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1969

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Recommended Citation

Robert R. Hussey, Trade Association Offering Legal Services - A Possibility for Small Corporations, 18 Clev.-Marshall L. Rev. 25 (1969)

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Trade Association Offering Legal Services— A Possibility For Small Corporations

Robert R. Hussey*

WITH THE EVER INCREASING NUMBER and complexity of legal problems which result from operating a small corporation today, the involvement of attorneys in these small companies is continually growing. In many sectors of the economic arena a group of small businesses rather than one large corporation, may dominate an industry. Due to the greater need for legal work, the cost to the corporation for this work is correspondingly increasing in spite of their efforts to use attorneys well versed in their particular field of endeavor. In order to minimize this cost the giant corporations may hire attorneys on a salary basis to serve them, but the small corporation usually does not have the volume of work to justify such an arrangement.

Small corporations generally belong to a trade association which allows them to increase their proficiency in and knowledge of their industry. As a possible solution to the problem of increasing legal service requirements this paper investigates the suitability of allowing these trade associations to provide legal services to member corporations.

With this technique there would, of course, be certain obvious advantages to the corporation. Each could be sure that an association attorney possesses legal expertise particular to their industry. He would be familiar with their methods of manufacture, product lines and other industry problems. This would undoubtedly decrease the cost of his services when handling product liability suits, labor relations, contracts, corporate security transactions, corporate sale and acquisition, and other advice and opinions to members. However, there are some areas where there could be a conflict of interest. When such a conflict arises the assumption must be made that the attorney would notify both member parties of the conflict.¹

On the other hand there would be advantages to the attorney. In general, professional attorneys have their income taxed as ordinary income and have not been able to take certain tax advantages that are available to corporations. Some states allow attorneys to practice law as a corporate entity under certain requirements, but their personal and the corporate assets are not insulated from liability for unethical acts.² In states where a professional corporation is not allowed to prac-

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¹ ABA Canons of Professional Ethics, No. 6.

² In re Florida Bar, 133 So.2d 554 (Fla. 1961), Keogh, Tax Equity for the Self-Employed, 47 A.B.A.J. 665 (1961).

tice because of state statute, the Federal Government has allowed members of an unincorporated association to practice medicine and be considered as a corporation for tax purposes.³ An incorporated trade association would certainly be able to take advantage of its corporate status for its salaried attorneys. An added advantage to the attorney is greater occupational security.

An *association* has been defined as a combination of two or more persons, or partnership, acting together for the prosecution of some business enterprise, with corporate characteristics but in many cases without a corporate charter.⁴ More particularly, a trade association has been defined as

an agency through which many or all of the sellers of a like commodity unite to promote their common interests. It exists solely to serve its members; it does not itself engage in the production or sale of goods.⁵

The right of association is a necessary inference in the First Amendment, to properly protect the express guarantees,⁶ but it is not an absolute right and is subject to particular interests that the State may wish to protect.⁷ There is a clear right to associate for the purpose of promoting ideas or views,⁸ or soliciting members,⁹ and membership in an association cannot be used as the only criterion for restricting a citizen's constitutional rights.¹⁰ These associational rights have recently been expanded by the Supreme Court to include the right of a union,¹¹ or association,¹² to provide legal services to its individual members. In probing the question of whether this associational right includes corporate members one must contrast the current liberal trend with judicial history of denying individual rights to corporations.

Almost all industries have formed trade associations even though their right to associate has been challenged by the antitrust laws. The

³ *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954); see also *Galt v. United States*, 175 F. Supp. 360 (D. Tex. 1959), in which a Texas Medical Association is taxable as a corporation.

⁴ 7 C.J.S. Associations § 19 (1937).

⁵ Stickells, A., *Legal Control of Business Practice*, 178 (1965) citing, *Competition and Monopoly in American Industry* (TNEC Monograph No. 21). See also, Oleck, *Non-Profit Corporations, Organizations & Associations*, § 272 (2d ed., 1965).

⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965); and see, Oleck, *op. cit. supra* note 5.

⁷ *Sigma Chi Fraternity v. Regents of Univ. of Colorado*, 258 F.Supp. 515 (D. Colo. 1966).

⁸ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

⁹ *Thomas v. Collins*, 323 U.S. 516 (1945).

¹⁰ *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); Oleck, *op. cit. supra* note 5 at § 195.

¹¹ *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

¹² *NAACP v. Button*, 371 U.S. 415 (1963).

legality of an association of "cooperative competitors" becomes questionable as cooperation increases and competition decreases.¹³ The early antitrust cases pointed out that where the objective is to control prices, trade association activities are unlawful,¹⁴ and this rule was soon broadened to state that the necessary combination inherent in a trade association is unlawful when the tendency is to destroy proper competition.¹⁵ Even though a trade association is not monopolistic in character, a change in the market conditions will not be considered an undue restraint where it would increase competitive opportunities.¹⁶ In addition, the price of goods must not be unreasonably low, for the Robinson-Patman Price Discrimination Act makes it unlawful to sell goods at unreasonably low prices (including below cost) to eliminate competition.¹⁷ In order to observe these guidelines the trade association legal fee schedule must be set to cover the attorney's salary and overhead and show no profit. If there is no price discrimination between members of a trade association, and all members of the industry were invited to join, there should be no antitrust problem in providing legal services to the members of an association.

In order for an attorney to practice law in a particular state, it is required that he be accepted by the bar of that state and adhere to certain ethical standards that they have deemed necessary. In general, this code of behavior is embodied in the American Bar Association's Canons of Professional Ethics,¹⁸ a code of conduct which prohibits an attorney from representing those who have conflicting interests except in cases where both parties have complete knowledge of the situation and give express consent.¹⁹ Therefore, in a trade association offering legal services to its members, a member could give express consent after he had been fully advised that the particular case in which the attorney was involved might present a conflict of interest. When both parties in the case are members of the trade association, the association attorney should refer each to outside counsel. If the attorney from a trade association is acting for one of the parties, and outside counsel representing the opposite party, he would have to be careful not to communicate with the opposing party, or have any interest in the case,²⁰ even though natural relations might exist between him and the opposing party.²¹

¹³ Stickells, *Legal Control of Business Practice* 182 (1965).

¹⁴ *American Column and Lumber Co. v. United States*, 257 U.S. 377 (1921).

¹⁵ *United States v. American Linseed Oil Company*, 262 U.S. 371 (1923).

¹⁶ *Sugar Institutes Inc. v. United States*, 297 U.S. 533 (1936).

¹⁷ *United States v. National Dairy Products Corporation*, 372 U.S. 29 (1963).

¹⁸ *Drinker, Legal Ethics* 22-30, 309-325 (1953).

¹⁹ *Canons, supra* note 1.

²⁰ *Id.*, Canon 9.

²¹ *Id.*, Canon 10.

Since the early days of the bar, advertising to solicit clients has been looked upon with great disdain. To maintain this traditional dignity, to prevent the stirring up of litigation (such as extensive advertising would create),²² and to protect the public from those less able, these prohibitions against advertising and solicitation have been maintained.²³ The members of this honorable profession also require assumption of the responsibility by its members for litigation in accepted cases.²⁴ Most certainly the salaried attorney supplied by a trade association would find no financial enticement to increase or generate litigation in any fields within the structure of the trade association. His responsibilities and authority could be clearly defined to comply in both letter and spirit with Canon 31.

Should a trade association prepare, certify and distribute an approved law list, instead of hiring the attorney on a salary basis? Since this could be injurious to the dignity of the profession or damage the public stature of the profession, there is an ethical question as to whether an attorney may be so listed.²⁵ If this method of operation were utilized by a trade association there would also be the strong possibility that an attorney might be tempted to stir up litigation.

The attorney-client relationship is one that requires trust, confidence, undivided allegiance, faithfulness, "disinterest" in the action, integrity, and absence of any personal advantage for the attorney²⁶—and is in fact fiduciary in nature.²⁷ In order to clarify this relationship, Canon 35 of the Canons of Professional Ethics was adopted.²⁸ This canon specifically allows an attorney to be employed by a trade association, but indicates that he should not offer legal services to the members "in respect to their individual affairs."²⁹ This canon strikes at the heart of the matter that we are considering. Although it does not prohibit counsel hired by an association to also work for members of the trade association, the American Bar Association Committee on Unauthorized Practice in 1950 prohibited corporations from providing retained attorneys to perform legal services for the employees of the corporation, even when there was no conflict of interest between the interest of the association and member.³⁰ It has been indicated that Canon 35 is not

²² *Id.*, Canon 28.

²³ *Drinker, supra* note 18, at 210-212; *Id.*, Canon 27.

²⁴ *Id.*, Canon 31.

²⁵ *Id.*, Canon 43.

²⁶ *State Bar Ass'ns v. Conn. Bank and Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958).

²⁷ 7 *Am. Jur.2d Ass'ns*, § 105 (1963).

²⁸ Canon 35 was adopted at the 51st meeting of the A.B.A. at Seattle, Washington, on July 26, 1928, and amended Aug. 31, 1933.

²⁹ *Canons, supra* note 1, Canon 35.

³⁰ *Informative opinion on the Committee on Unauthorized Practice of Law*, 36 *A.B. A.J.* 677 (1950).

violated if a small unincorporated group hires an attorney to handle all of their legal business.³¹

While these canons may be considered to peripherally deal with the question at hand, the American Bar Association has clarified its position on this issue in Canon 47.

No lawyer shall permit his services or his name, to be used in aid of or to make possible the unauthorized practice of law by any lay agency, personal or corporate.³²

The ideals enumerated in the Canons of Professional Ethics have continually been vigorously advocated by the legal profession. However, once the idealism is washed away, the practicalities of the issue before us present themselves in many case law situations.

Under the state police powers each state has the power to regulate the practice of law³³ by means of rules, state statutes or both.³⁴ This power resides in the Judicial Department,³⁵ and where the constitution of a state does not expressly bestow the regulation of the practice of law in any specific governmental department, "it must be exercised by the department to which it naturally belongs" (the judicial).³⁶ Therefore the unlawful practice of law may be legislated against even though the power to determine disbarment is only up to the court, and such legislation does not detract from such powers of the court.³⁷ The legislative provisions usually are upheld by the state judiciary.

States have held that, except when acting for oneself, as guardian for another, or performing non-professional services, one who is not a member of the bar cannot practice law.³⁸ This control over those who are admitted to the bar is for the protection of the public and not simply to decrease competition between attorneys.³⁹ For example, various state judiciaries have prohibited one from using a name which denotes authorization, to practice law,⁴⁰ have required membership in a state bar association,⁴¹ and in some cases graduation from an accredited law

³¹ Drinker, *supra* note 18, at 165-167.

³² Canons, *supra* note 1, Canon 47 (adopted Sept. 20, 1937).

³³ In re Summers, 325 U.S. 561 (1945) (rehearing denied Oct. 22, 1945).

³⁴ 7 Am. Jur.2d Ass'ns, § 48 (1963).

³⁵ Judd v. City Trust & Sav. Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937); Cuyahoga Abst. Title & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934).

³⁶ In re Integration of Nebraska State Bar Association, 133 Neb. 283, 275 N.W. 265 (1937).

³⁷ People ex rel. Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937); also see, In re Saddler, 35 Okla. 510, 130 P. 906 (1913).

³⁸ 7 CJS, Attorney and Client, § 724 (1937).

³⁹ Darby v. Mississippi State Board of Bar Admissions, 185 So.2d 684 (Miss. 1966); Kentucky State Bar Ass'n. v. Holland, 411 S.W.2d 674 (Ky. App. 1967).

⁴⁰ The Florida Bar v. Fuentes, 190 So.2d 748 (Fla. 1966) (A notary public may not use terms such as "Notario Publico," "Consultoria," or "Notaria").

⁴¹ Integration of Bar Case, 244 Wis. 8, 11 N.W.2d 604 (1943) (The Supreme Court will decide whether they will follow the requirement).

school,⁴² for admission to the bar. But it should be noted that due process does not require that every unethical act be anticipated.⁴³

These same courts have maintained that a corporation cannot practice law, even though it may act through attorneys who are themselves members of the bar,⁴⁴ under many various lines of reasoning including the Canons of Ethics.⁴⁵ Other cases maintain that proper attorney-client relationship cannot be maintained by a corporation, which is not a human being but rather an artificial creation.⁴⁶ Ohio allows only natural persons to be admitted to the bar, and until the rules of practice are changed the admission of a corporation shall not be allowed.⁴⁷ The legislature is not competent to enact statutes allowing associations to practice law.⁴⁸ It is rather within the power of the courts to prohibit corporations and associations from practicing law,⁴⁹ and the use of corporate limited liability will not be permitted. An attorney may be employed by a corporation or association, but he may not include in this employment legal services for the member's individual affairs.⁵⁰ In spite of this consensus of legal opinion, some trade associations have been set up by attorneys merely to solicit business for the attorneys.⁵¹ At least three undesirable consequences result when lay organizations are allowed to provide legal services: 1) the harm that could result from conflicting interests between the client and the organization, 2) a deterioration of the attorney-client relationship and 3) the commercialization of the practice of law.⁵² In order to analyze the courts' interpretation of proper conduct for attorneys, let us examine the case of attorneys working for a particular lay organization and its members.

In some instances collection agencies have solicited and prosecuted claims for others by having such claims assigned to them. They then

⁴² Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966).

⁴³ In re Ruffalo, 370 F.2d 447 (6th Cir. 1966).

⁴⁴ Grievance Com. of Bar of Flairfield County v. Dacey, 154 Conn. Ct. 129, 222 A.2d 339 (1966) (appeal dismissed 386 U.S. 683, reh. denied, 387 U.S. 938). And see, Oleck, *op. cit. supra* note 5, at § 45.

⁴⁵ State of Arizona v. Arizona Land Title and Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); See Canons 6, 15, 27, 35 & 47.

⁴⁶ State Bar Ass'n. v. Conn. Bank and Trust Co., *supra* note 26.

⁴⁷ State ex rel. Green v. Brown, 173 Ohio St. 114 (1962); also see, Cleveland Clinic v. Sombrio, 6 Ohio Misc. 48, 215 N.E.2d 740 (1966).

⁴⁸ 7 C.J.S., Ass'ns., § 36 (1937).

⁴⁹ In re Opinion of the Justices, 289 Mass. 354, 194 N.E. 313 (1935); and see, *supra* note 44.

⁵⁰ A.B.A., Committee on the Unauthorized Practice of Law, Informative Opinion No. A, 1950, 36 A.B.A.J. 677 (1950).

⁵¹ Hicks and Katz, Article, 41 Yale L. J. 69, 85 (1931).

⁵² Note, The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys, 72 Harv. L. Rev. 1334 (1959).

hire attorneys who prosecute the assigned claims and in this way circumvent the prohibition against having legal services offered to a member of a lay organization by the lay organization.

No matter how one looks at it, this constitutes the rendering of legal services for others as a regular part of a business carried on for financial gain. This essential fact cannot be hidden by the subterfuge of an assignment.⁵³

An attorney may, however, accept a case from a collection agency when his relations with the agency account are direct and his fees are not subject to or restricted by the agency.⁵⁴ Correspondingly, the collection agency is also restricted by the previously noted rule that a corporation or lay organization cannot practice law.⁵⁵ As we have noted certain First Amendment freedoms have created an implied "right to association," but collection agencies are not protected by the First and Fourteenth Amendments against unauthorized practice charges when they hire or appoint an attorney to litigate claims assigned to these agencies.⁵⁶

Credit associations, similar in nature to collection agencies, have similar restrictions. For example, *Rinderknecht v. Toledo Association of Credit Men* involved a credit men's association that would notify others of a bankruptcy schedule and send a form for proving their claim. They would also offer services to present the claims and participate in the election of a trustee by using a power of attorney duly executed. The trustee in some cases was a member or officer of the association. For their services and appearances before the referee in bankruptcy, they would collect a fee equal to the customary percentage of the amount collected for the use of the association. It was held that this was not practice of law,⁵⁷ but when the credit association controlled the flow of money and the attorneys, without the creditors having knowledge of the attorneys or arrangement, it was found to be an unlawful practice of law.⁵⁸ Therefore, it would seem that a credit association may represent creditors if each creditor has full knowledge of the arrangement and the fees remain reasonable and customary.

A bank or trust company is also akin to the trade association in that its "members" are the public at large. A corporation may hire an at-

⁵³ *Nelson v. Smith*, 107 Utah 382, 154 P.2d 634 (1944); *In re Incorporated Consultants*, 6 Ohio Misc. 143, 216 N.E.2d 912 (1965); See also, *Bay County Bar Ass'n. v. Finance System, Inc.*, 345 Mich. 434, 76 N.W.2d 23 (1956) (not a licensed attorney).

⁵⁴ *Drinker*, *supra* note 18, at 169.

⁵⁵ *L. Meisel and Co. v. Nat'l. Jewelers' Bd. of Trade*, 152 N.Y.S. 913, 916, 90 Misc. 19 (1915); *In re Shoe Manufacturers Protective Ass'n.*, 295 Mass. 369, 3 N.E.2d 746 (1936); *State ex rel. McKittrick v. C. S. Dudley Co., Inc.*, 340 Mo. 852, 102 S.W.2d 895 (1937); *Bay County Bar Ass'n. v. Finance System, Inc.*, *supra* note 53.

⁵⁶ *State v. Bonded Collection, Inc.*, 36 Wis.2d 643, 154 N.W.2d 250 (1967).

⁵⁷ *Rinderknecht v. Toledo Ass'n. of Credit Men*, 13 F.Supp. 555 (D. of Ohio 1935).

⁵⁸ *Richmond Ass'n. of Credit Men v. Bar Ass'n. of the City of Richmond*, 167 Va. 327, 189 S.E. 153 (1937).

torney on a salary basis to represent it,⁵⁹ but a banking corporation may not use its salaried attorneys to examine titles and make separate charges to their mortgages,⁶⁰ or in any other instance where they practice law for others (even when incident to their business) and receive resulting fees.⁶¹ When banks form a State Bank Association, publish a bulletin giving legal advice to the members and identified the advising attorney, such attorney is engaged in the unauthorized practice of law.⁶² Banks are, therefore, prohibited from providing legal services to their customers even though they have an interest in the transaction.

Title companies have been allowed to perform legal work merely incident to the performance of their business,⁶³ but not when excessive charges are involved,⁶⁴ nor in filling in legal forms for other lending institutions,⁶⁵ drafting deeds for its customers in which it did not have an interest (even though it received no separate charge for its services because it was being indirectly compensated by greater volume of work),⁶⁶ or in any situation where advice and opinions are given to clients for a fee.⁶⁷

Automobile service associations also present an analogous situation. These associations offer legal services as a benefit of belonging to the association. If the association appoints an admitted attorney to perform the legal work,⁶⁸ or suggests recommended attorneys in their magazines for direct membership contact having nothing else to do with the litigation except pay for the services, it is considered to have participated in the unauthorized practice of law.⁶⁹ Since automobile service associations are dealing with the public, the courts seek to protect

⁵⁹ *Arkansas Bar Ass'n. v. Union Nat'l. Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954); (a bank may employ an attorney to foreclose mortgages owned by the bank and include proper attorney's fees in the foreclosure charges as long as the fees do not exceed his salary resulting in a net profit to the bank); also see *Swift v. Board of County Comm'rs. of Hennepin County*, 76 Minn. 194, 78 N.W. 1107 (1899).

⁶⁰ *Kentucky State Bar Ass'n. v. First Federal Sav. and Loan Ass'n. of Covington*, 342 S.W.2d 397 (C.A. Ky. 1961).

⁶¹ *In re Otterness*, 181 Minn. 254, 232 N.W. 318 (1930); *Frazer v. Citizens Fidelity Bank and Trust Co.*, 393 S.W.2d 778 (Ky. 1965); *Green v. Huntington Nat'l. Bank*, 3 Ohio App.2d 62, 209 N.E.2d 228 (1964), *Title Guar. Co. v. Denver Bar Ass'n.*, 135 Col. 423, 312 P.2d 1011 (1957).

⁶² A.B.A. Comm. on Professional Ethics and Grievances, Opinions, No. 98 (1957).

⁶³ *Detroit Bar Ass'n. v. Union Guardian Trust Co.*, 282 Mich. 216, 276 N.W. 365 (1937).

⁶⁴ *New Jersey State Bar Ass'n. v. Nor. N.J. Mtg. Ass'n.*, 32 N.J. 430, 161 A.2d 257 (1960); *Steer v. Land Title Guarantee & Trust Co.*, 65 Ohio L. Abs. 33, 113 N.E.2d 763 (1953).

⁶⁵ *New Jersey State Bar Ass'n. v. Nor. N.J. Mtg. Ass'n.*, Id.

⁶⁶ *Bar Ass'n. of Dallas v. Hexter Title and Abstract Co.*, 175 S.W.2d 108 (Tex. 1943); affd. 179 S.W.2d 946 (1944).

⁶⁷ *Land Title Abstract and Trust Co. v. Dworken*, 129 Ohio St. 23 (1934).

⁶⁸ *Rhode Island Bar Ass'n. v. Auto. Servs. Ass'n.*, 55 R.P. 122, 179 A. 139 (1935).

⁶⁹ *In re Maclub of America*, 295 Mass. 45, 3 N.E.2d 272 (1936).

the public interest, maintain the confidential and fiduciary attorney-client relationship that should exist, and to keep the automobile service associations from acting as intermediaries. But as long as the association receives no direct or indirect compensation from the attorneys employed, and the attorneys are selected by the member, there is no unauthorized practice of law.⁷⁰ The lenient trend has been furthered by the allowance of association members to fill out blank forms and negotiate claims for members of an automobile association as long as they do not render legal advice to the member.⁷¹ Thus can be traced the liberal attitude developing toward associations offering legal services to its members.

However, the strength of these preceding historical arguments has been shaken by three recent Supreme Court decisions. The crux of these decisions has been the authority of the Federal Judiciary over the State Judiciary's power to regulate admission to the state bar. The ever growing power of the Federal Judiciary has been a constant thorn in the side to those who advocate judicial restraint. Thomas Jefferson once said to Spencer Roane (1821),

The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot, and in alarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the state governments into the jaws of that which feeds them.⁷²

Baker v. Carr, a landmark case in this area, provided that federal respect for state self protection could not act to shield the state and allow it to invade a citizen's constitutional rights.⁷³ The Federal Judiciary is required to balance individual rights versus state self protection.⁷⁴

Against this backdrop of judicial development a definite judicial trend in response to the social and economic demands of current American society has taken place. As a result of the increasing interest in individual rights *NAACP v. Button*⁷⁵ was accepted by the Supreme Court after considerable litigation.⁷⁶ This case involved the Virginia branch of the NAACP, a nationwide incorporated nonprofit association. The Virginia branch was an unincorporated association, which had the basic purpose of creating, providing and enforcing equal rights for Negroes. The primary source of their funds was public contributions. This or-

⁷⁰ *Re Thibodeau*, 295 Mass. 374, 3 N.E.2d 749 (1936).

⁷¹ *American Auto Ass'n. v. Merrick*, 117 F.2d 23 (D.C. Cir. 1940).

⁷² See *Dombrowski v. Pfister*, 227 F.Supp. 556, 564 (D.Ct.La. 1964).

⁷³ 369 U.S. 186 (1962).

⁷⁴ *Jordan v. Hutcheson*, 323 F.2d 597 (4th Cir. 1963).

⁷⁵ *NAACP v. Button*, *supra* note 12.

⁷⁶ *NAACP v. Patty*, 159 F.Supp. 503 (D.Ct. Va. 1958); *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960), *rev'd*, 371 U.S. 415 (1963).

ganization developed a unique method of obtaining cases to litigate. For example, they would have a meeting of Negro parents who would, after a discussion of their civil rights and any particular situations in which they were involved, sign a form authorizing the NAACP to litigate their civil rights. Oftentimes the litigant did not even know of his involvement. The legal staff of the Virginia Conference, consisting of 15 attorneys, could decide whether or not to litigate, received a *per diem* fee not to exceed \$60 plus out-of-pocket expenses, but did not receive *any* other compensation. Virginia did not attempt to actively prohibit this activity until 1956, when it passed a law which prohibited any entity or person from soliciting business for an attorney.⁷⁷ When attempting to enforce these statutes, the state of Virginia argued that, since they had adopted Canons 35 and 47,⁷⁸ the NAACP, a lay organization, was acting as an intermediary in aiding attorneys, and that this constituted the unauthorized practice of law.⁷⁹ The NAACP contended that the Virginia state regulations abridged the freedoms guaranteed by the First and Fourteenth Amendments. The Court held that the legal services offered by the NAACP were "modes of expression and association" guaranteed by the First Amendment and rights protected from state action by the Fourteenth Amendment, and that the state of Virginia had not shown any substantial regulatory purpose which would be abrogated by the activities of the NAACP. A state may not prohibit this form of expression through its regulatory controls. The Court went on to point out that orderly group activities, such as providing legal services, are protected by the First Amendment. It should also be recognized that the fact that the rights of a minority race were involved did not affect the outcome of this suit, for these privileges and rights would be available to *any group* under constitutional protection of basic rights of expression and association.⁸⁰

Prior to the *NAACP v. Button* decision, railway unions had been involved in much litigation involving their referral system. For example, in *Hulse v. Brotherhood of Railway Trainmen*, the brotherhood was found to be practicing law when it received a portion of a legal fee from an attorney for referring a personal injury case.⁸¹ Even though the results of union cases have shown reduced legal rates,⁸² some attorneys who have been participating in the legal program of the brotherhood

⁷⁷ Code of Virginia, 1950, §§54-74, 54-78 and 54-70, as amended by Acts of 1956, Ex. Sess., c. 33 (Repl. Vol. 1958); see *NAACP v. Buton*, *supra* note 12, at 423.

⁷⁸ 171 Va. pages xxxii-xxxiii, xxxv (1938); also see *NAACP v. Button*, *supra* note 12, at 425.

⁷⁹ *Supra* note 12, at 425.

⁸⁰ *Ibid.*; see also, *United Mine Workers v. Illinois State Bar Ass'n.*, *supra* note 11.

⁸¹ *Hulse v. Brotherhood of Ry. Trainmen*, 340 S.W.2d 404 (Mo. 1960).

⁸² *Cleveland Bar Ass'n. v. Fleck*, 172 Ohio St. 467, 178 N.E.2d 782 (1961); cert. denied, 369 U.S. 861 (1962).

have been suspended.⁸³ Even as early as 1963 there was some anticipation that these rulings would not stand in the future, and there was a definite tendency towards allowing unions to provide legal counsel to their members.⁸⁴ Thus it was only natural that the important *Brotherhood of Railroad Trainmen v. Virginia*⁸⁵ decision follow close on the heels of *NAACP v. Button*.

The brotherhood was founded in 1883 to protect railway employees, after obtaining legislation for these railroadmen.⁸⁶ They needed some method of realizing the full benefit of these acts. Members of the brotherhood were plagued by lack of adequate counsel, and by claim adjusters seeking to quickly expedite their causes. To overcome this situation, the brotherhood selected an attorney in each area of the United States, to recommend to their members. A department of legal counsel was organized for this purpose, making attorneys well versed in these particular suits available to the membership, attempting to maximize each recovery. Usually 25% of an attorney's fee was returned to the union for investigatory services provided by the union. Here again the Supreme Court subjugated the powers of Virginia to regulate the practice of law in the state to the First Amendment rights of free speech, petition and assembly, through the Fourteenth Amendment, and held that the members of the union have a right to associate in order to advise themselves of their rights and protect the associational rights of the union members.⁸⁷

After the Supreme Court made it eminently clear that they would allow a union to suggest and recommend lawyers, there was much conjecture as to whether they would allow these unions to hire salaried attorneys to represent their members. From some corners the same arguments were advocated, that is, that the attorney-client relationship would be destroyed and the legal profession would be commercialized by the union-hired attorneys.⁸⁸ Others reasoned that the bar was shifting its attitude on the point because of these two recent Supreme Court cases and the increasing sensitivity to the importance of counsel. Since the union would have no selfish financial interest in the outcome of a case handled by a salaried attorney, it was reasoned that there would be no

⁸³ *Columbus Bar Ass'n. v. Potts*, 175 Ohio St. 101, 191 N.E.2d 728 (1963).

⁸⁴ *Drinker*, *supra* note 18, at 167.

⁸⁵ 377 U.S. 1 (1964).

⁸⁶ *Safety Appliance Act*, 27 Stat. 531, as amended, 45 USC §§ 1-43; *Federal Employer's Liability Act*, 35 Stat. 65, as amended, 46 USC §§ 51-60; see *Brotherhood of R.R. Trainmen v. Virginia*, *supra* note 85, at 3.

⁸⁷ *Brotherhood of Railroad Trainmen v. Virginia*, *supra* note 85.

⁸⁸ Note, *Unauthorized Practice of Law—Union Program of Hiring Attorneys is Unauthorized Practice of Law*, 65 Mich. L. R. 805 (1967) (Note: this article was written before the *United Mine Workers of America v. Ill. State Bar Ass'n.*, 389 U.S. 217 (1967)).

injustice to the public. The assumption that there would always be a conflict of interest was unwarranted since both parties are actually working for the best interest of the individual member.⁸⁹

In late 1967 this question was presented before the Supreme Court. The Illinois Workmen's Compensation Statute⁹⁰ was enacted in 1912. Litigation of claims subjected members of the United Mine Workers to exorbitant contingency fees, sometimes amounting to 40% or 50% of the recovery. In order to solve this problem the U.M.W. employed on a salary basis, a licensed attorney to represent union members. Members had the option of not using the union counsel, who was specifically instructed that his relations and obligations were strictly with the member and not with the association. When the settlement was made the member received the full amount of the settlement and the attorney received as compensation only his salary from the union. A Virginia Court had held that the *NAACP v. Button* decision was restricted to forms of political expression and therefore was not applicable in this instance. The Supreme Court announced that such a restriction on the rights unjustifiably restricted the associational rights of the members, and the possibility of baseless litigation and conflicting interest was too remote to justify such a broad abrogation of the union member's First Amendment rights. Therefore the First Amendment rights of speech, assembly and petition, made effective in the state through the Fourteenth Amendment, gives the union the right to hire salaried counsel for use by the members of the union.⁹¹

The favorable attitude towards group legal services seems always increasing.⁹² Even as early as 1935 it was decided that legal aid given in a charitable situation, with no opinion or advice, without substantial income, and not as an occupation, was not practice of law.⁹³ But as time progressed some argued that the divided allegiance,⁹⁴ conflict of interest, lack of fiduciary or attorney-client relationship and commercialization of the profession are strong deterrents.⁹⁵ The judicial trend to a more liberal attitude towards non-lawyers who assist others to exert

⁸⁹ Note, Ethics-Unauthorized Practice of Law-Labor Unions Furnishing of a Salaried Attorney for Use of Members in Prosecuting Workmen's Compensation Claims, 52 Iowa L. R. 351 (1966), also see the changing attitude of the Bar in, Committee Report on Group Legal Services, Group Legal Services, 39 Cal. S.B.J. 639, 652, 722-28 (1964).

⁹⁰ Ill. Rev. Stat. c., 48, § 138.1 et seq. (1963).

⁹¹ *United Mine Workers of America v. Ill. State Bar Ass'n.*, *supra* note 11.

⁹² McCracken, Report on Observance by the Bar of Professional Standards, 37 Va. L. R. 399 (1951); Drinker, Legal Ethics 165-167 (1953); Hildebrand v. State Bar of Cal., 36 Cal.2d 504, 225 P.2d 508 (1950); Markus, Group Representation by Attorneys as Misconduct, 14 Clev.-Mar. L. Rev. 1 (1965).

⁹³ In re Opinion of the Justices, 289 Mass. 354, 194 N.E. 313 (Mass. 1935).

⁹⁴ A.B.A., *supra* note 50.

⁹⁵ Note, The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys, 72 Harv. L. R. 1334 (1959).

their legal rights, while receiving no compensation,⁹⁶ indicates the need for socialized legal services for the poor, so that now a charitable corporation may give legal advice to indigents.⁹⁷ This changing attitude has been attributed to the rise in modern commerce (in the area of trade and travel) and the growth of modern science.⁹⁸ Members of the legal profession should begin to consider more methods of supplying legal services to those who need them. Group service is a possible solution.⁹⁹ This shifting attitude is applying increasing pressure on the legal profession to decrease the cost of legal service. Legal insurance, referral services and bank financing are possible solutions that have been suggested. The Group Legal Service seems to be one possible solution for individual members of the public.¹⁰⁰

Since legal services are "modes of expression and association" which may be offered by a corporation to its individual members, may these same services be offered to corporate members? The translation of this attitude and constitutional interpretation into the situation of legal services offered to corporate members by a trade association indicates a permissive trend. However, before becoming involved in this type of program each party must make an in-depth evaluation.

Would the association wish to subject its assets to liability for unethical acts? Is such a legal service operable when the association cannot exert control over the attorney? Would there be any antitrust implications involved in their legal service system? Could the association allow a natural attorney-client relationship to exist without acting as an intermediary? Could they resist the temptation to make a profit from such a system?

Corporate members must determine the possibilities and ramifications of the conflict of interest problem. Would technical and business knowledge of their particular industry actually be helpful in the solution of their legal problems? If the association was unincorporated, or did not properly shield them from liability, would the corporate member be willing to subject its assets to liability for the unethical acts of an association attorney?

Each prospective attorney must also analyze the conflict of interest problem. He should be aware of the lack of independence he would now have, which might be offset by occupational security. The attorney must also resolve personal ethical questions involved in such an ar-

⁹⁶ *Hackin v. Arizona*, 88 S.Ct. 325 (1967) (see the dissenting opinion of Mr. Justice Douglas).

⁹⁷ *Touchy v. Houston Legal Foundation*, 417 S.W.2d 625 (Tex. Civ. App. 1967).

⁹⁸ Cohen, *The Legal Conscience* 21 (1960).

⁹⁹ Note, *Group Legal Services*, 79 Harv. L. R. 416 (1965).

¹⁰⁰ *Helping Mr. Average*, *The Wall Street Journal* (Aug. 6, 1968).

rangement. Will he be able to maintain a proper attorney-client relationship? Would he accept separate compensation from others?

The answers to these questions are dependent upon the particular parties involved. Their answers, attitudes and "personalities" eventually will determine the operational feasibility and practicability of all legal services offered by a trade association.