REGULATING GROUP LEGAL SERVICES: WHO IS BEING PROTECTED—AGAINST WHAT—AND WHY?

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A labor union employs a lawyer to handle the workmen's compensation claims of its members. An association of motel owners retains a lawyer to give advice and other services to its members on legal problems peculiar to motel ownership and operation. An employer provides the services of a lawyer to employees threatened with wage garnishment. A group of property owners whose interests are harmed by the construction of a public facility near their several properties join together to hire a lawyer to handle all of their individual claims. A nonprofit motor club, as a benefit of membership, provides a lawyer to represent individual members in traffic cases. A civil rights organization furnishes lawyers to individuals in cases involving racial discrimination.

These and similar activities, usually denominated "group legal services,"[1] have been the subject of a long and sometimes bitter controversy.[2]

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[1] Note that this discussion of "group legal services" pertains to the grouping of people—prospective clients—for the purpose of obtaining legal services, and not to the grouping of lawyers in partnerships or other practice arrangements for the purpose of rendering services. *See* E. CHEATHAM, A LAWYER WHEN NEEDED 70 (1963). "Group legal services" may be defined as services rendered to individual members of an identifiable group by a lawyer or lawyers provided, secured, recommended, or otherwise selected by the group, its organization or officers, or by some other agency having an interest in obtaining legal services for members of the group. *See* B. CHRISTENSEN, GROUP LEGAL SERVICES 9 (Tent. Draft, 1967). For a more extensive examination of such arrangements see *id.* at 8-36.

[2] Among the more notable contributions to the dialogue are: *Symposium—The Unauthorized Practice of Law Controversy*, 5 LAW & CONTEMP. PROB. 1 (1938); *Symposium—The Availability of Counsel and Group Legal Services*, 12 U.C.L.A.L. REV. 279 (1965); Cal. St. Bar Comm. on Group Legal Serv., *Progress Report*, 39 J. ST. B. CAL. 639 (1964); Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 279 (1963), in A LAWYER WHEN NEEDED 59 (1963); Copaken, *Group Legal Services for Trade Associations*, 66 MICH. L. REV. 1211 (1968); Markus, *Group Representation by Attorneys as Misconduct*, 14 CLEV.-MAR. L. REV. 1 (1963); Weihofen, *Practice of Law by Motor Clubs—Useful but Forbidden*, 3 U. CHI. L. REV. 296 (1936); Weihofen, *Practice of Law by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119 (1934); Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966 (1967); Comment, *Group Legal Services: Button & Brotherhood*, 18 BAYLOR L. REV. 394 (1966); Comment, *Union's Attorney Solicitation Program Unethical*, 11 STAN. L. REV. 394 (1959); Comment, *Membership Associations as Attorney-Client Intermediaries*, 1968 U. ILL. L.F. 65; Note, *Group Legal Services*, 79 HARV. L. REV. 416 (1965); Note, *Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, 72 HARV. L. REV. 1334 (1959); Note, *Legal Aid Programs of a Labor Union and the Unauthorized Practice of Law*, 20 U. PITT. L. REV. 85 (1958); 65 MICH. L. REV. 805 (1967); 107 U. PA. L. REV. 392 (1959).

The latest chapter in this controversy was written by the American Bar Association's Special Committee on Availability of Legal Services in a recent report to the ABA House of Delegates.[3] This report, one of the most provocative ever to be made by an ABA committee, recommends that the ABA acknowledge group legal service programs as acceptable methods of making lawyers' services more readily available to the public, provided that such programs comply with certain minimal safeguards.

THE DEVELOPMENT OF THE PROBLEM

The committee's report is the culmination—but certainly not the end —of more than 30 years of dispute. The debate began during the 1930's when the organized bar, as a part of its depression-engendered campaign against the unauthorized practice of law, undertook to prohibit groups or organizations from furnishing lawyers' services to their individual members. The bar considered this to be the unlawful practice of law by lay organizations and the improper solicitation of legal business by the participating lawyers.[4]

Although most bar organizations and courts have adhered to this position,[5] agreement has been far from unanimous. Indeed, many thought-

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[3] ABA SPEC. COMM. ON AVAILABILITY OF LEGAL SERVICES, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Rep. No. 18 (Aug. 5-9, 1968); ABA Spec. Comm. on Availability of Legal Services, Rep. No. 18 Supp. (unpublished); ABA SPEC. COMM. ON AVAILIBILITY OF LEGAL SERVICES, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Rep. No. 100 (Jan. 27-28, 1969). The House of Delegates of the American Bar Association has twice deferred action on this report. See ABA, SUMMARY OF ACTION: HOUSE OF DELEGATES 7 (Aug. 5-8, 1968); Action taken by the ABA House of Delegates on Report No. 100, Jan. 28, 1969 (not yet reported).

[4] The main source of the profession's position on group legal services is Canon 35 of the Canons of Professional Ethics of the American Bar Association, which states:

> The professional services of a 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 indigent are not deemed such intermediaries.
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> 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.

Other pertinent Canons of Ethics are Canon 6 (Adverse Influences and Conflicting Interests), Canon 27 (Advertising, Direct or Indirect), Canon 28 (Stirring up Litigation, Directly or Through Agents), Canon 34 (Division of Fees), and Canon 47 (Aiding the Unauthorized Practice of Law). For an example of state laws prohibiting the practice of law by a corporation see ILL. REV. STAT. ch. 32, § 411 (1957). *See also* ABA COMM. ON UNAUTHORIZED PRACTICE OF LAW, INFORMATIVE OPINIONS 46-47 (1960); Lewis, *Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus*, 2 MD. L. REV. 342 (1938).

[5] *See, e.g.*, Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1

ful critics—including Karl L. Llewellyn in 1938,[6] Roger J. Traynor in 1950,[7] Henry S. Drinker in 1953,[8] Elliott E. Cheatham in 1963,[9] and the California State Bar's Group Legal Services Committee in 1964[10]—have raised serious questions about the wisdom and propriety of restrictions that prohibit the public from obtaining legal services on a group basis. The restrictions also have been challenged by three recent decisions of the Supreme Court of the United States, decisions which have given the matter an entirely new dimension.

THE CONSTITUTION REARS ITS BENEVOLENT HEAD

National Association for the Advancement of Colored People v. Button[11] arose as a result of a program by which the NAACP provided the services of staff lawyers to its members and to others in cases involving racial discrimination. The State of Virginia sought to enjoin the program on the grounds that it constituted the unlawful solicitation of legal business. The Supreme Court rejected the state's claim, holding that the program was a form of political expression and hence protected by the first and fourteenth amendments to the Constitution of the United States. It further held that the state had "failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."[12]

Few lawyers expressed any real alarm over the *Button* decision, probably because most saw it as "just" a civil rights case. Perhaps the characterization of the program as a protected form of political expression tended to obscure the fact that for the first time, the Court had imposed a fundamental and potentially absolute constitutional restriction upon the power of the states to regulate the practice of law.

Because of the widespread misinterpretation of the *Button* case, the decision in *Brotherhood of Railroad Trainmen v. Virginia*[13] came as

(1935); People *ex rel.* Courtney v. Association of Real Est. Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933); *In re* Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936); Hospital Credit Exch. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Mun. Ct. 1946); Dworken v. Apartment House Owners Ass'n, 38 Ohio App. 265, 176 N.E. 577 (1931). *But see In re* Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); *In re* Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936). *See also* ABA COMM. ON PROFFESSIONAL ETHICS, OPINIONS, Nos. 294 (1958), 148 (1935), 56 (1931), 35 (1931), & 31 (1931). For an exhaustive collection of authorities see S. BASS, UNAUTHORIZED PRACTICE SOURCE BOOK 139-45 (rev. ed. 1965); CHRISTENSEN, *supra* note 1, at 8-53; Calif. St. Bar Comm. on Group Legal Services, *supra* note 2.

[6] Llewellyn, *The Bar's Troubles, and Poultices — and Cures?*, 5 LAW & CONTEMP. PROB. 104 (1938).

[7] Hildebrand v. State Bar, 36 Cal. 2d 504, 527, 225 P.2d 508, 518 (1950) (dissenting opinion).

[8] H. DRINKER, LEGAL ETHICS 167 (1953).

[9] E. CHEATHAM, *supra* note 1, at 69-86.

[10] Cal. St. Bar Comm. on Group Legal Services, *supra* note 2.

[11] 371 U.S. 415 (1963).

[12] *Id.* at 442.

[13] 377 U.S. 1 (1964).

somewhat of a shock to much of the bar. This was clearly not a civil rights case, nor did it involve "political" expression. Rather, it involved a union program whereby members or their families who had Federal Employers' Liability Act claims against the railroad were contacted and advised to retain lawyers previously selected by the union. Forgetting its recent setback in *Button*, the State of Virginia again sought to enjoin the program on grounds that it was the unauthorized practice of law and the unlawful solictation of legal business. Once again the Supreme Court held the program to be constitutionally protected,[14] finding the state's interest in prohibition insufficient to override the constitutional protection. Once more the Court's opinion was specific and clear:

> In the present case the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers. The Brotherhood's activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP.[15]

With ostrich-like tendencies, many lawyers still overlooked or ignored the heart of the *Button* and *BRT* decisions—the finding that the state had shown no interest in terms of actual injury to the public to justify prohibiting the types of group legal services involved in the two cases. Instead, members of the bar persisted in the traditional position that whatever restrictions the profession sees fit to impose on the practice of law are presumptively in the public interest. Thus, they continued to cling to a hope that the Supreme Court might somehow, without any other justification, be moved to limit the effect of its decisions to the narrow facts of those two cases. Specifically, they hoped that the constitutional protection might be held to cover only referral-type arrangements of the kind at issue in *BRT* and programs involving the assertion of federally-created rights.

But these hopes were soon to be dashed by the decision in *United Mine Workers of America, District 12 v. Illinois State Bar Association.*[16] There the Supreme Court had before it a program by which a labor union provided the services of a salaried lawyer to its members in workmen's compensation cases. Thus, instead of a referral arrangements as in *BRT*, the program involved the actual selection and payment of counsel by the union; it also involved not federally-created rights, but rights created by state workmen's compensation statutes. This activity, too, was held to be constitutionally protected, and its prohibition was held to be unnecessary to the preservation of any legitimate state interest. The Court's language was most pointed:

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[14] *Id.* at 5-6.
[15] *Id.* at 8.
[16] 389 U.S. 217 (1967).

> In the many years the program has been in operation [since 1913], there has come to light, so far as we are aware, *not one single instance* of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members.[17] (emphasis added).

THE GOVERNING PRINCIPLE

Many lawyers still hope that *Button*, *BRT*, and *UMW* might one day be overruled, or at least limited to their facts.[18] But the hope seems vain. A realistic reading of the three cases reveals little basis for any reasonable expectation that their effects may be limited *at all*, except in accordance with the principle articulated by the Court: *State restrictions on professional conduct that operate to impair or interfere with the constitutionally protected right of citizens to take concerted action to obtain help with their individual legal problems are justifiable only when genuinely necessary to prevent some real evil, demonstrable in terms of actual and substantial injury to the public.*

This principle seems sound, regardless of any doubts about the wisdom of deciding these cases on constitutional grounds.[19] Furthermore, the principle can be premised with equal validity on a duty that, for lawyers, should be just as compelling as a constitutional imperative—the lawyer's own obligation to the public as a professional.

The lawyer's claim to professional status implies a dedication of himself to the principle of service above personal gain. This dedication is one of the factors recognized by the state in granting lawyers a monopoly on the business of providing legal services to the public. Consequently, the legal profession would appear to have a duty to make the services of lawyers available on acceptable terms to all who need and want them.

WHERE DO WE NOW STAND?

It is apparent that whatever restrictions are devised by the profession in the future will have to pass muster in the Supreme Court. It is equally apparent that much of the profession's difficulty in dealing with group legal services stems from failure to focus on the essential issues. From the outset, the bar's response to group efforts to secure legal services for individual members has been mechanical, formalistic, and so preoccupied with labels and rhetoric that the crucial questions have been overlooked

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[17] *Id.* at 225.

[18] Indeed, this sentiment pervaded most of the testimony presented at hearings on group legal services conducted by the ABA Spec. Committee on Availability of Legal Services in October, 1968. *See* ABA SPEC. COMM. ON AVAILABILITY OF LEGAL SERVICES, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Rep. No. 100 (Jan. 27-28, 1969).

[19] *See, e.g.*, Comment, *Membership Associations as Attorney-Client Intermediaries, supra* note 2, at 69-70 (1968).

or ignored.[20]

"Group legal services" have traditionally possessed two distinctive characteristics. They have been *group* programs, involving lay membership organizations and other identifiable lay groups, and they have been *intermediary* arrangements, in which the lay group or organization undertook to secure lawyer's services for individual members. A legal program exhibiting these two characteristics has usually either been prohibited as "the practice of law by lay agencies,"[21] or has prompted disciplinary action against the participating lawyers as well as proscriptive measures against the organizations, on the ground that such programs were "the improper solicitation of legal business" by lawyers.[22] No matter which approach was adopted, prohibition of the program was deemed to be required for the protection of the public, quite without attention to the actual or potential harmful consequences of the program. It was simply assumed that group intermediary arrangements were necessarily injurious to the public interest. While threat of injury to the client's interests from the intervention of a non-lawyer intermediary between lawyer and client was the ultimate justification for prohibition, the inclusion of a particular legal service program in the prohibited class depended largely upon whether or not the intermediary was a *group.* As a result, some group intermediary arrangements were condemned, even though they neither caused nor threatened significant injury to the public;[23] at the same time, other arrangements *not* involving groups were condoned, even though they presented intermediary problems identical to —and in some instances, even more severe than—those of group programs.[24] By its dogged adherence to this irrational approach to regulation, the legal profession ultimately found itself in the strange and uncomfortable position of asking the Supreme Court of the United States to sanction interference with constitutionally protected rights, supporting the request with little more than the bald assertion that all group legal service programs were bad simply because the profession said that they were bad.[25]

For the legal profession to persist in this course would only invite further rebuffs from the Supreme Court. On the other hand, it is likely

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[20] *E.g.*, Cedarquist, *Lawyers at the Crossroads—Profession or Trade?*, 31 UNAUTHORIZED PRACTICE NEWS 79 (1965-66).

[21] *E.g.*, Illinois St. Bar Ass'n v. United Mine Workers, 35 Ill. 2d 112, 219 N.E.2d 503 (1966), *rev'd*, 389 U.S. 217 (1967).

[22] *E.g.*, Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950).

[23] The *Button, BRT* and *UMW* cases furnish good examples.

[24] Legal aid, where the governing board may regulate the services which may be performed for clients, is one example. *See* Azzarello v. Legal Aid Soc'y, 117 Ohio App. 471, 185 N.E.2d 566 (1962). The representation of insureds under casualty insurance contracts by insurance company lawyers, where the insured's interests in a settlement may be opposed to those of the company's, is another. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 282 (1950). *See also* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

[25] This, of course, was the position in which the bar found itself in *UMW.*

that the Court will respond affirmatively to a regulatory system that is genuinely responsive to the need of both the legal profession and the public. What is needed is a rational system of regulation focusing on the genuinely relevant issues.

THE ESSENTIAL QUESTIONS

What *are* the crucial questions with respect to group legal services and their regulation? It would seem reasonable to begin with a simple query: "Who is being protected—and why?" This leads to a second: "What are they being protected against—and why?" Or, alternatively: "What values are we seeking to preserve—and why?" It is submitted that thoughtful answers to these questions may produce a sound and rational system of regulations for group legal services, regulations that will protect the public, foster the profession's primary obligation of service, and satisfy the test set forth by the Supreme Court.

1. *Who Is Being Protected—and Why?* When a vocational group claiming status as a profession seeks to maintain professional restrictions that interfere with the constitutional rights of citizens, impair the bar's ability to serve the public, or infringe upon some other public interest, there can be only one acceptable answer to the question of who is to be protected by those restrictions. It must be the public. Not the economic position of particular lawyers. Not a particular segment of the bar. Not even the entire legal profession. But *the public.*

This is not to say that protection of certain values of the legal profession may not be necessary for the protection of the public, or even that the protection of the economic interests of lawyers may not be in some ways at least relevant to the public interest. Conferring an exclusive license on lawyers to render legal services is premised on the assumption that at least some of the values of the profession are in the public interest. And a good case might be made for the proposition that a strong economically healthy, privately practicing bar is in the public interest. But we lawyers may be just a bit too ready to assume that what was once good for Rufus Choate is necessarily good now for the U.S.A., or that the interests of the public necessarily require preservation of the practice of law as grandpa knew it.

There are those who contend, however, that preservation of the private practice of law in its traditional form is per se in the public interest.[26] They view the existence of a privately practicing bar as vital to the preservation of individual freedom and the democratic way of life. Because they see all group legal services as a threat to the existence of the traditional private bar, they regard the complete prohibition of group services

[26] *See, e.g.*, Fendler, *Are We Hearing the Death Knell of the General Practice of Law?*, 33 UNAUTHORIZED PRACTICE NEWS 18 (1967).

as necessary. This position has three important weaknesses, however.

First, the concept of the private practice of law as a bulwark of freedom is necessarily tied to the current utility of private practice. The role of the private lawyer as a defender of freedom is not that of a minuteman, remaining dormant or engaging in other activities only to leap to action in the defense of freedom in the event of some future cataclysmic assault on it. Rather, his role is that of counselor and advocate in the assertion of individual rights and in the defense of individual freedom day by day in the context of current problems.

The defense of freedom is truly a present and constant endeavor. The measure of traditional private law practice as a bulwark of freedom, then, is its current *use* by the public in the preservation of rights. If people do not in fact make use of lawyers' services to solve problems, then private law practice is to that extent and for those problems no longer a bulwark of freedom. Professional restrictions that unnecessarily impair public access to lawyers, and thus the public's use of lawyers, actually diminish the profession as a bulwark of freedom.

Moreover, the public cannot be expected indefinitely to give sustenance and status to any occupational group of which they do not make use merely on the expectation that they may one day utilize it. The late Karl Llewellyn put the idea pithily when he observed: "*They also serve who only stand and wait* is one of the noblest lines written in our tongue; but it presupposes, most unpoetically, rations for those who stand."[26a] The danger is that if lawyers persist in making their services unavailable to large segments of the public or irrelevant to their problems, the public may cut off the rations. The best way to preserve the legal profession as a bulwark of freedom, then, is not to stifle innovative uses of lawyers by any segment of the public, but to foster the more extensive use of lawyers by all the public.

The position that group legal services must be prohibited in order to preserve the private practice of law as a bulwark of freedom has a second weakness. There is reason to doubt that group services would ever completely supplant the private bar. Business and property clients, who now appear to account for a large part of the practice of the larger law firms are most unlikely ever to turn to group legal services in any substantial numbers. For example, are large law firms really threatened by the prospect that the National Association of Manufacturers might employ a gigantic legal staff to provide legal services to all its members? The legal problems and needs of the individual companies seem far too extensive and complex to be dealt with in such a manner. If there is any threat to the large law firms, it is the possibility that the individual companies might expand their "in-house" legal staffs to handle matters that they

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26a Llewellyn, *supra* note 6, at 109. (emphasis original).

now send to private law firms. But this is an entirely different problem from that of group legal services. So, what now seems to be the great bulk of law practice—service to business and property clients—will probably not be substantially affected by group legal service programs.

Group programs will probably have their greatest impact upon that part of the practice of law involving clients of modest means. And even here there is doubt that group services would sweep the field. It is perhaps significant that while doctors may ethically accept employment from groups or organizations for the purpose of providing medical services to individual members of such groups, private practice seems generally to have remained the model for the rendering of medical services. This is no doubt because, with medical insurance available as an acceptable alternative, everyone concerned—doctors, patients, and maybe even the groups themselves—seems generally to prefer the private practice approach.[27] There is some reason to hope that the same would be true with legal services if the public were to be given the same alternatives.[28]

The third weakness of the position that seeks, in the public interest, to preserve private law practice by prohibiting all group legal services is that it mistakes a particular style of law practice for the underlying legal profession values. It may well be that the public interest requires the protection of certain basic values of the legal profession—the lawyer's obligation of service before personal gain, for example, or his duty of loyalty to clients. It may even be that private law practice in its traditional form provides the best conditions for preserving those basic values. But it is surely going too far to say that those basic professional values can exist *only* in the traditional form of private practice. Indeed, the long experience of lawyers in rendering services under arrangements other than traditional private practice—including employment in government, by business organizations, and by legal aid organizations, to name only

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[27] For an interesting account of how one local medical service plan—sponsored by a medical society and featuring free selection of doctors—grew in response to challenges from a variety of closed panel contract arrangements see D. SHIPMAN, J. LAMPMAN & W. MIYAMOTO, MEDICAL SERVICE CORPORATIONS IN THE STATE OF WASHINGTON 22-32 (1962). *But see* Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 474 n.149 (1968).

[28] The work of the ABA Special Committee on Availability of Legal Services has been directed primarily toward finding and evaluating a variety of alternative methods of making legal services more readily available to the public. One possibility that has been studied carefully is legal expense insurance. Stolz, *supra* note 27, at 417. In February, 1968, the committee recommended to the ABA House of Delegates that the association undertake to sponsor one or more experimental programs to test the feasibility of legal expense insurance. ABA SPEC. COMM. ON AVAILABILITY OF LEGAL SERVICES, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Rep. No. 59 (Feb. 19-20, 1968). This recommendation was adopted. ABA, SUMMARY OF ACTION: HOUSE OF DELEGATES 3-4 (Feb. 19-20, 1968). Work is now under way to set up experimental legal expense insurance projects in at least two cities. Goldberg, Report to the Board of Governors *in re* Prepaid Legal Services Pilot Project (ABA, Oct. 17, 1968) (unpublished). *See* American Bar Association, Resolution of the Board of Governors with regard to the Prepaid Legal Cost Insurance Pilot Experiment (Oct. 18, 1968) (unpublished).

the more obvious—demonstrates that lawyers *can* be professional in the highest sense of that term even though not engaged in traditional private practice. The question, then, is not whether a particular method of furnishing legal services conforms to some traditional style of practice, but whether it in fact preserves the basic values.

When professional restrictions result in the impairment of the constitutional rights of citizens or of the profession's ability to carry out its primary task of serving the public, those restrictions are defensible only in terms of the professional values they protect, and then only to the extent that the protection of those values may be *necessary to important public interests.* Consequently, when we seek to justify such restrictions, the next question ought to be, "What *values* of the profession are threatened, and why is it important to the *public* that they be preserved?"

2. *What is The Public Being Protected Against—and Why?* The literature opposing group legal services contains a great deal of rhetoric about commercialism, exploitation, economic harm to the bar or segments of it, and the supposed low quality of legal services rendered through group programs.[29] It also contains some speculation about the possible benefits to the public from group arrangements—primarily in terms of the quality and cost of the services rendered.[30] But these are at best peripheral or incidental issues, and some are not real issues at all.

The quality of the services rendered through group programs, for example, may be relevant to the question of the utility and social value of group arrangements, and thus may be a factor to be weighed in granting approval or disapproval to a particular program, but quality is not, *by itself,* such a controlling consideration as to justify the complete prohibition of all group programs.

It can be argued that a state may legitimately require a minimum level of competence of those it permits to practice law. And the profession would seem to be acting legitimately in providing lawyer referral services and other devices for assisting clients to select better lawyers. Indeed, it might even be argued that a state could legitimately set up special classes of law practice, with higher qualifications required for the performance of particular kinds of legal functions. But could it be argued that one person or class of people could legitimately be *required* to obtain a given legal service from one particular class of lawyers while other people were permitted to obtain the *same* service from *any* lawyer? And, under the present system, where only a minimum level of competence is required for law practice and where people generally are permitted to obtain their legal services from *any* lawyer, could either the profession or the state justifiably *require* one class of people to obtain their legal services from large Wall Street law firms or prohibit it from obtaining legal services

[29] *E.g.,* Cedarquist, *supra* note 20.
[30] *E.g.,* Cal. St. Bar Comm. cn Group Legal Services, *supra* note 2.

from general practitioners, on the ground that the large firms can provide better service?

The point is that where the profession and the state undertake only to require of lawyers a minimum level of proficiency for lawyers, the client himself should be the one to determine the level of quality—above that minimum—that he will purchase. One might argue that the minimum level is too low, or that the provisions for maintaining it are inappropriate or imperfectly applied. But one can hardly argue that measures to remedy such deficiencies should be applied to some lawyers or prospective clients and not to others. Restrictions that seek to improve the quality of legal services obtained by members of groups by limiting the manner in which they may secure lawyers do precisely that. They say, in effect, "You cannot act collectively to purchase a level of quality that others are completely free to purchase individually."

It would appear, then, that the person who acts in concert with others to obtain individual legal services should have the same alternatives, with respect to the quality of legal services to be purchased, as the person who acts individually. Thus, the quality of the services available through a group program is not, by itself, a ground for prohibition, and appears relevant only to the question of the utility or social value of the program.

Many of the other reasons commonly given to justify proscriptions against group legal services are likewise only incidentally related to the protection of the public. Economic harm to a segment of the bar would appear to be relevant to the public interest only if, and to the extent that, the ultimate result is to impair the public's ability to obtain needed legal services from lawyers who retain independence of professional judgment and action. And more than mere speculation is required to demonstrate that such impairment is or would be the result. Similarly, it is difficult to see how the public is harmed by laymen profiting from a lawyer's professional efforts, unless such exploitation does in fact interfere with the lawyer's independence of professional judgment and action.

Thus, when group legal services are viewed from the standpoint of the public interest, one central issue—relating primarily to the intermediary aspect of group services—emerges: the question of the independence of professional judgment and action of the participating lawyer. The one compelling justification for prohibiting the intervention of lay intermediaries between lawyer and client seems to be the necessity of preserving, *for the benefit of the client*, the client's direct relationship with a lawyer who is independent in the exercise of his professional judgment and in the discharge of his professional functions and who has no professional obligations to anyone but the client.

The very idea of a self-disciplining profession is closely associated with this concept of independence. The theory seems to be that if lawyers are genuinely professional—dedicated to service above gain—

and independent of outside control in the discharge of their functions, then they will conduct themselves in all respects in accordance with high ethical standards.[31] Deviations can be regarded and treated, through disciplinary procedures, as mere individual aberrations. The same theory seems applicable to the group legal services situation. If the legal profession is in fact genuinely professional, the preservation of the lawyer's independence of professional judgment and action should take care of most of the evils against which the public has been thought to require protection—low quality service, subverting the clients interests to the interests of someone else, misrepresentation and overreaching, and other improprieties.

As suggested earlier, many lawyers, in thinking about group legal services, tend to identify a particular style of practice with underlying professional values. They believe that independence of professional judgment and action is impossible except through traditional private law practice. While some relationship probably does exist between the style of law practice and basic professional values, it seems doubtful that traditional private practice is either an exclusive or even a sure source of independence.

To begin with, absolute independence is probably *never* possible, even in traditional private practice, if only because the lawyer's own interests are involved in decisions he makes for his client. For instance, a lawyer may conclude that a given remedy is not in the client's best interest because it is a more expensive solution than can be justified in light of the value of the matter involved. But one element in the cost of the remedy is the level at which the lawyer, in his own interest, has set his fees. This is entirely proper, of course, but it does mean that interests other than those of the client have played a part in what is usually viewed as a purely professional decision.

Moreover, any practicing lawyer whose time is substantially filled must necessarily limit the time and attention given to any one matter. Of course, a good lawyer should not accept more business than he can adequately handle. But "adequate" is a relative concept, not an absolute one. A lawyer's conception of what is "adequate" cannot help but be affected by a number of factors, including the demands upon his time from the rest of his practice, his evaluation of the significance and urgency of each of his cases, and his own interests. Thus, the freedom of even the lawyer in private practice to do what he deems best for his client is limited; he may have "substantial" freedom, but his freedom is not absolute in the sense of being entirely untouched by consideratons other than the best

[31] Indeed, this seems to be the reasoning behind Canon 6, which permits a lawyer to continue to represent a client even when a conflict of interest is involved, provided he makes full disclosure to the client, obtains the client's consent, and believes that he can represent the client fairly despite the conflict. *See* AMERICAN BAR ASSOCIATION, OPINIONS ON PROFFESSIONAL ETHICS 22-39 (1967).

interests of the individual client. Of course he does have freedom—perhaps absolute—in the sense that *he* is the one who makes the decision. Nevertheless, he is subject to influences that can and often do affect the way he makes it.

In its treatment of certain kinds of legal service arrangements involving lay intermediaries, the legal profession itself has given formal recognition to the relative character of the "independence of professional judgment" concept. Canon 35, for example, condemns the control or direction of a lawyer's professional efforts by lay agencies interposed between lawyer and client[32] but specifically excludes from consideration charitable societies rendering aid to the indigent. They are simply defined as not being "intermediaries," as that term is used in the canon. In actuality the governing boards of charitable legal aid societies do stand in an intermediary relationship between the legal aid lawyer and the poor client and are frequently controlled by laymen.[33] Furthermore, such boards have often found it necessary—mainly because of budget limitations—to regulate both the kinds of cases that the attorneys may accept and the services they may perform for the clients they do undertake to represent.[34] Thus, while the canon appears to establish an absolute standard of independence with regard to some arrangements for the rendition of legal services, it also seems to say that some lay interference with, or threat to, the lawyer's independence is acceptable in legal aid programs, the injury to the public from such interference being far outweighed by the social value of the program.

The profession has also accepted the intervention of lay intermediaries in the field of casualty insurance, where insureds are customarily defended by lawyers provided by the insurance company.[35] Here, the justification is somewhat different. Representation of the insured by the insurance company lawyer is thought to be necessary for the protection of the company's interest, which is said to be substantially identical with the interest of the insured up to the policy limits.[36] While the justification may be different, the meaning of the exception is the same: Some interference with, or threat to, the lawyer's independence of professional judgment and action is justified by the social value of casualty insurance and the legal representation provided under it.

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[32] *See* note 4 *supra.*

[33] B. BROWNELL, LEGAL AID IN THE UNITED STATES 87-122 (1951).

[34] P. WALD, LAW AND POVERTY 1965, REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY 49-50 (June, 1965); Carlin & Howard, *Legal Representation and Class Justice,* 12 U.C.L.A.L. REV. 381, 413-17 (1965); Frankel, *Experiments in Serving the Indigent,* 51 A.B.A.J. 460, 461 (1965).

[35] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 282 (1950).

[36] See the February, 1960, and April, 1961 memoranda submitted to the ABA Committees on Professional Ethics and Unauthorized Practice of Law on behalf of the American Mutual Insurance Alliance, the Association of Casualty and Surety Companies, and the National Association of Independent Insurers. *See also* Comment, *Where Does a Defense Attorney's Responsibility Lie?* 4 FED. OF INS. COUNSEL. Q. 5 (1954).

The point, of course, is not the simple-minded contention that group legal services should be permitted simply because the profession tolerates intermediary arrangements in legal aid and casualty insurance. Rather, the point is that in these two exceptions to the prohibition against intermediaries, the legal profession has recognized that an acceptable level of independence of professional judgment and action *is* possible outside the traditional forms of private law practice. While there are significant differences between legal aid and casualty insurance arrangements on the one hand, and group legal services on the other, these arrangements are *very much* alike with respect to the *intermediary* problem. All involve the intervention of a lay agency between lawyer and client, and all raise the same kinds of problems with respect to the independence of the lawyer. If independence of professional judgment may be viewed as a relative concept, to be weighed against social value, for purposes of permitting the intervention of lay intermediaries between lawyer and client in legal aid and casualty insurance arrangements, should it not be viewed the same way for the purpose of permitting similar intermediary arrangements in group legal services programs?

A POSSIBLE RATIONALE

It is submitted that the apparent rationale of the legal profession in excluding legal aid and casualty insurance from the profession's proscriptions against lay intermediaries is a reasonable and appropriate rationale for the handling of group legal services. It might be restated as follows:

> An intermediary arrangement—group or otherwise—that does not impair the independence of professional judgment and action of the participating lawyer presents no significant risk of injury to the public and should be permitted. An arrangement impairing the lawyer's independence risks injury to the public; however, it should not be prohibited *unless* such impairment and the resultant risk of injury are sufficiently serious to override both the constitutionally protected rights that may be involved and whatever other social value the arrangement may have.

Obviously, this rationale invokes a "balancing" test not unlike that called for by the Supreme Court in *Button, BRT*, and *UMW*. Restrictions impairing constitutional rights might be justified where the group program has little social value and threatens substantial injury to the public; the same restrictions may not be justified, however, where the activities have great social value, even though the risk of injury is high. The program involved in the *Button* case appears to be a high risk, high social value arrangement,[37] in which restrictions impairing constitutional rights were

[37] A fairly high degree of risk is implicit, of course, in any legal service program carried on by an organization devoted to a "cause." There is always considerable danger that the interests of individual members may be subordinated to the needs of the "cause." For some thoughtful comments on this same problem in a somewhat

considered to be unjustified; on the other hand, a program in which general legal services were to be sold commercially by a profit-making corporation would seem to be the kind of high risk, low social value arrangement that would justify a state in imposing restrictions that impair constitutional rights. Should there be any intermediary arrangements that do not involve constitutional rights—although it is difficult to imagine any—the risk of injury might appropriately be weighed against social value alone, in precisely the same manner as was done before *Button*, *BRT*, and *UMW* in excluding legal aid and casualty insurance intermediary arrangements from the prohibitions of the canons.

One difference between the proposed rationale and the test articulated by the Supreme Court deserves mention. Here the discussion has been in terms of the *risk* of injury to the public from the impairment of the lawyer's independence of professional judgment, while the Court seemed, in *UMW* at least, to require proof of *actual* injury.[38] The gap is not as great as it might seem, however.

It is easy to see why the Court required proof of actual harm in *UMW*, where the legal service program involved had been in operation more than 50 years, apparently without complaint from anyone but the bar. It may well be, however, that the Court would prohibit or restrict some newly established program because the arrangement was similar to other arrangements that could be shown to have produced actual harm to the public.

The main advantage of this proposed rationale is that it directs the inquiry toward the crucial elements of group legal services. The question is no longer whether or not the intermediary is a group. Nor—worse yet—whether it is a group that one happens to like or dislike. Rather, the central issue becomes the extent to which the lawyer's independence of professional judgment and action is actually impaired.

There are two types of problems that seem especially relevant to this issue. One has to do with the possibility of conflict of interest between the group and its members or between individual members. The other relates to the potential power and opportunity of the group to control or influence the lawyer. Interference with the independence of the lawyer participating in a group program is unlikely unless the matter for which the legal services are being provided involves some significant conflict of interest between the group and the individual member or between different members *and* unless the group or organization has the power and the opportunity to exert influence or control over the lawyer.

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different context see E. CHEATHAM, *supra* note 1, at 28-38. Of course, there can be little question that the NAACP program was at the same time of great social value in providing representation to people who could not otherwise have obtained it for the purpose of asserting basic rights.

[38] *See* p. 233 & note 17 *supra*.

Among the factors that bear on the question of conflict of interest are: the group's character, objectives, and activities; the nature of the relationship between the group and its members and between individual members; and the nature of the problems to be dealt with by the attorneys and of the legal services to be provided. Thus, it might well make a difference that the organization involved was primarily engaged in profit-making rather than nonprofit activities; that it was primarily, rather than only incidentally, engaged in the providing of legal services; that the relationship between the organization and its members made possible the coercion of members by the organization; that the proposed program covered only matters related to the organization's primary activities rather than unrelated matters; or, most importantly, that certain interests of the organization were, or might be, significantly antagonistic to the interests of the members in the matters covered by the legal service program.

Elements relating to the group's potential power or opportunity to control the lawyer include: whether the organization selects the lawyer and pays his fee or merely recommends him to its members; whether the organization employs the lawyer on a salary or on retainer; whether the lawyer spends full time or only part time rendering services to members under the program; whether he handles other matters for the organization itself or handles only the cases of the individual members; and whether or not the agreement between the lawyer and the organization obligates the organization to respect the lawyer's independence of professional judgment and action or otherwise protects such independence.

But in every instance, the question is: Taking *all* pertinent factors into account, is the lawyer's independence of professional judgment and action actually impaired, with resulting risk of serious injury to the public?

SAFEGUARDS OR ROADBLOCKS?

The task of translating a suggested rationale into a practical system of regulation is a difficult one. Two possible approaches are often advocated.

Many of the lawyers who appreciate the need for new regulations to replace those that have now been held to be constitutionally impermissible favor the immediate formulation of a comprehensive and detailed system of specific restrictions. Those who take this position generally favor limiting the operation of group legal services as narrowly as possible, consistent with the decisions in *Button*, *BRT*, and *UMW*. For example, there are those who would permit legal service programs involving intermediary arrangements only when such programs were operated by nonprofit organizations. Others would limit group legal services programs to groups engaged primarily in activities other than the rendition of legal services, and some lawyers think that this should be further restricted to permit the rendition of only those legal services having a reasonable

relation to the group's primary activities.[39]

The difficulty with these proposals is that, while the factors on which they are based are ordinarily relevant to the question of impairment of the lawyer's independence, they are not the *only* elements. If applied by themselves, as mechanical tests, they would exclude a number of intermediary arrangements presently thought to be entirely proper. The nonprofit limitation, for example, would prohibit the casualty insurance arrangement, and the limitation restricting group legal services to groups primarily engaged in activities other than the rendition of legal services would rule out legal aid societies. Moreover, such standards would probably also permit the operation of some group programs in which the lawyer's independence was in fact impaired.

Because the profession has heretofore been looking at the wrong issues in dealing with group legal services, the experience of the past 30 years is of little help in identifying and evaluating *all* the factors bearing upon the central question—impairment of independence. We simply do not know enough about these factors to devise a system of regulations that would achieve the desired objective of avoiding loss of independence but yet would permit group legal services programs where there would be no such loss.

Perhaps an even more serious problem is the susceptibility of any set of specific restrictions to mechanical application, without reference to the principles upon which they are based or the objectives for which they were originally devised. This, of course, was the failing of the profession's traditional position on group legal services—the outright prohibition of all such programs through the mechanical application of the restrictions without reference to their purpose. Because of the remaining strength of this traditional point of view, there appears to be considerable danger that any comprehensive system of specific restrictions established at this time would soon resolve itself into a mechanical device for prohibiting group programs for reasons other than their threat to the independence of professional judgment and action of the participating lawyers. This danger is intensified by the fact that we do not fully understand the factors that affect professional independence. Thus, a substantial danger may exist that "safeguards" would instead become roadblocks.

The second possible approach to regulation is for the profession to formulate a system of safeguards consisting of general principles, such principles to be applied by the courts to specific situations on a case by case basis.[40] This is essentially the approach taken by the ABA Special

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[39] *See, e.g.*, comment of Mr. William H. Avery in concurring with the ABA SPEC. COMM. ON AVAILABILITY OF LEGAL SERVICES, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Rep. No. 100.

[40] This approach was suggested by Professors L. Ray Patterson and Elliott E. Cheatham in a statement submitted to the ABA Special Committee on Availability of Legal Services on September 9, 1968.

Committee on Availability of Legal Services.[41] The committee's report acknowledges that group legal services "may substantially enhance the availability to the public of competent legal services . . . ." and advocates that "such arrangements should be permitted if there is no substantial danger of a serious conflict of interest among the members of the group or between the members and the group itself or the entity providing the lawyer's services . . . ."[42] The report then recommends the adoption of a system of minimum safeguards "to protect the legitimate interests of the public and the state in preserving the independent exercise of the lawyer's professional judgment and preventing the exploitation of his services . . . ."[43] In addition to containing provisions designed to bring the details of group legal services programs to the attention of the state regulatory authority, these safeguards express the following general principles:

> 3. The group or entity may provide for its members any legal services which do not involve a conflict of interest among members of the group or between the members and the group itself or the entity providing the legal services;
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> . . . .
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> 5. The terms of such agreement [between the group or organization and the lawyer] shall affirmatively provide: that the lawyer (despite his relationship to the group or organization) is in all events unqualifiedly independent of all professional obligations to anyone other than the individual member of the group whom he serves; that his obligations are in all events directly to and solely to the individual member; 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 that the lawyer, in his relations with the individual members and the group, must at all times strictly comply with all provisions of the Canons of Ethics of the profession;
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> . . . .
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> 8. Although the organization may itself pay the attorney's compensation, the organization must not utilize such payment as a means for directing or controlling the attorney in his exercise of judgment in representing any member. Where the attorney represents a member and by agreement is paid directly by the member on any basis, there must be no division of the attorney's compensation between the attorney and the organization or between the attorney and any person not licensed to practice law;
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> 9. There must be a true attorney-client relationship between the attorney and the member being represented by him;
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> 10. Any violation by the group or entity of the terms of the agreement between it and the lawyer shall be grounds

[41] ABA SPEC. COMM. ON AVAILABILITY OF LEGAL SERVICES, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Rep. No. 100 (Jan. 27-28, 1969).
[42] *Id.*
[43] *Id.*

> for the termination of the agreement; and any violation by the attorney of the appropriate Canons of Ethics or rules of court, shall be grounds for the discipline of the attorney.[44]

The safeguards suggested by the ABA committee are clearly designed to assist lawyers in deciding whether to become involved in a given group legal services program; for the guidance of the profession in formulating ethical standards to govern the conduct of lawyers with respect to group legal services;[45] and for the guidance of the organized bar, not only in deciding which group programs should be brought before the courts, but also in selecting the theory on which such cases should be brought. The unarticulated premise of the committee's recommendation, however, is that the task of deciding just which group programs do in fact impair the lawyer's independence of professional judgment and action sufficiently to justify prohibiting the program or disciplining the lawyer is to be left to the courts, to be discharged through a case by case application of the governing principles.

This approach to regulation seems to be the preferable one. By focusing on the important principles and by leaving specific restrictions to be developed by the courts, the program promises not only the sound resolution of immediate cases but also the ultimate development of a rational and coherent regulatory system.

CONCLUSION

Lawyers, like the society of which they are a part, are entering a time of trial. Public needs, desires, and expectations are challenging not only traditional ways of practicing law but even the law and the legal system itself. For the profession, the examination may be one of two kinds. It may be a test of our ability to hold back the tide of change, and thus to preserve the legal profession as an arrested slice of history. Or, it may be a test of our ability to adapt to today's needs and problems while preserving those professional values of genuine worth to the public and preserving the lawyer as a vital and creative element in contemporary society. The profession itself must determine which it will undergo.

Little is sure in social change except change, and there can be no real assurance that the legal profession will be able to survive even the latter test. But one thing does seem certain. It *cannot* survive the first. The tide of change is inexorable, and slices of history end up in museums.

The group legal services problem, although of considerable importance to both the bar and the public, is, admittedly, a relatively small one in the overall scheme of things. After all, the kinds of legal business

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[44] *Id.*

[45] As a supplement to its report, the ABA special committee has drafted a possible ethical rule embodying the general principles advocated by the committee. *Id.*

involved in most group programs does not appear to be terribly significant to a substantial portion of the bar. And people can and will find other ways of solving their problems if lawyers' services are not readily available on acceptable terms. Nevertheless, our response to this one small part of the test may well portend the ultimate result of the entire trial now before the profession.