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Group Legal Services in Patent Law

G. Franklin Rothwell*

WHAT ARE GROUP LEGAL SERVICES? In the usual meaning of the phrase, *group legal services* refers to lay groups or organizations which hire lawyers to provide legal services for the individual legal needs of their members.¹

How do group legal services affect the practice of patent law?

Recently, a number of organizations have developed which have the same general format. A group consisting of a number of individual inventors is organized and a patent attorney is retained by the group organization to provide patent legal services to the individual members of the group. The groups or organizations may be called clubs, leagues, guilds, unions, etc., for inventors. These groups may and usually do provide services other than patent legal services to their members; such services include alleged evaluation of the merit of their members' inventions, invention brokerage services, and the like. Commonly, the groups also provide the services of preparing, filing and prosecuting patent applications on the members' inventions, through the attorney retained by the group, and usually at an alleged discount rate due to group volume.

Some of the groups are profit-making organizations and take a percentage of the members' inventions. Most are not-for-profit organizations, with a paid or unpaid group leader, such as a secretary or president. Most groups, however, charge significant dues whether or not they take a percentage of the invention.

Patent lawyers in most ways are no different from general lawyers, with regard to the fact that they are members of the legal profession bound by the Canons of Ethics. The Canons, among other things, prohibit soliciting business via advertising, and prohibit representing clients through intermediaries.² A patent lawyer, the same as a general lawyer, may be disbarred and prevented from practicing before the Patent Office for violating the Canons of Ethics.³

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¹ Lawyers at the Crossroads—Profession or Trade: Whelan v. Cedarquist, 31 Unauthorized Practice News, 79 (Nos. 3-4) (Fall-1, 1965-6). As to the organization and operation of such "service groups" generally, see, Oleck, Non-Profit Corps., Orgns. & Assns. (2d ed., 1965).

² American Patent Law Association, Canons of Ethics parallel to the American Bar Association *Canons of Ethics*. Canon 35 in both associations is identical. See also, Patent Office Rule 345; 37 CFR 1.345, wherein the use of advertising, etc., to solicit patent business directly or indirectly, is forbidden as unprofessional conduct. Any person engaged in such solicitation or associated with or employed by others who solicit may be disbarred from further practice.

³ 35 U.S.C. § 32; see, Sperry v. Florida, 373 U.S. 379 (1963).

The subject of group legal services involves, however, not only unauthorized practice (including solicitation, advertising, or use of the lay intermediary), but also public policy. There are those who argue that, at least in the area of personal (as distinguished from business) problems, there is a large unfulfilled need for legal services.⁴ They say that the legal profession should recognize this fact, and revise the Canons of Ethics so as to allow the practice of group legal services. The proponents of group legal services also point out that there are several areas where group legal services are practiced today without challenge. One area is in civil rights cases. Another is in the field of automobile and casualty insurance, where policyholders of the insurance company are represented in individual legal problems by lawyers retained by the insurance company.⁵ A further area is the group legal services given to the poverty stricken, by Neighborhood Legal Services Program funded by the Office of Economic Opportunity, constituting a battalion in the war on poverty.⁶

In the not very distant past, the law with regard to group legal services was somewhat more settled. Various automobile clubs wanted to furnish lawyers to their members during the depression, but were prohibited because neither a corporation nor a voluntary association operating under a trade name may practice law or hire lawyers to carry on the business of practicing law for it.⁷ The law, on this point, could be succinctly summarized:—a lay agency cannot do indirectly (through the hiring of lawyers to represent its individual members) what it cannot do directly.⁸ And the professional services of a lawyer should not be controlled or exploited by any lay agency which intervenes between client and lawyer. If that were permissible, it would permit the lay agency or group to do what the lawyer could not do: namely, solicit business.⁹

⁴ Cf., Stolz, *The Legal Needs of the Public; A Survey Analysis; Research Contribution of the American Bar Association 1968*, #4.

⁵ "The automobile has had almost as profound an impact on the average American's relation with his lawyer as it did on his sexual relations." Murray L. Schwartz, *Law in a Changing America; Changing Patterns of Legal Services*, 115 (The American Assembly, Columbia Univ., 1968).

⁶ It is reported that 93,000 cases were handled by the Neighborhood Legal Services Program during the first three months of 1967. 2 *Law in Action* 1 (July 1967).

⁷ *Rhode Island Bar Association v. Automobile Service Association*, 55 R. I. 122, 179 A. 139, 100 ALR 226 (1935); *People ex rel. the Chicago Bar Association v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935); *In re MacClub of America, Inc.*, 3 N.E.2d 105, 105 ALR 1360 (Mass. S. J. 1936).

⁸ This anti-intermediary restriction is found in Canon 35.

⁹ Information Opinion "A" of 1950, Committee on Unauthorized Practice of Law, American Bar Association; reprinted in 32 *Unauthorized Practice News*, 52 (No. 3) (Fall 1966). Solicitation and advertising prohibitions are justified by reference to the evils of underrepresentation and overcharging of clients, stirring up litigation, and unnecessary legal activity. See, Schwartz, *supra* note 5, at 114.

The activities of labor unions gave impetus to the general interest in the subject of group legal services. In 1930 the Brotherhood of Railroad Trainmen (BRT) organized a "legal aid" department and appointed counsel in various regions throughout the United States. The BRT recommended these attorneys only to its own members, for the handling of personal injury claims against the railroads. The attorneys subsidized the injured persons, gave gratuities for cases brought in, and contributed to the maintaining of a clearing house in Cleveland which was alleged to have brought in over \$150,000 per year. It was pointed out that the railroad worker was engaged in a hazardous occupation and that if he was injured and had a good claim he needed to be represented by skilled lawyers. However, there was no shortage of lawyers. In fact, an injured man was besieged by lawyers; and the legal profession has always been opposed to soliciting in personal injury cases. The injured workmen should, however, be represented when they faced the railroad claim agent who wanted to get an early settlement.

The conduct of the BRT lawyers was called into question in a number of cases filed in at least five different states. In Illinois, the Supreme Court said that the Brotherhood should eliminate all financial arrangements with attorneys, so as not to tear down the standards of the legal profession.¹⁰ The Brotherhood modified its practices to eliminate unethical financial arrangements. But since the court did not rule direct on the issue of channeling cases, the Brotherhood still used its full resources to channel personal injury cases. There followed the *Virginia BRT* case, which started in 1959 when a lower court enjoined the BRT from giving the names of specific attorneys to their members. The United States Supreme Court held, however, that the protection afforded by the rights of free speech and free association in the First Amendment of the Constitution allowed the union to recommend specific attorneys and allowed the preselected attorneys to accept such employment. A minority opinion characterized the BRT plan as one which degrades the profession and relegates the practice of law to the level of commercial enterprise.¹¹

The *BRT* decision in 1964 had followed a 1963 decision in the *NAACP* case, wherein the Supreme Court had held that the furnishing of paid counsel by NAACP to represent its members in their personal civil rights cases was protected by the First Amendment.¹²

The most recent United States Supreme Court case involving group legal services originated from the practice of an Illinois District of the United Mine Workers of America. The UMWA hired an attorney on a

¹⁰ *In re Brotherhood of Railroad Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958).

¹¹ *State of Virginia ex rel. Virginia State Bar v. Brotherhood of Railroad Trainmen*, 377 U.S. 1 (1964).

¹² *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

salary basis, to represent its members and its members' dependents in their workmen's compensation claims. The UMWA had been doing this since 1913, one year after the Illinois Workman's Compensation Statute was enacted. The court held that the freedoms of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gave the UMWA the right to hire attorneys on a salary basis in the "assertion of their legal rights."¹³

The State Bar of California has had extensive experience with the problem of group legal services *vis-a-vis* the alleged unfulfilled need of certain members of groups for such services.¹⁴ They have recently circulated a proposed rule of professional conduct which would permit group legal services, with certain very important safeguards.¹⁵

In the field of patent law there is a precedent involving an inventor's club, which was organized as a profit-making organization and which utilized, *inter alia*, the "pro se gimmick" of having the inventor sign all papers which were prepared for him by a corporate employee. This activity was enjoined, as was the rendering of opinion on patentability, the drafting of affidavits and assignments, and the prosecution of the application after it is on file.¹⁶

The adverse effects on the public of the advertising practitioners who are not registered before the Patent Office, and who have the inventor file a case *pro se* (that he has paid them to prepare) is apparent from the facts reported in the recent *Hull* and *Blasius* decisions.¹⁷

The problem with group patent legal services can be illustrated by several hypothetical examples. Suppose an inventor's association retains a patent attorney to render "free advice" to inventors on their individual problems, while the group retains a percentage interest in the invention. Suppose the group has a policy of assigning, where the inventor feels he can make more on an outright license (or *vice versa*). Suppose further that two members of the group have the same invention and both have confided in the attorney. What about the problems of conflicts of interest and confidential communications?

As a second hypothetical example, assume the inventor's group puts a patent attorney on its payroll and is attempting to get new members for the group. The group splashes large advertisements over nationally

¹³ *Mine Workers v. Illinois Bar Association*, 388 U.S. 353, 357 (1967). The dissent noted that with this "absolute" approach the logical end could be that a group could employ a layman to represent its members in court because it felt his low fee made up for his deficiencies in legal knowledge.

¹⁴ Note, *Group Legal Services*, 39 J. St. B. Calif. 639 (1964).

¹⁵ Note, *Proposed Rules: Group Legal Services*, 43 J. St. B. Calif. 474 (1968); see the summary thereof in 54 A.B.A.J. 917 (Sept. 1968).

¹⁶ *Marshall v. New Inventors Club*, 117 N.E. 737, 99 U.S.P.Q. 460 (Ohio C.P. 1953).

¹⁷ *Hull v. U.S.*, 390 F.2d 262, 158 U.S.P.Q. 355 (D.C. Cir., 1968); *Hull v. Gamblin*, 158 U.S.P.Q. 424 (D.C. App. 1968); *U.S. v. Blasius*, 158 U.S.P.Q. 371 (2d Cir. 1968).

distributed publications and periodicals, declaring that if people join the group they will have the availability of a patent lawyer "free."

As a third example, take an aggressive patent attorney who does not wait for the inventor's group to be organized. He organizes it. This way he is assured that he can obtain all the business of the group and can increase his business by organizational advertising rather than by personal reputation.

A further example is a business man who sees how financially lucrative a corporation would be which renders patent legal services to various members. He hires a number of specialists on a payroll. A possible eventuality is that most of the patent lawyers of the country could all become corporate employees of either industrial corporations or patent service corporations.

It should also be recognized that as long as the status of the unregistered practitioners remain in limbo, or while the *Hull* decision stands (*Blasius* has petitioned for certiorari) the "patent attorney" in each of the above examples could be replaced by a freebooter.

It has been said that access to legal services (without qualification) must be recognized as a matter of right, and that group legal services should be encouraged, subject to safeguards.¹⁸ Although I am aware of no formal statistical study, so far as can be ascertained from personal observation, there is no great unfulfilled need for *patent* legal services.¹⁹

I submit that access to legal services by those who cannot afford them (middle class as well as poor) should be qualified and limited to personal legal services of a nature which cannot be handled by a contingency retainer, as distinguished from business legal services or other contingent fee type services. "Personal legal services" include the subjects of housing (public and private), consumer (collections, contracts, usury, etc.) welfare, family or criminal cases, and the like. "Business legal services" include communications, aviation, related administrative public law, business taxation, patents, and the like. Services which lend themselves to contingency arrangements are those where the potential recovery will cover the cost of legal services, and include negligence claims, condemnation cases, and in some instances patents.

Serious proposals have been advanced to include impecunious inventors among those entitled to legal services.²⁰ So far as I know, however, no one has made a proposal that others should have free legal services to obtain a broadcasting frequency or an airline route as a

¹⁸ Law and the Changing Society, p. 6, in American Assembly (U. of Chicago, Mar. 14-17, 1968).

¹⁹ The U.S. Patent Office will refer any inquiring inventor to registered practitioners in his geographical area. See the Directory of Registered Patent Attorneys and Agents, arranged by states and cities (1966 ed.).

²⁰ A.B.A., P.T.C. Section, 1966 Committee Reports, pp. 146, 175, 176.

matter of right, and these latter two rights are also government-granted monopolies, where representation by competent attorneys is particularly essential.

Group legal services in patent law would, based on my experience,²¹ attract the type of practitioner, and become the type of organization, that would lower the public's opinion of the patent system. Group legal services should be discouraged to the extent legally possible and practical.

If group legal services are to pervade the field of patent law, and in view of the *UMW* case and the activities of the unregistered patent practitioners, that I suspect is imminent, the most stringent safeguards should be specifically set forth, including the following: specific approval and regulation by the Patent Office of the group, its *modus operandi*, and the patent practitioners participation; and stringent restrictions by the Patent Office of the groups' advertising and promotional activities, both written and outside the group. The Patent Office now has statutory authority to regulate registered practitioners,²² and some regulation could be accomplished in this way. Further, if the abuses that I suspect begin to occur, attempts to broaden the present statute could be made.²³

The other usual recommendations for combating group legal services include better lawyer referral services, with emphasis on specialists, more lawyer efficiency and consequent lowering of legal fees, and legal insurance. It would seem that each of these suggestions may have some limited effect but would, as a practical matter, not be totally effective to combat group legal services in view of the *UMWA* case.

²¹ Chairman, A.P.L.A. Committee on Unauthorized Practice (1963-1967).

²² 35 U.S.C. §§ 31, 32.

²³ The latest proposed revision of the Patent Laws (Title 35, U.S. Code) introduced by Sen. McClellan on July 26, 1968, includes a revision of the unauthorized practice section, 35 U.S.C. § 33; see, S. 3892, 90th Cong., 2d Session.