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Pragmatic Approach to Problems of Group Law Practice

Herschel Kriger

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"EQUAL JUSTICE UNDER LAW" is inscribed on the facade of the United States Supreme Court Building in Washington.

This principle has been illustrated in numerous decisions in recent years, adapting to the needs and mores of a primarily industrial community of 200,000,000 people, a legal structure which was founded as a small town agricultural society. Thus, the Supreme Court has declared itself anew on civil rights, the relationship between the individual and his government, of individuals inter se, between employer and employee, between producer and consumer, and in other areas. The process is a continuing one and draws its essence from the ability of the Court to find new meaning in constitutional provisions which have proved applicable to the needs of the nation as it faces problems not specifically envisaged by the Founding Fathers.

United Mine Workers of America, District 12 v. Illinois State Bar Association,[1] is one of the latest in a line of holdings which have demonstrated that areas heretofore considered by the Bar as sacrosanct unto itself or the state courts are not immune from re-evaluation. That decision, rendered on December 5, 1967, was not unexpected in the light of the pronouncements of the Supreme Court in *NAACP v. Button,*[2] and *Railroad Trainmen v. Virginia Bar Association,*[3] and the process is likely to continue.[4]

The Mine Workers Case

In *Mine Workers* the Court had before it an appeal from an order by the Illinois Court[5] enjoining the Union from engaging in certain practices alleged to violate the Canons of Legal Ethics. The practice complained of was described by Justice Black as follows:

> The union *employs* one attorney on a salary basis to represent members and their dependents in connection with claims for personal injury and death under the Illinois Workmen's Compensation

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* Member of the Bar; Canton, Ohio.

1 389 U.S. 216 (1967).

2 371 U.S. 415 (1963).

3 377 U.S. 941 (1964).

4 F. William McAlpin, of St. Louis, Chairman of a bar association committee studying the problems of providing legal services at lower expense to the public, observed that his committee expected that the Supreme Court would rule as it did in Mine Workers. (New York Times, Dec. 6, 1967.)

5 Illinois State Bar Association v. United Mine Workers of America, District 12, 35 Ill.2d 112, 219 N.E.2d 503 (1966).

Act. The terms of the attorney's employment, as outlined in a letter from the acting president of the Union, to the present attorney, included the following provision: "You will receive no further instructions or directions and have no interference from the District, nor from any officer, and your obligations will be to and with only the parties you represent." The record shows no departure from this agreement. The Union provides injured members with forms entitled "Report to Attorney on Accidents" and advises them to fill out these forms and send them to the Union's legal department. There is no language on the form which specifically requests the attorney to file with the Industrial Commission an application for adjustment of claim on behalf of the injured member, but when one of these forms is received, the attorney presumes that it does constitute such a request. *The members may employ other counsel if they desire, and in fact the Union attorney frequently suggests to members that they can do so.* In that event the attorney is under instructions to turn the member's file over to the new lawyer immediately.

The applications for adjustment of claim are prepared by secretaries in the Union offices, and are then forwarded by the secretaries to the Industrial Commission. After the claim is sent to the Commission, the attorney prepares his case from the file, usually without discussing the claim with the member involved. The attorney determines what he believes the claim to be worth, presents his views to the attorney for the respondent coal company during prehearing negotiations, and attempts to reach a settlement. If an agreement between opposing counsel is reached, the Union attorney will notify the injured member, who then decides, in light of his attorney's advice, whether or not to accept the offer. If no settlement is reached, a hearing is held before the Industrial Commission, and unless the attorney has had occasion to discuss a settlement proposal with the member, *this hearing will normally be the first time the attorney and his client come into personal contact with each other.* It is understood by the Union membership, however, that the attorney is available for conferences on certain days at particular locations. *The full amount of any settlement or award is paid directly to the injured member. The attorney receives no part of it, his entire compensation being his annual salary paid by the Union.* (Emphasis ours)[6]

The Illinois court had distinguished *Railroad Trainmen* on the theory that the plan there approved, whereby the Union had referred members to specific approved attorneys for the handling of claims under the Federal Employees Liability Act, did not include the explicit hiring of counsel by the Union for its members. And it distinguished *Button* on the theory that, although the NAACP referred members and nonmembers to counsel paid by the Union, nevertheless the employment only involved litigation of political rights. The court rejected the distinction, noting:

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[6] United Mine Workers v. Illinois, *supra* note 1 at 219-221.

> We do not think our decisions in *Trainmen* and *Button* can be so narrowly limited. We hold that 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.[7]

The court thus overrode the dissent of Justices Clark and Harlan in *Railroad Trainmen* that *Button* only could be applied to matters of "political expression" and that the majority "relegates the practice of law to the level of a commercial enterprise" and the dissent of Justices Harlan, Clark and Stewart in *Button* based on concern that the decision "presents a danger of harm to the public interest in a regulated bar."

The majority, of course, was aware of the problems of legal ethics presented, for it stated, as it had stated in *Railroad Trainmen,* "That the States have broad power to regulate the practice of Law is, of course, beyond question." [8] But it went on to say, consistent with the earlier decisions, that:

> But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation impair the value of associational freedoms.[9]

The Mine Workers Union also was aware of the ethical problems involved, for that plan carefully provided: [10]

a. No instructions or directions from the District or any officer after the referral of the accident report form;

b. Counsel's obligations and relations were to and with only the persons represented;

c. The members might employ other counsel, if they desire, and the Union attorney often suggested just that and then turned the file (with the accident report form) over to such other counsel;

d. While the attorney often did not see the member until the hearing, he was available for conferences on specific days at particular locations;

e. Neither the union nor the attorney received any part of the recovery, the entire amount of which was paid directly to the injured member;

f. The Union did not provide legal services to any non-member;

g. And, underlying the entire plan, by a situation in which the Union, as an institution, was vitally interested—proper recovery of

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[7] *Ibid.* at 221-222.

[8] *Id.* at 222.

[9] *Id.*

[10] *Id.* at 220-221.

damages for its members injured in industrial accidents or through industrial disease, or for their dependents in the case of death, without diminution by attorney's fees.

The Button Case

The National Association for the Advancement of Colored People, faced with the necessity of enforcing civil rights of Negroes, specifically to end segregation in the schools of Virginia, found a dearth of lawyers willing or able to assume such litigation. The reason for the reluctance of Virginia counsel to act on behalf of individuals in such cases is obvious. After the 1955 Supreme Court decision declaring school segregation illegal *per se*,[11] organizations seeking to enforce the decision also found themselves faced with a 1956 Virginia statute which, *inter alia*, added to existing legislation controlling the practice of law a definition of a "runner" or "capper" to include an "agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability." NAACP sued, attacking the constitutionality of the objected-to section and its application to the activities of the Association. The matter came before the Supreme Court on appeal from decision by the Virginia Court sustaining the section.[12]

The significant activities of the NAACP, approved by the Supreme Court, were essentially as follows:

1. The Virginia conference of NAACP ordinarily will finance only a litigant who retains a member of the NAACP legal staff to represent him;

2. Ordinary damage actions, criminal actions in which no possibility of racial discrimination exists or in which the complainant seeks separate but equal instead of fully desegregated school facilities are not handled;

3. The litigant may or may not be a member of NAACP and the Virginia conference decides who is entitled to assistance;

4. Members of the NAACP legal staff are generally paid on a *per diem* basis plus expenses in each case and the staff member may not accept any other remuneration from the litigant or otherwise;

5. The *per diem* rate is smaller than that customary for private professional work. The litigation is under the control of the attorney, although the NAACP remains concerned that the outcome of the litigation be consistent with NAACP policy.

6. The client is free at any time to withdraw from an action.

7. Litigation is commenced in several ways—(a) an aggrieved

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[11] Brown v. Board of Education, 347 U.S. 483 (1955).

[12] N.A.A.C.P. v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960).

Negro may apply for such help to the NAACP and the application is referred to the legal staff. (b) In school segregation cases a local NAACP branch would invite a legal staff member to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member brings with him printed forms authorizing him and other NAACP attorneys to represent them in such litigation.

8. Thus the prospective litigant retains, not an individual attorney, but rather a "firm" of NAACP attorneys which has expertise in such questions of law.

9. The meetings sometimes are prompted by letters and bulletins urging active steps to achieve desegregation, and by distribution of petitions among persons willing to engage in litigation. While the NAACP encourages the bringing of such suits, the plaintiffs in particular actions make their own decisions to sue.

Answering the finding of the Virginia court that these activities were in violation of the statute on the ground that this constituted

> fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control.[13]

Justice Brennan held for the majority that:

> We hold that the activities of the NAACP . . . are modes of expression and association which Virginia may not prohibit, under its power to regulate the legal profession . . .[14]

He parenthetically noted that the right of political expression is not limited to Negro organizations seeking redress of their grievances but also had been used by opponents of New Deal legislation in the 30's, *i.e.*, The Liberty League, which was held by a Bar Association Committee not to have engaged in unprofessional conduct in assisting such litigation.[15] In essence, he held that NAACP had the right, not only to engage in litigation on its own behalf, but to solicit and to support litigation, for its members and others, for:

> . . . the litigation it assists, while seeking to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.[16]

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13 N.A.A.C.P. v. Button, *supra* note 2 at 426.

14 *Ibid.* at 428-429.

15 *Id.* at 430 n. 13.

16 *Id.* at 431.

Justice Brennan also was aware of the problems of legal ethics involved but declined to comment one way or the other on various forms of group legal activities, even that involved in the *Railroad Trainmen* cases,[17] thus limiting his opinion to the facts before the court. He did note, however, that there were no monetary stakes involved nor any showing of conflict of interest between the aims and interests of the NAACP and its member or non-member litigants.[18]

Justice Douglas was more to the point. He noted specifically that this suit resulted from a massive attack by segregationists to destroy the fruits of the Supreme Court decision in the school segregation cases. Justice Harlan's dissent, while expressing awareness of the principles of free speech and association, drew a line between speech and action by litigation, stating, in effect, that the latter must remain under traditional state controls. In view of the limitation by the majority in its findings to the specific facts before it as they involve NAACP, it remained for later litigation to furnish further meaning. That opportunity came in *Railroad Trainmen.*

Railroad Trainmen

In *Brotherhood of Railroad Trainmen v. Virginia State Bar,*[19] the Supreme Court reviewed an injunction by the Virginia court against the Union continuing a plan whereby:

1. It maintained a panel of approved regional lawyers selected on the advice of local lawyers and state and federal judges and who had a reputation for skill and honesty in representing plaintiffs in railroad personal injury litigation.[20]

2. Its local lodges submitted to its Legal Aid Department reports on all cases of accidental injury or death of its members.

3. Local lodge officers had the duty of informing injured members or survivors of the Brotherhood's facilities, to caution them against settlement without advice of counsel and so that they might avail themselves of the services of the approved lawyers if they chose to do so.[21]

4. Fees were established at 25 per cent of the recovery. Regional counsel originally remitted part of the fee to the Legal Aid Department for its maintenance, but later the entire 25 per cent fee was retained by the regional counsel. However, since 1959, the Brotherhood did not fix fees of the regional counsel, although the tradition of the 25 per cent contingent fee continued.

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[17] *Id.* at 442 n. 25.

[18] *Id.* at 443.

[19] Brotherhood v. Virginia, *supra* note 3.

[20] *Ibid.* at 4.

[21] *Id.*

5. It provided a staff at its own expense to gather evidence for use in the event trial be necessary.[22]

6. The plan concededly resulted in channeling railroad personal injury litigation to the regional counsel.[23] All fees were paid by the litigant. The plan encompassed no proceedings other than FELA litigation.

The Supreme Court held the plan entitled to the constitutional protections, based on *Button,* Justice Black stating simply that:

> The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutional guaranteed right to assist and advise each other.[24]

And later:

> And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge.[25]

So far *Railroad Trainmen* added little to *Button* other than recognizing the right of the Union to refer certain legal business of affected members to approved counsel with the fee to be deducted from the recovery on a contingent basis rather than paid by the association. However, Justice Black implied that there might be further rights which might be vindicated in such manner in a proper case (such as in *Mine Workers*) for he observed:

> . . . in Great Britain unions do not simply recommend lawyers to members in need of advice; they retain counsel, paid by the union, to represent members in personal lawsuits, a practice similar to that which we upheld in NAACP v. Button, supra.[26]

Justice Clark's dissent in *Railroad Trainmen* feared that the decision:

> . . .will be a green light to other groups who for years have attempted to engage in similar practices,[27]

noting examples of attempted group practices in automobile litigation and dental and optical services. This must be read *in pari materia* with Justice Brennan's notation (but careful failure not to consider) in

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[22] *Id.* at 4 n. 5.

[23] *Id.* at 5.

[24] *Id.* at 6.

[25] *Id.* at 8.

[26] *Id.* at 7.

[27] *Id.* at 12.

Button of other similar association activities.[28] It is with these implications that this discussion will deal further.

The Common Thread Running Through the Group Practice Cases

It might be suggested that the law is merely the crystallization of the conscience of the community based on the needs of the times in which the problems have arisen. And the courts under our constitutional system have proven remarkably adaptable in finding bases in the Constitution for meeting the needs of the times. Thus we observe:

1. In each case the issue arose as the result of the organization seeking to vindicate rights of peculiar interest to the group as well as the individual. For example:

In *Button* the NAACP faced its organizational obligation to enforce generally rights of Negroes to non-segregated education conferred by the Supreme Court in *Brown v. Board of Education,*[29] in the face of a calculated program to frustrate effectuation of the decision.

In *Railroad Trainmen,* the Brotherhood faced its organizational obligation to enforce for its members rights conferred by the Safety Appliance Act and the FELA. Justice Black noted the peculiar hardships of railroad workers which led to the organization of the Brotherhood in 1883 and its relationship to the statutory rights granted by the Safety Appliance Act in 1893 and the FELA in 1908.[30]

In *Mine Workers* the Union faced its organizational responsibility of vindicating rights of injured miners or the survivors of deceased miners to benefits provided under the Illinois Workmen's Compensation Statute enacted in 1912.

2. Each of these cases arose under conditions where the local bar in general had not provided or was unable to provide the necessary service and did not have the necessary expertise or confidence of the member-beneficiaries.

For example, in *Button* the Virginia lawyers, as a group, were fearful and unmindful of their professional obligation to defend the rights of the Negro minority. In fact, they assumed NAACP referrals only on threat of penalty and disbarment under a statute amended as part of massive resistance to the decision in *Brown.* Furthermore, the NAACP lawyers were expert in a field not generally known to the average practitioner.[31]

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[28] N.A.A.C.P. v. Button, *supra* note 2 at 442 n. 25.

[29] *Supra* note 11.

[30] Brotherhood v. Virginia, *supra* note 3 at 233.

[31] N.A.A.C.P. v. Button, *supra* note 2 at 434-435.

In *Railroad Trainmen*, we take notice of the fact that railroad workers generally reside in small towns along the railroad right-of-way where skilled lawyers able to meet railroad counsel on equal terms are not available and are unknown to them.

In *Mine Workers* the same principles apply.

3. Each of these cases arose out of the necessity of providing the remedy to individuals at practical cost, and to place them on a parity with the massive organizations which would frustrate their claims. All three plans provided machinery for reporting of claims with competent investigation by association officials. And the plans provided either for the service at no cost to the beneficiary or a limitation of the amount of the fees.

4. All three plans provided protection against practices which would deprive the members and the other beneficiaries of the fruits of the statutes or court decision. We need not belabor the difficult position in which a Virginia lawyer asserting Negro rights would find himself in the southern environment. In *Railroad Trainmen* Justice Black said:

> It soon became apparent to the railroad workers, however, that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have. Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar.[32]

And in *Mine Workers* he noted:

> Shortly after enactment of the Illinois Workmen's Compensation Statute in 1912, the mine workers realized that some form of mutual protection was necessary to enable them to enjoy in practice the many benefits that the statute promised in theory. At the Union's 1913 convention the secretary-treasurer reported that abuses had already developed; "the interests of the members were being juggled and even when not, they were required to pay forty or fifty per cent of the amounts recovered in damage suits for attorney fees." [33]

Quaere whether the NAACP Legal Services would have been necessary if Virginia had not engaged in a studied campaign to frustrate the effects of the no-segregation rule? Or if Virginia lawyers had been willing to provide legal services even if the cause be unpopular? And *quaere* whether the Brotherhood plan would have been necessary if the railroads had settled FELA claims on an equitable basis and without imposition? Or if the railroad workers generally had been able to pro-

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[32] Brotherhood v. Virginia, *supra* note 3 at 3-4.

[33] United Mine Workers v. Illinois, *supra* note 1 at 219.

cure expert and fair legal services for the handling of their claims? And *quaere* whether the Mine Workers plan would have been necessary had the miners not been subject to the impositions described by Justice Black? The Supreme Court decisions were pragmatic ones which met the needs of the time.

The Pragmatic Approach Already Had Been Ingrained in the Law of Labor Relations

The right of workmen to organize and cooperate for their mutual interest and protection has been recognized for many years. Back in 1933 the National Industrial Recovery Act, enacted as part of a broad program of lifting the nation from depression, recognized the right of workmen to organize and bargain collectively.[34] The Norris-LaGuardia Act in 1932 noted that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." [35] The National Labor Relations Act in 1935 referred to "the inequality of bargaining powers between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." [36] While grounded on statutes enacted under the commerce clause of the Constitution, it would appear that this right might as well have been grounded on the First and Fourteenth Amendments except that such rights then were not fully recognized by court decision. But this concept is not much different from Justice Black's commentary in *Railroad Trainmen* about the inequality of bargaining power or individual railroaders and "persuasive claim adjusters" of their employer in the settlement of their claim.[37] Whereas employees once organized into unions at the peril of discharge unless their economic action was sufficient to enforce their grievance (corrected by the statutes), railroaders often prosecuted their claims individually only under threat of discharge or refusal to reinstate.[38]

Settlement of grievances under union contracts, often involving substantial sums of money on behalf of individual employees, now is an essential part of the industrial way of life. Thousands of grievances are processed annually under union contracts without any reference to the need for counsel, even to the point that some would require more arbitration—compulsory arbitration to the exclusion of the right to strike. While we do not subscribe to *compulsory* arbitration of new contract terms with

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[34] 48 Stat. 195 (1933).

[35] 29 U.S.C. § 101-115 (1932).

[36] 29 U.S.C. § 151-166 (1935).

[37] Brotherhood v. Virginia, *supra* note 3 at 3-4.

[38] N.R.A.B. Award 321 (1st Div. 1938); and 149 N.R.A.B. 315 (1st Div. 1961).

consequent erosion of the Free Enterprise System, the lesson of this system of voluntary private jurisprudence dealing with grievances during the term of the contract seems to have been lost on the opponents of group practice plans. Most arbitrations are conducted by unions on behalf of employees by their international representatives or local officers. Substantial justice is done under a system in which the arbitrator often is not a lawyer but an industrial engineer, an economist or just an "arbitrator."

This plan has the blessing of the Supreme Court as the preferred method of settlement of grievance disputes. Justice Douglas has described the arbitration process as "the substitute for industrial strife," but without regard to whether or not the litigants are represented by counsel or even if the arbitrator himself is a member of the Bar.[39] At one time the court seemed to distinguish between so-called union rights and individual rights, holding that the union had no right to sue under Section 301 of the Labor Act to vindicate purely personal rights of employees.[40] However, that concept has since been discarded and the Court has held that individual rights may be enforced by suit. The union has an interest in enforcement of the rights guaranteed to the employees by the contract.[41] But an individual may not sue in the face of a union contract without exhausting or attempting to exhaust the contractual grievance and arbitration procedure.[42] The result achieved—a private system of industrial jurisprudence—too, is a pragmatic one, for it is inconceivable that modern industry could perform its function without collective bargaining and expeditious and relatively economical resolution of grievances. There is no expense at all to the employee in the usual case. The system is of benefit to employer, union and employee alike.

So, with recognition of this type of group "practice" through an association, the decisions in *Button, Railroad Trainmen* and *Mine Workers* logically followed.

The State Courts Had Been Groping for an Answer to Modern Needs

Even prior to the decisions under consideration, state courts had been groping for an answer. This is illustrated by experience in Ohio. Some state courts had held that plans which furnished counsel to association members, as in *Button* and *Mine Workers,* or which referred

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[39] Examination of cases in the CCH Arbitration Service over a period of several years shows that in about 28% of the reported awards the union was represented by counsel.

Steelworkers Trilogy: Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[40] Westinghouse Salaried Employees v. Westinghouse, 348 U.S. 437 (1955).

[41] Smith v. Evening News Association, 371 U.S. 195 (1962).

[42] Republic Steel Corp. v. Maddox, 379 U.S. 650 (1963).

union members to approved counsel, as in *Railroad Trainmen,* were illegal as in conflict with the Canons of Ethics.[43]

But Ohio, in recent years, showing more practical thinking, drew the line, not in blind adherence to tradition, but for the needs of the times. The line was drawn on whether the services were performed for profit. *In re Brown, Weiss & Wohl,*[44] the Ohio Supreme Court, while holding to its position that no agency (either an administrative agency or the legislature) might define what is the practice of law, nevertheless stated in Syllabus 3 that:

> No person, other than an attorney in good standing may hold himself out as being qualified to render service to those who may have claims for compensation arising under the Workmen's Compensation Laws of Ohio or as being able to render services in the preparation and presentation of such claims nor may such person render such advice *if a fee for such advice or services is to be received from or charged against the one having such a claim.* (Emphasis ours.) [45]

In this case a partnership of laymen conducted a business of representing workmen's compensation claimants *for a fee* based on a percentage of the recovery, respondents claiming that such practice was protected by Ohio Constitutional provisions establishing the Workmen's Compensation System. The lower court had enjoined all activities relative to practice before the Industrial Commission of Ohio. The Supreme Court modified the order, stating:

> However, the judgment of the trial court enjoins respondents from doing those acts complained of instead of, as it probably should have, merely enjoining *them from doing them for a fee . . .* To this extent that judgment should probably be modified. (Emphasis ours.) [46]

Under prior authority, *Goodman v. Beal,*[47] the line had been drawn at appearance at a "rehearing" where a record of testimony was taken for use in later trial. All practice prior to the "rehearing" was not the "practice of law." In *Brown, Weiss & Wohl,* briefs *amicus* were filed on behalf of the Ohio AFL-CIO and the Ohio Chamber of Commerce and Ohio Manufacturers Association, which brought to the attention of the court the realities of Industrial Compensation practice whereby local unions customarily furnish advice and representation to their members and whereby employees or "actuaries" employed by industrial

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[43] In re BRT, 13 Ill. 2d 391, 150 N.E. 2d 162 (1958); Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P. 2d 508 (1950). Also see cases cited by Justice Clark in dissent, *supra* note 3 at 1, and those cited in Markus, Group Representation by Attorneys as Misconduct, 14 Clev-Mar. L. Rev. 1 (1965).

[44] 175 Ohio St. 149, 23 Ohio Op. 2d 445 (1963).

[45] *Id.* at 149, Syllabus 3.

[46] *Supra* note 44 at 152-153.

[47] 130 Ohio St. 427, 5 Ohio Op. 52 (1936).

and business concerns appear for the employer in contesting and adjusting such claim. The AFL-CIO noted that it customarily prints booklets and other literature advising members and their representatives in the intricacies of the Workmen's Compensation Law and that local unions customarily have non-lawyer members who have become skilled in handling of such matters—but without any fee. The Constitution of the United Steelworkers of America (14) provides:

> A Workmen's Compensation Committee and a Safety and Health Committee, under the direction of the International Union or its designated representative, shall be designated in each Local Union.[48]

Thus, compensation schools are held periodically in which the members serving on such committees are educated in the laws and in the handling of claims for the members. The same procedures are followed with respect to representation in unemployment compensation claims. Thus, with the distinction made with respect to no-fee representation, the Ohio court was prophetic in accepting the plan similar to that later approved in *Mine Workers*. The rights of the Bar were vindicated by drawing the line at charging a fee for representation, and at the same time the association rights were vindicated by permitting the union to handle claims for its members. It is interesting that the Ohio Court did not find it necessary to rely on federal constitutional rights as the basis for its decision.

In a prior case, in a somewhat different context, *Cleveland Bar Association v. Fleck*,[49] disciplinary proceedings were brought against law partners who had entered into a written agreement with a local union whereby respondents agreed to represent its individual members in Workmen's Compensation proceedings and permitted and aided in the distribution among the union members of copies of the contract. The charging committee alleged "for the purpose of soliciting professional employment." Respondents were charged with aiding the union members in signing the contracts, in preparing their claims and in representing them before the Industrial Commission. One, it was charged, appeared before the local union to urge the execution of the basic employment contract, copies of which were mailed to 8,000 union members. Compensation was from the individual recoveries, presumably on a contingent basis.

While there was one facet dealing with borrowing of money in order to facilitate payment of the fee, the basic plan differs only in degree from that approved in *Mine Workers*. The existence of a legal service plan of this general type, or the fact that announcement was made to the union membership. do not appear improper under the rule

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[48] Constitution of United Steelworkers, Art. VI, Sec. 10C (1962).

[49] 172 Ohio St. 467, 17 Ohio Op. 2d 458; cert. den. 369 U.S. 861 (1961).

of that case. And the contingent fee arrangement does not appear improper in view of *Railroad Trainmen*. While the case does not state which party to the arrangement was the motivating agent, it would seem that if the union had requested respondent to attend the meeting for the purpose of explaining the contract to the membership, there would have been no wrongdoing in that respect. Did respondents have the duty to tell the union not to make the agreement? But the thrust of the Supreme Court's opinion seems to be acceptance of the fact that the respondents' participation in the plan was a violation of the Canons. From the Court's opinion it does not appear that the constitutional question later raised in *Button, Railroad Trainmen* and *Mine Workers* was before the Ohio court.

Columbus Bar Association v. Potts,[50] involved a factual situation superficially analogous to *Railroad Trainmen*. There an international union maintaining a legal aid department had retained New York counsel to handle FELA claims for its members, payment to be made on a contingent basis. Respondent was retained as their local counsel. Publicity of respondent's availability was given orally at union meetings and by written publications and notices. Union officials brought injured workmen to his office where they signed "requests to see counsel" and contingent fee agreements. So far, the facts appear indistinguishable in principle from *Railroad Trainmen* unless we are to find a difference in the fact that respondent was local correspondent for the actual approved lawyers in New York or that the union official brought the plaintiff to see the lawyer.

However, respondent and the legal aid chairman of the local called at the hospital to see a seriously injured workman who there signed the "request to see counsel" letter and the contingent fee contract. The injured employee later rescinded the agreement and it was returned. As the court saw it, the serious evil in the arrangement was that the New York counsel were the named attorneys and that the case, while presumably "forwarded" to New York, actually was handled by respondent with occasional consultation with the New York Counsel. But this seems a slight variation from the approved plan, if we consider respondent as the approved agent or associate of the approved New York counsel. The lesson of the case, in the light of the later Supreme Court pronouncement, is that the union might refer FELA work to its approved counsel far away, but such counsel might not maintain an attorney-agent in a locality to do the local work, hardly a serious distinction if the referral system in itself be legal as an expression of constitutional rights. Respondent visited the injured workman in the hospital *with* the legal aid chairman and his indiscretion in that respect and

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[50] 175 Ohio St. 101, 23 Ohio Op. 392 (1963).

procuring an authorization for approved New York counsel seems to be the gravamen of the offense.

Interestingly, the constitutional lesson of *Button* was raised in the Ohio court, but that defense was struck down because of Justice Brennan's *caveat* as expressed in *Button* in footnote 25, hereinbefore referred to.

The decision was not appealed to the Supreme Court. *Quaere,* what would that court have done with this case in view of its later answer to Justice Brennan's note in *Railroad Trainmen?*

The status of such plans as *Railroad Trainmen* had been considered by an Ohio appellate court in 1933 in *In re Petition of the Committee on Rule 28 of the Cleveland Bar Association,*[51] and that court, like most courts of that era, found the plan in violation of the Canons. But prophetically, a dissenting member of the court considered very much the same history recited in *Railroad Trainmen* and held that the Legal Aid plan did not constitute "soliciting," stating:

> The plan of regional counsel conceived by the Brotherhood of Railroad Trainmen was meritorious and worthy. It sought to protect the members of the Brotherhood of Railroad Trainmen against imposition. It was not tainted with unlawful or unethical elements. It must follow that since it is lawful and ethical for the Brotherhood of Railroad Trainmen to employ counsel that it is not unlawful or unethical for counsel to accept the employment.[52]

And this was without assistance of the constitutional support used by the Supreme Court some 30 years later. The change in judicial thought which has come about as a result of the decisions in *Button, Railroad Trainmen* and *Mine Workers* well might cause the prosecutors in the earlier cases to have the same afterthoughts which surely faced the prosecutors of the Salem witches—should they have been hung in the first instance?

Do the Recent Group Practice Decisions Completely Close the Door on Traditional Ethical Considerations in Group Practices?

As we have noted, the justices were concerned with the ethical considerations even though the specific plans before them in the three cases were approved. Justice Brennan spoke at length on this subject in *Button,* but declined to rule beyond the scope of the immediate case.[53] Justices Harlan, Clark and Stewart were concerned in their dissent in that case, as was Justice Harlan again in *Mine Workers.* However, we urge that the Legal Canons still are alive but must be adapted to the needs of the times and the constitutional protections referred to. No

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[51] 15 Ohio L. Abs. 106 (1933).

[52] *Id.* at 111.

[53] N.A.A.C.P. v. Button, *supra* note 2 at 442 No. 25.

longer can the Bar blindly follow canons born in an earlier day, without regard to constitutional protections. If the Bar is to properly fulfill its function of administering justice for all, it too must grow with the times and meet the needs of the industrial age. Blind resistance to change might result in the same fiasco experienced by the American Medical Association when it resisted group practice.[54] As suggested by Justice Brennan in *Button,* each case must be considered on its merits. We thus inquire:

What Is the Scope of Services Which a Union May Provide for Its Members?

It is significant that all three cases involved association rights and obligations as well as individual rights. But the union no longer merely is an organization whose purpose is to win "more" for its members from the employer. The scope of collective bargaining has expanded widely in recent years. While an employer has the duty of bargaining on matters of wages and hours, it also must bargain on "other terms and conditions of employment."[55] And, by the National Labor Relations Act, employees have the right to organize "to engage in . . . concerted activities for the purpose of . . . other mutual aid and protection."[56] Thus we pose the following questions which come to mind, from the daily grist of law practice:

1. Inasmuch as employers usually seek some limitation on garnishments, might not a union refer or employ counsel for its members to represent them in garnishment proceedings to protect their job rights? Or even in bankruptcies, where necessary?

2. Inasmuch as most insurance agreements limit the employer's liability to furnishing the insurance plan bargained for, leaving the matter of individual recovery to litigation between the employee and the insuror, might not a union refer or employ counsel to enforce such insurance claims so that the employee might have the benefits he anticipates pursuant to the contract?

3. Inasmuch as many employers sub-contract cafeteria and other food services for the employee, especially in a large plant where outside food services are not generally adequate, might not a union refer or employ counsel for suit by employees damaged as result of eating tainted food?

4. In those cases where an employer has the right to move its operation, and the plant then is acquired by a new employer, might not

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[54] American Medical Assoc. v. United States, 317 U.S. 519 (1943).

[55] 29 U.S.C. § 158 (8c) (1964).

[56] 29 U.S.C. § 158 (7) (1964).

the union refer or employ counsel for suit by employees who claim residual rights against the old or new employer?

5. Although unemployment compensation generally is a matter between the state and the individual, might not the union refer or employ counsel in vindication of the right to unemployment compensation? There have been numerous mass proceedings litigated by union counsel on behalf of employees in unemployment compensation matters, such as in the case of the Supplemental Unemployment Benefits suits[57] or the more recent "vacation pay" suits.[58] Or in deciding the question of whether a plant shutdown was the result of a strike in the "establishment"? [59] Or in deciding whether an employee attending evening school is to be thus deprived of his unemployment benefits as a "student regularly attending an established educational institution"? [60]

6. Inasmuch as some contracts contain provisions for providing meals or company housing, might not a union refer or employ counsel for suit against the manufacturer of the food or defect in the housing? Or for suit against a company doctor who is negligent in treatment of injured employees?

7. Or if a machine or a tool in the shop is defective, might not the union refer or employ counsel to prosecute suit against the manufacturer on behalf of an employee injured thereby?

8. Inasmuch as conviction of a crime or incarceration for a specific period might be grounds for termination, might not the union refer or employ counsel to defend the employee against the criminal proceedings or to procure his release?

9. Or stretching the analogy further, inasmuch as domestic tranquillity has a bearing on an employee's ability to remain on the job, might a union refer or employ counsel to handle the member's domestic problems?

The list, of course, might be endless, depending on how far we are to extend the concept of the employment relationship or the obligation or interest of the union in regard thereto. Perhaps this inquiry explains Justice Black's cryptic reference in *Railroad Trainmen*[61] to the practice in Britain to "retain counsel, paid by the union, to represent members in personal lawsuits. . ."

The answer well might be that in Britain, with perhaps a stronger tradition of trade unionism, the union plays a greater role in the daily

[57] United Steel Workers of America v. Doyle, 169 Ohio St. 324, 7 Ohio Op. 2d 11 (1958).

[58] Nunamaker v. U. S. Steel Corp., 2 Ohio St. 20, 31 Ohio Op. 2d 110 (1963).

[59] Abnie v. Ford Motor Co., 175 Ohio St. 273, 25 Ohio Op. 2d 110 (1963).

[60] Acierno v. General Fire Proofing Co., 166 Ohio St. 538, 3 Ohio Op. 2d 7 (1957).

[61] Brotherhood v. Virginia, *supra* note 3 at 7, n. 12.

lives of the members. However, the common thread running through the foregoing examples is the relation to the employment relationship, which surely is a legitimate interest of the union.

Some unions already have entered the foregoing or related fields. As stated, with Ohio Supreme Court approval, unions are providing representation for members in workmen's compensation and unemployment matters, even by laymen. Certain Teamsters Locals in St. Louis provide income tax services to their members during the spring tax-return season. Auto Workers Local 600 at Detroit provides the same service.[62] Retail Clerks and Teamsters in California and Carpenters in New York provide a drug insurance plan.[63] The Joint Teamsters Council at St. Louis maintains a comprehensive medical-dental plan whereby such services are provided to members either by union-employed personnel or referral to panel doctors, depending on the gravity of the problem. And in southern California the Hotel and Restaurant Employees and Bartenders Union, for a time, maintained a "judicare" program providing various legal services for members by a panel of approved lawyers.[64] The list is endless, and illustrates the possibilities which arise as the union exerts a growing interest in the lives of the members. It well may be that Justice Black's suggestion as to the British practice is not far-fetched and that the cases may present a "green light to other groups who for years have attempted to engage in similar practices," as suggested by Justice Clark in *Railroad Trainmen*.[65]

The California Hotel & Restaurant Employees plan offered bail bond benefits, and legal advice on civil matters, but excluding income tax problems, domestic relations, matters relating to outside business activities, and disputes between members and employers and their unions. Employees who made known their need for legal aid to their employer or the union were referred to the fund office, and determination was made as to whether the need fell within the ambit of the plan and whether the employee was financially unable to employ counsel. The fund's social worker then inquired whether the employee had an attorney. If he had counsel, he was referred to his own attorney, who was advised of the extent of aid which the fund would provide. If he had no counsel, he was referred to the Lawyers Referral Service; but if he did not wish such referral, then he was referred to one of the lawyers on the fund's panel. Interestingly, most of the employees rejected the suggestion of referral to the Lawyers Referral Service because "most of the employees wanted an attorney whom they knew or who was referred to them by a person they knew and trusted." The

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62 Wall Street Journal (Jan. 31, 1968) at 1, Col. E.

63 Wall Street Journal (March 4, 1965) at 1, Col. D.

64 Journal of the State Bar of California (Sept.-Oct. 1964) p. 670 et seq.

65 Brotherhood v. Virginia, *supra* note 3 at 12.

plan, though apparently successful, was terminated in 1961 because of lack of funds to make its availability known and to extend its benefits to all employed in the industry.[66]

Unemployment Compensation referral services similar to that in *Mine Workers* are not uncommon.[67] A teachers association with a membership of 60,000 maintains a legal fund to provide assistance to members in protection of their professional rights.[68]

Nor have these systems been limited to unions. Trade associations have retained counsel on behalf of their members to provide limited services in connection with the association's activities, on the premise that such counsel are expert in the area covered—for example, counsel retained by a landlord's association[69] who gave advice on preparing and serving eviction notices and filing unlawful detainer actions and similar matters. Corporations have provided such services for many years. Usually the corporation refers the problems of its employees to other counsel or to the Lawyer Referral Service, but one corporation during the war actually employed lawyers to handle personal problems of its employees, on the theory that such assistance reduced absenteeism.[70] Particular attention was paid to wage garnishments. We assume that Internal Revenue Service approved such expenditures as being for a necessary and valid business purpose. And while this particular plan was terminated with the end of the war, that should not be a consideration of its current validity.

One corporation, opening a plant in a new locality, organized its own "bar association" and "legal referral service" in order to meet the needs of its employees who were generally unfamiliar with the local bar and who knew no lawyers in whom they had confidence. Some sort of catalytic agency was necessary in order to bridge the gap between legal needs and the wish of employees to be referred to counsel in whom they would have confidence.[71] A portion of the maritime industry consisting of small ship-owners formed an association which referred members to counsel familiar with maritime problems and who handled individual matters at prescribed charges.[72] And further illustrative of what is being done is the Army Legal Assistance Program established in 1943, which provides advice to servicemen on personal problems of a civil nature, without charge. If court action is desired, the legal assistance officer refers the client to lawyer reference or a

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[66] *Supra* note 64 at 674.

[67] *Ibid.*

[68] *Id.* at 675.

[69] *Id.* at 678.

[70] *Id.* at 679.

[71] *Id.* at 682.

[72] *Id.* at 684.

local bar association.[73] The Canton Automobile Club, apparently as part of the AAA general service, provides bail bonds for its members arrested in traffic cases, and also pays legal fees under a present schedule for defense of specified traffic violations. The plan provides, however, for mere reimbursement of legal fees pursuant to the schedule, and does not purport to set the fee, and the AAA does not even assist in the selection of counsel.

Guidelines for the Future

As we have noted, running through the reasoning of the Supreme Court in the three cases is recognition that application of the Canons of Legal Ethics is important and must be observed. The rules are not dead, yet the Court has made it clear that it will not permit rules as defined in an earlier environment to stand in the way of the First and Fourteenth Amendment Rights applicable to the needs of a modern industrial and urban society. We do not believe that labor unions or any other institutions wish to usurp the practice of law generally. But the recently enunciated law does permit practices which preserve association rights reasonably necessary to the association purpose.

We do not go along entirely with Justice Clark's fear that the new guidelines will be a "green light" to other groups which would intrude into the practice of law, but we do see them as an "amber light" to the profession, a *caveat* which the Bar as an institution well might heed. For example, the legal profession for years failed to furnish expertise in the growing complexity of the income tax laws, with the result that today the tax practitioner, the CPA and the estate planner has come to dominate those areas of activity. Likewise, in the area of Labor Law, lawyers generally have failed to acquire the expertise in this complex field. So we find many employers turning to management consultants and so-called "labor consultants" for assistance. And the Bar is poorer for it. Labor organizations have developed expertise from among their own ranks. The National Labor Relations Board explicitly recognizes the right of laymen to practice before it, even in unfair labor practice proceedings in making a record on which the NLRB and the circuit courts will act.[74] The answer would seem to lie in the responsibility of the Bar to furnish the necessary legal services, else we will see further advance of group plans even over the opposition of the Bar, such as occurred in *Railroad Trainmen.*[75]

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[73] Winkler, Legal Assistance for Armed Forces, 50 Amer. Bar Assoc. J. 451 (1964).

[74] Sec. 102.44 of the NLRB Rules and Regulations, whereby aggravated misconduct, when engaged in by an attorney or "other representative of a party," shall be ground for suspension or disbarment by the Board from further practice before it.

[75] Brotherhood v. Virginia, *supra* note 3. The position of the Brotherhood of Railroad Trainmen was opposed by motion for rehearing by the American Bar Association, 44 State Bar Associations and four major local bar associations.

The grounding by the court of its conclusions on constitutional rights, in our opinion, makes it clear that the rights in the three cases do not rest alone on the peculiar interests of the NAACP or the two unions, for constitutional rights are not peculiar to any specific group. Thus, if a group of landlords band together for mutual aid and protection, might they not furnish to their members, under the principles stated, legal services to vindicate their rights? Or a tenants' association? Or a group of ship-owners? Or even an association of automobile owners (a conclusion which might cause concern among the plaintiff personal injury bar)? And whether we denominate it as such, group practice actually is in effect in that important area. For insured defendants generally are provided with group legal services by their insurors, because of the financial interest of the insuror in the outcome of the litigation. And plaintiffs, particularly in some areas, are afforded a type of group practice through the custom of general practitioners referring personal injury litigation to firms specially skilled in plaintiff's personal injury practice. The problem now is one of extent, not of principle.

We thus look at the stated major objections to such group practices.

1. *Oppressive Lawsuits*—Traditionally the Canons have sought to discourage "oppressive lawsuits," which in *Button* the court implied should be distinguished from other litigation. But that distinction makes little sense except in a blatant case. There is nothing "oppressive" in any legitimate lawsuit regardless of the small sum involved. That is the theory of Legal Assistance Plans, of the Poverty Program and the small claims courts. For it now is the national purpose to provide adequate counsel to all persons regardless of their ability to pay. Numerous small lawsuits well might crowd the court's docket, but that too is just another problem which the Bar must help meet. For, cumulatively, grave injustices are permitted merely because poor people don't have the money to litigate and their grievances remain unredressed under the traditional scheme.

In *Button* the court referred to possible encouragement of divorce suits, claims of adverse possession, multiple suits against a small company and suits calculated to harass debtor. But can we say that a divorce suit should be avoided at whatever cost to the social relationship? Or that adverse possession, recognized as a principle of law, is inherently wrong? Or that suits against corporations should be discouraged merely because they might be profuse? It would seem that denial of counsel in itself becomes "oppression." And, of course, the suit to harass a debtor is best handled by availability of counsel to the debtor so that he might protect himself. If the suit is indeed "oppressive," then the Canons provide adequate means to handle this problem on an *ad hoc* basis.

2. *Lack of Personal Attention*—It well might be that a group practice might provide a different type of relationship than existed under the old "family lawyer" system. However, the criticism is not unlike that of the medical profession's emphasis on retention of the so-called sacred doctor-patient relationship as an excuse for opposing group medical plans and "medicare." But we now have group medical plans and Medicare and have not witnessed any reduction in the quality of care furnished. There must be an element of "impersonality" in any plan of furnishing mass services, but that is not more so than in the case of the usual busy lawyer with many files in his office. These too must be handled in expeditious fashion, with expertise required for the problem. The solution also is to be found in the Canons which place on the lawyer the responsibility for handling his cases honorably and with some dispatch. This problem, if it be a problem, too, can be considered on an *ad hoc* basis.

3. *Solicitation of Representation*—It is settled that the Brotherhood and the Mine Workers plans are not "solicitation," even though the approved lawyers were the beneficiaries. That too can be handled under the Canons, for if counsel had sought out the association for procurement of legal "business," then the Bar surely would have successfully challenged that form of misconduct, as it has many times. Here the unions sought out the lawyers to perform a service for their members and, as the court noted, the constitutional protections inherent to the association also adhere to the lawyers. The lawyers did not seek out the individual workers and solicit representation but rather they provided the services inherent in a plan of furnishing adequate representation of their members.

4. *Conflicts of Interest*—The concern that the individual lawyer might find himself in a conflict of interest between the goals of the association and the personal interest of the member is a question which the lawyer, in his own conscience, must answer. But it is extremely far-fetched to tar the plan itself with the "possibility" of a conflict, for on the face of the plan it is apparent that no such conflict could exist. What conflict can exist between the interest of an injured railroader or miner to achieve an adequate award and the interest of the union that he be properly compensated? Or between the interest of a Negro for nondiscriminatory treatment and the interest of NAACP that his school be non-segregated. But in all of the plans the element of conflict was avoided. In *Railroad Trainmen* the member was not forced to employ approved counsel. In *Mine Workers* the lawyer even turned the file over to such other lawyer whom the injured miner might desire. In *Button* no one became a party to the suit unless he willingly did so and he even later might withdraw. And all of the plans make it clear that the law-

yer is in control of the case. But if conflict appear later in the suit, the lawyer, of course, would resolve the conflict by withdrawal or referral.

5. *Right of Layman to "Practice Law."*—This criticism often has been leveled at group plans, but that is inherent in any area of business or of life. For example, there is no question but that the insurance adjuster is "practicing law" in the sense that he applies legal principles to his investigation and his negotiations for adjustment. And the trust officer of a bank is "practicing law" in the sense that he applies legal principles to his administering the trust. So a lay union compensation committee member "practices law" in the sense that he investigates and advises injured workmen and even appears for him at the hearing. But the Ohio Supreme Court has held this practice permissible by laymen if without payment of fee. The answer is that laymen, of course, practice law in a limited sense. Else society cannot function. But unless the Bar rises to its role of providing legal services, then more laymen will practice more law. This is evident in the eminence of accountants in tax law practice and of "consultants" in labor law practice. But valid channeling of the actual "legal practice" to qualified lawyers recommended by associations under adequate restrictions seems preferable to laymen taking over the field entirely should the Bar not meet its responsibilities.

Conclusion

The needs of the time place ever greater responsibility upon the Bar, which must provide legal services to the public at prices it can pay and still maintain its role as a learned profession with specific Canons of professional conduct. We hereinbefore have described some of the plans approved by the Supreme Court or which have arisen informally as the result of the specific needs of an industrial society. The Group Legal Services Committee of the California Bar has stated *caveats* which should attach to such plans: [76]

(1) A group which undertakes to provide legal service cannot be organized solely for this purpose;

(2) There may be no group control over the attorney in areas usually reserved for the attorney and client;

(3) There may be no direct or indirect kick-backs between the attorney and the group;

(4) There must be scrupulous observation of conflicting interest rules;

(5) Limitations are imposed upon the methods of publicizing the attorney and his availability.

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[76] Progress report, Group Legal Services Committee of California State Bar, 723-24 (July 30, 1964).

Item 5 is obscure, because there must be a systematic program of bringing the right to legal services to the attention of the membership for the plan to be successful. But we would make two further suggestions—the plan should guarantee that the recommended or employed counsel possess diligence and expertise in the particular fields of law involved, and there should be no solicitation by the lawyer to the association for participation if the fee in the individual case is to be paid by the employee.