is the following overdue observation:

[I]n the past group arrangements with scarcely distinguishable essential features have received widely varied treatment at the hands of ethics committees and the courts. Recognizing this, we adopted a definition broad enough to bring within its ambit all programs with essential similarities without regard to past proscription or acceptance so that the subject could be approached on a rational rather than an historical basis.<sup>71</sup>

Perhaps the most serious defect in the report is the refusal to deal seriously with the possible decline in the size and strength of the independent privately practicing bar—of ultimate disadvantage to the public—which might result from a proliferation of group legal services. Although recognizing this as a legitimate and important concern, the committee members were content to defer to the decision of the marketplace on this issue. It seems to this author that the concept of a profession entails a commitment to exercise judgment and to adhere to standards of conduct which might not be supported in a purely democratic poll. The report does refer to the use of insurance as a device which potentially offers the benefits of economies of scale while retaining the possibility of individual attorney choice and independent attorney-client relationships. This indeed may be the needed answer.

In a brief concurring report, three members of the committee noted that, in their judgment, the recommendation and report were logically demanded by *UMW*. The forces for change, awakened and energized by the three landmark pronouncements of the Supreme Court, are beginning to be felt in new places. It will be interesting to watch the ABA's ultimate response to this new thrust.

#### B. *Due Process Balancing Tests: Some Suggested Considerations*

Certain factors not discussed in *Button*, *BRT*, and *UMW* might prove useful in constructing a theoretical basis for limiting these decisions through the use of the very due process balancing test which

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71. COMMITTEE REPORT 8.

they implicitly apply. The Court might find it desirable to give greater weight to state judgments about legal ethics in recognition of the fact that the basic allocation of power in our federal system imposes upon the states the primary responsibility for the regulation of conduct in the public interest.<sup>72</sup> Such a view would justify a change in judicial attitude which would be more a difference in degree than in kind—a somewhat greater deference on the part of the Supreme Court to a state's view of the public interest as manifested in statutory or court-made rules of ethical conduct.

It might appear that such an approach is no longer possible or appropriate after the recent Supreme Court decisions imposing federal constitutional standards of criminal procedure upon the states. There is, however, an important qualitative difference between state legislative judgments in the substantive area of professional ethics and state legislative judgments on questions of criminal procedure. As Justice Harlan pointed out in the latter context in his separate opinion in *In re Gault*:

The legislative judgments at issue here embrace assessments of the necessity and wisdom of procedural guarantees; these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence.

. . . The procedural framework is here a principal element of the substantive legislative system; meaningful deference to the latter must include a portion of deference to the former. The substantive-procedural dichotomy is, nonetheless, an indispensable tool of analysis, for it stems from fundamental limitations upon judicial authority under the Constitution. Its premise is ultimately that courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected.<sup>73</sup>

State judgments upon the ethics of the legal profession are not subject to the peculiar tensions of the criminal procedure area; determinations concerning professional ethics have a less obvious effect on individual constitutional rights and appear more appropriate for legislative treatment. Thus, total disregard for the states' efforts to define workable ethical standards is perhaps undesirable.

The protection of the conflicting interests of individual dissenting

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72. This may have been a significant influence in Justice Harlan's dissent in *UMW*. See note 8 *supra*.

73. 387 U.S. 1, 70 (1967) (Harlan, J., concurring in part and dissenting in part).

members is another potential limiting factor in any effort to define the scope of the associational rights of a group majority. The Supreme Court has dealt only inconclusively with this question.<sup>74</sup> As has already been pointed out, conflicts of interest between a member and his group are inevitable; when a group sponsors litigation for its members these sometimes subtle but important conflicts may be overlooked to the detriment of an individual member. Assuming the appropriate safeguard of compulsory full disclosure on the part of group-affiliated attorneys, these inevitable conflicts between groups and their members might be tolerable as long as the dissenting members can find adequate representation of their interests. However, alteration of the Canons to permit extensive utilization of group legal service plans may so accelerate the trend toward group affiliation and the demise of the solo practitioner that the pool of unaffiliated attorneys in a position to represent dissenting members will be too small and poorly qualified to meet this need. There will always be a cadre of competent attorneys available to represent affluent dissenting members if the demand warrants it, but what of the less than affluent?

One possible solution to this problem is for the dissenting

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74. In two cases involving the propriety of using group funds to pursue political objectives not shared by all group members—*International Association of Machinists v. Street*, 367 U.S. 740 (1961) and *Lathrop v. Donahue*, 367 U.S. 820 (1961)—the Court struggled inconclusively to accommodate vigorous expression of dissenting political viewpoints with the group majority's interest in joining together to promote its common concern more effectively. In the *Street* case the Court interpreted the Railway Labor Act, which authorizes union-shop agreements, to deny to a union the right to use an employee's dues to support, over his objections, a political cause which he opposes. The majority opinion thus avoided constitutional issues, though only because Justice Douglas, who was willing to rest his decision on constitutional grounds, joined in Justice Brennan's opinion to provide a majority judgment. (Justices Harlan and Frankfurter thought the questioned union practice permissible on both statutory and constitutional grounds. Justice Black wished to strike so much of the statute as he deemed to violate the first amendment. Justice Whittaker agreed with the majority's statutory construction, but thought that the proper remedy was an injunction against enforcement of so much of the union-shop agreement as violated the statute. The majority voted to remand with instructions to the state court to provide an appropriate remedy to safeguard the objecting member's rights.) In the *Lathrop* case the Court found no unconstitutionality in a statute requiring all members of the bar of a state to enroll in a state bar and pay dues. The majority did not deal with the question whether the state bar could then use such dues to support, over the objections of a member, legislative proposals with which the member did not agree. Justices Harlan and Frankfurter concurred, but on the grounds that the constitutional issue raised was without merit. Justice Whittaker concurred, stating his belief that there was nothing unconstitutional in requiring payment for the privilege to practice law. Justices Black dissented on the grounds that forced use of dues money to support a political object opposed by a member violates the first amendment. Justice Douglas dissented on the grounds that the forced association of the state bar violated the first amendment. Since a group levy, if permitted as in *Lathrop*, could have sapped some of the dissenters' resources and thereby promoted the majority's contrary political view in either of these cases, it is unclear how heavily the Court will weigh dissenting members' interests.

members to ally themselves with another group which shares their interest, and which, therefore, has the incentive and possibly the resources to finance litigation by the dissident members. The perfect mating of interest would arise where the dissident members had standing to litigate against their original group but lacked financing and the second group, sharing the dissidents' goals, had finances but lacked standing.<sup>75</sup> Of course this solution will not always be available. The financing group may often have standing of its own. Dissenting members may not be aware of the existence of other groups which share their conflict. In fact, such other groups may not always exist. However, the assumed premise upon which the problem of a scarcity of unaffiliated attorneys becomes serious—a greatly increased utilization of group legal service plans with a consequent increase in attorney affiliation with groups—would also seem to entail a substantial increase in the actual number of groups that maintain legal staffs. The probability, therefore, that a dissenting member can and will find a kindred spirit in another group should be enhanced under

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75. This pattern is strikingly illustrated by a series of cases involving milk producer cooperatives. Milk production varies from season to season, whereas demand for milk remains fairly constant throughout the year. This economic fact of life worked havoc with the price individual milk-producing farmers could obtain until the federal government encouraged their organization into cooperatives capable of stabilizing milk prices at higher levels. The cooperatives wanted all milk producers, nonmembers as well as members, to bear the cost of this cooperative effort from which they all derived benefit. Some nonmember milk producers wanted to maximize their profits by selling at the higher price achieved by the cooperatives while maintaining lower costs through avoidance of financial participation in the maintenance of the cooperatives. The cooperatives succeeded in denying this "free ride" to the nonmembers by inducing the Secretary of Agriculture to promulgate an order under section 8(c) of the Agricultural Marketing Agreement Act of 1937 which fixed uniform prices to be paid to all producers with certain amounts deducted for special payment directly to the cooperative marketing associations. The nonmembers claimed that these deductions and payments to the cooperatives unlawfully diverted funds which belonged to them as producers. However, even though the independent milk farmers themselves lacked the financial resources necessary to make this claim effective in a test case, in the wings stood an affluent group of milk handlers, middlemen who bought from milk farmers and sold to wholesale and retail dealers, who shared the nonmembers' antipathy toward the cooperatives, albeit from a different vantage point. These handlers saw themselves in a profit margin squeeze between the retail market and the ever-increasing prices successfully demanded by the powerful cooperatives. They were interested in exploiting any possibility of undermining the cooperatives and felt that to the extent they could encourage more farmers to try for the "free ride," the power and price demands of the cooperatives would diminish. In *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), the handlers mounted their own attack against the required payments to cooperatives but the Supreme Court held that they lacked standing because they had no financial interest in the fund collected. *Id.* at 561. Thus the stage was set for a perfect marriage of interests. Both handlers and nonmember milk farmers wanted to strike down the Secretary's order. The handlers, who could afford to litigate, lacked the standing requisite to an attack. The nonmember farmers seemed to have the necessary standing but lacked the financial resources needed to bring suit. Financed by the handlers, the nonmember farmers first established their standing to sue for an injunction against the Secretary of Agriculture, *Stark v. Wickard*, 321 U.S. 288 (1944), and then successfully attacked the order, *Brannon v. Stark*, 342 U.S. 451 (1952).

this premise. Nevertheless, it would not be unreasonable for a state to view with alarm the transformation of its judicial system from an institution that traditionally provided justice for all into one that merely offered justice for all groups; and, such a consequence is not unlikely if the trend toward greater utilization of group legal services continues.

It has been suggested that what is really at issue in *Button* and *BRT* is economic due process, and that *BRT* merely serves as a *reductio ad absurdum* of the first amendment basis of decision in *Button*.<sup>76</sup> This would be true a fortiori of *UMW*. Yet, apart from the difficulty of separating the right to associate with other like-minded people for the purpose of advancing shared political views from the right to associate with others for the purpose of making the effective expression of these views economically feasible, the substitution of an economic for a qualitative first amendment or political element in the due process analysis does not seem to assist materially in the resolution of the difficult questions underlying a rather open-ended and subjective balancing test. It might be thought that such an economic due process analysis would at least make it possible to place the case of the trade association, comprised of affluent members and organized for economic purposes, beyond the reach of *Button*, *BRT*, and *UMW*. Prohibition of group legal services in the latter cases would arguably have made it economically impossible for members to have had an effective opportunity to secure their federal and state rights in litigation; as to trade associations, however, surely the due process clause does not secure to everyone the right to spend his fortune in the most efficient way possible, regardless of countervailing state interests. Even if the Court were to shift to an economic due process theory, however, an argument could be made for allowing trade associations to provide group legal services with regard to matters so highly specialized as to be economically impractical for even relatively affluent association members to handle on an individual basis. In fact, the trade association may well be more difficult to distinguish from *Button*, *BRT*, and *UMW* on an economic due process theory than on a first amendment theory; even granting the frequent inseparability of economic and political elements in expression and association, there may be some matters of economic concern to trade associations which are of such minimal political impact as not to reach the dignity of first amendment concern.

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76. This observation was made by Professor Paul Freund in lecture to his Constitutional Law Class at Harvard University Law School in January of 1965.

C. *Due Process Balancing Tests: How Do Trade Associations Weigh In?*

Under a due process balancing test the Court is faced with difficult tasks: weighing the benefits of group legal services against the continuing need for protection from the dangers with which the traditional Canons were concerned and pitting the idiosyncratic interest of an individual against the interest of a group majority. In *Button*, the need for group legal services was great, since all other forms of effective expression were choked off and the demands of the group were of fundamental political importance. Balanced against this was a speculative but potentially serious danger to the public inherent in the lowering of professional standards. The Court may have reached its decision too easily by largely ignoring the latter considerations, but it would be difficult to quarrel with the result.

*BRT* presented a more difficult choice. Although the Brotherhood's group legal service plan may once have been essential to provide the union members with the power necessary to protect their rights in litigation against the mighty railroad interests, it is far from clear that this continues to be the case. A history of favorable case law and sizeable verdicts seems to indicate that railroad workers' claims today represent attractive legal work which many lawyers would welcome and could handle adequately. It is true that under the union's plan the members enjoy the benefits of economies of scale, specialized counsel, and an institutionalized impetus to bring suit which make some recovery more likely. However, the existence of an alternative means by which the workers' rights can be enforced and the fact that the workers' interests are primarily economic rather than political suggests that these benefits should weigh less heavily in the due process scales than the benefits of the NAACP group legal service plan. On the other hand, the danger inherent in the *BRT* plan also seems somewhat less. Since the issues in the *BRT* context are straightforward economic ones, subtle conflicts of interest between a member and his group are less likely to arise and to go unperceived than in *Button*. The relationship between a member and his attorney is likewise more direct, because the attorney is hired and paid by the individual worker and not by the union. However, the union lawyer typically will be seeking settlement of a large volume of claims whereas the NAACP lawyer usually will be engaged in a more concentrated effort with protracted test case litigation on behalf of an individual client. Thus, the danger of individual



interests being sacrificed for the sake of wholesale justice is probably increased.

The considerations in *UMW* are similar to those in *BRT*. The distinction between *BRT*'s channeling of legal work to selected attorneys who presumably specialize in and depend upon such cases as a major source of income and the *UMW* direct salary arrangement is not immediately compelling. The facts recited by the Illinois Supreme Court, however, flesh out practical consequences of this additional step toward depersonalization of the attorney-client relationship: many union members never saw "their" lawyers until they actually appeared before the agency. There is no reason, however, to accept this as an inevitable consequence of the kind of financial arrangement adopted by the miners' union. Even though this plan has been held to be constitutionally protected, local courts undoubtedly may still insist upon individual attorney-client consultation and other appropriate safeguards.

How does the balance in the trade association context compare? Certainly, as our trade association has been hypothesized, the benefits of group legal services are neither so obvious nor so compelling as in *Button*. The affluent members of the trade association envisioned by this author would each have their own counsel retained for the bulk of their legal work. Likewise, such members would know their rights and would be pragmatic in their willingness to assert them. Nevertheless, group legal services beyond those already permitted under the Canons could make it possible for the group to litigate, through a member's test case, matters of too little consequence to any member to justify the expense of an individual suit but of sufficient cumulative consequence to the group to warrant group-financed litigation. Furthermore, group legal services will afford members economies of scale in access to specialized counsel who might otherwise be unavailable, either because of their high cost or distant location, or for example because of the impracticality of every trade association member maintaining his own Washington counsel in addition to local counsel. These benefits would seem to weigh most heavily when they permit the expression of a political view that would otherwise remain unexpressed or ineffectively articulated, but even in this case, the benefits do not seem to be as important as those in *Button* and may not even be as important as those in *BRT* and *UMW*. Nevertheless, the other side of the due process scale also seems to be lighter; consequently, the balance struck in the trade association context may be no more pernicious than that which was permitted in *Button*, *BRT*, and *UMW*. That is, the relatively sophisticated, often corporate, members of a trade association

should be able to protect themselves against many of the dangers inherent in any group legal service plan. They, unlike the NAACP and union members, who may be more naive, should be able accurately to evaluate the danger of conflicts of interest between themselves and their association and to act accordingly, as they would in any other business undertaking, by consciously deciding whether the potential benefits justify assumption of the particular risks. As a matter of fact, some corporations are so sophisticated that they actually exploit the lawyers' Canons of Professional Ethics by purposely sending a share of their legal work to every major law firm in town so that future adversaries will be hard put to find competent, disinterested counsel to represent them against these far-sighted corporations.<sup>77</sup> Corporations that exhibit such "enlightened" self-interest surely should be able to protect themselves against the dangers inherent in group legal service plans. Thus, trade association legal services seem both to provide less important benefits to members and to entail less serious danger of harm to the public.

The crucial question is whether the potential benefits are important enough to trigger constitutional protection at all. Prior to *BRT*, a common political concern seemed essential, but *BRT* and *UMW* suggest that an association motivated solely by economic concern may also be entitled to constitutional protection. Unfortunately, prediction in this area presently remains guesswork; future litigation will determine whether and to what extent trade associations can fit within the *Button*, *BRT* and *UMW* doctrines.

Due process balancing tests, though sometimes unavoidable,<sup>78</sup> invariably are messy and particularly unreliable as planning guides for future conduct. This is always unfortunate, but it is tragic where it is partially avoidable. As Justice Frankfurter stated in *AFL v. American Sash Co.*<sup>79</sup> and in *Machinists v. Street*: "At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck. . . . When that point has been reached—where the intersection should fall—is plainly a question within the special province of the legislature."<sup>80</sup>

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77. The author learned of and confirmed this practice in personal interviews with several attorneys in large San Francisco and Los Angeles law firms. It also has been suggested to the author by a partner in one of the largest firms in the country that sophisticated corporate clients are perceptively aware of the inevitability of conflicts of interest in the diverse and complex practice of the giant firm. They knowingly tradeoff undivided loyalty for the high degree of competence uniquely available at such firms.

78. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring in result).

79. 335 U.S. 538, 546 (1949) (concurring opinion).

80. 367 U.S. 740, 817 (1961) [dissenting opinion, quoting from *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 546 (1949)].

The organized bar, the state courts, and the state legislators should offer the Supreme Court a feasible option. As long as the traditional Canons continue in force, impervious to change regardless of how inappropriate they have become, the Court has no choice but to plunge headlong into murky waters if it is to fulfill its constitutional responsibility. However, if other interested groups, beginning with the organized bar, would take an objective look at the public interest in a long overdue reformation of the Canons, culling ancient prohibitions until they more precisely reflect rather than frustrate the public interest, two advantages would result. In the first place, the arena of potential conflict would contract materially, making unstructured judicial intervention less necessary and less likely. In the second, in those cases where judicial intervention proved inescapable, the states' view of the public interest would deservedly receive more respectful treatment by the Supreme Court, thereby contributing at least some degree of precision to the Court's due process balancing operation.

### III. PROLOGUE TO THE REFORMULATION OF THE CANONS

The shock waves of *Button*, *BRT*, and *UMW* will long continue to be felt. The organized bar may be excused for its initial stunned response, but the time has come to stop complaining about commercialization of the profession and to recognize the opportunity these decisions offer. A profession which fails to reassess continually its capacity to serve the public is unworthy of the name. *Button*, *BRT*, and *UMW* confront us with the necessity and the opportunity for fresh thinking—for asking fundamental questions the answers to which have too long been assumed.

The advantages available to trade associations only through some form of group legal service may not be an important enough constitutional right to outweigh the interest of the state in regulating the legal profession through statutes or judicially adopted Canons. Indeed, as a threshold determination, these benefits may not rise to the dignity of a constitutionally protectible right. Nevertheless, merely as a matter of serving the public interest, it seems that the Canons should be reformulated to permit enjoyment of these benefits wherever such plans are lawful under state law or whenever they should become lawful in states which today proscribe such conduct. The danger of trade association members relying to their detriment upon erroneous legal advice seems miniscule if the association renders such advice only through qualified attorneys and the individual members confer with their own counsel before acting upon such

advice. The previous discussion also indicates that additional dangers to the trade association members certainly are less than those confronting indigent recipients of legal aid, a form of group legal service expressly permitted by the Canons. Thus, the public interest in this context seems to come down to a nice question of whether the harm to society and to the legal profession which might result from the acceleration toward concentration of our legal resources in larger units outweighs the benefits these group legal services might confer. The author would resolve this difficult question in favor of allowing trade associations to engage in a wide range of group legal services because the postulated harm seems far more speculative than the benefits suggested. Utilization of those group legal service plans which clearly come under the constitutional protection of *Button*, *BRT*, and *UMW* will accelerate the trend toward concentration anyway; the extent to which the existence of group legal services for trade associations will add to this concentration is far from clear. It may be preferable to deal with whatever evil inheres in this trend by government subsidization of a cadre of solo practitioners rather than by denying the public substantial benefits.

Recommendations for specific changes in the language of the Canons are beyond the scope of this Article, which is intended rather to provide some perspective for this task and to bring into focus some relevant albeit easily-overlooked considerations. Without reviewing all that has gone before, several observations merit discussion. There seems to be no need to alter the language of canon 47, although the notion that associations are guilty of the unauthorized practice of law even when they act only through qualified attorney-agents must give way where group legal services are protected by the Constitution under the due process balancing test. At a minimum, *Button*, *BRT*, and *UMW* should eliminate the possibility of a group-affiliated attorney being adjudged guilty of violating canon 47 when his advice is so limited to matters of common group concern as to satisfy the present canon 35. If canon 35 is reformulated to permit more extensive group legal services than are now constitutionally protected by the Supreme Court, perhaps an addendum to canon 47 would be in order to make it clear that attorneys who participate in such group legal service arrangements do not violate canon 47 even if the particular state condemns such group services as the unauthorized practice of law. In addition, the bar should use its influence to persuade such states that their position is unwise and unnecessary.

Reformulation of canon 35 is essential and presents the greatest challenge. Conflicts of interest between a member and his associa-

tion are difficult to eliminate in any legal service program through which a group advises its members or litigates on their behalf. Requiring group-affiliated attorneys to disclose the full extent of this risk to members whom they undertake to advise or represent may palliate but cannot cure this persistent danger. However, the seriousness of this danger will vary inversely with the ability of members to see the conflicts and to protect themselves. At a minimum, canon 35 must be modified to accommodate the group legal service plans of the NAACP, the BRT, the UMW, and other groups who utilize similar programs to litigate test cases of political or economic significance to their whole membership which otherwise could not be brought.

Alteration of canons 27 and 28 should be narrowly confined so that solicitation and the stirring up of litigation is permitted only where there is a substantial need to inform the ignorant of their rights. Indeed, the present language of canon 28 may be adequate if interpretive opinions make clear an appropriately broad construction of the exception based on "ties of blood, relationship or trust."<sup>81</sup> Deletion of the adjective "rare" preceding this exception will perhaps be necessary and sufficient. The future may require greater relaxation, but restraint would seem wise here until need for additional reform is more conclusively established.

Finally, one other important issue should be discussed. What is the potential impact of changes in the Canons upon the attitudes of attorneys and upon the incentives which motivate students to enter the legal profession? Even if the myth of the independent solo practitioner who provides highly personalized and individualized service is no longer consonant with the reality of most current urban legal practice, it may nevertheless continue to serve a valuable function. This myth stands as an inspiration to those who would become lawyers and as an idealized role model to be approximated as closely as possible in big firms and group legal service programs alike. It represents a conception of the attorney's role which is imbued with dignity, immense personal satisfaction, and an extraordinary degree of nondelegable responsibility. The organization may be man's greatest achievement in his quest for efficiency, and efficiency may be essential in satisfying the needs of the public, but the image of the "organization man" does not ignite the imagination or uplift the spirit. *Button*, *BRT*, and *UMW* confront the legal profession with an agonizing task: the bar must reconcile itself to the need of serving the public more efficiently without losing self-respect.

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81. See canon 27 reproduced in text accompanying note 40 *supra*.