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Labor Union Group Legal Service for Members

Eugene Green*

REPEATED CHALLENGES by Bar Associations against the efforts of the Brotherhood of Railroad Trainmen to provide its members with legal services culminated in the case of *Brotherhood of Railroad Trainmen v. Virginia, ex rel Virginia State Bar*.¹ Prior to *Trainmen*, challenges by the Bar were usually sustained by the Courts.² Grounds for the challenges were that the Brotherhood was engaged in the unlawful practice of law, and in schemes designed to stir up litigation. Lawyers agreeing to act as counsel for the Brotherhood were accused of knowingly participating in arrangements in which litigation was being solicited, of assenting to such solicitation,³ and, in some instances, of splitting fees with laymen.⁴

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¹ 377 U.S. 1 (1964).

² *In re* Petition of Committee on Rule 28 of the Cleveland Bar Association, 15 Ohio L. Abs. 106 (1933); *In re* Brotherhood of Railroad Trainmen, 13 Ill.2d 391, 150 N.E.2d 163 (1958); *In re* O'Neill, 5 F.Supp. 465 (E.D.N.Y. 1933); *Hulse v. Brotherhood of Railroad Trainmen*, 340 S.W.2d 404 (S. Ct. Mo. 1960); *Beck v. Lush*, 170 Neb. 376, 103 N.W.2d 136 (1960). But cf. *Ryan v. Pennsylvania R. Co.*, 268 Ill. App. 364 (1932) describing the union's legal aid plan as commendable and socially needed.

³ The Canons of Professional Ethics held to be violated by the Bar were American Bar Association's Canons of Ethics Nos. 28, 35, and 47.

Canon 28 provides:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disruptable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, . . .

Canon 35 provides:

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. . . .

Canon 47, which is complementary to Canon 35, provides:

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

⁴ *In re* Petition of Committee on Rule 28 of the Cleveland Bar Assn., *supra* note 2. Here the predetermined fee was 20%, of which 15% went to compensate the attorney and 5% was remitted to the Legal Aid Department. The practice of fee splitting between the railroad workmen's counsel and the Brotherhood was discontinued in 1959 in compliance with a decree of the Supreme Court of Illinois. *In re* Brotherhood of Railroad Trainmen, *supra* note 2. In *Brotherhood of Railroad Trainmen v. Virginia State Bar*, *supra* note 2, the Supreme Court noted it was not required to rule upon the validity of fee splitting because the Brotherhood had not engaged in such practices since 1959.

In *Trainmen*, the Virginia Bar challenged the practice of referring injured workmen or their families to attorneys selected by the union. As a service to its members, the Brotherhood had created a Legal Aid Department. This department investigated all the reported work-related injuries of members. The injured member would be advised to consult an attorney recommended by the Brotherhood in order that his legal rights could be evaluated and a determination made of the course of action that should be pursued. In this way, the Brotherhood channeled claims and litigation involving its members and their families, arising under the Federal Employers' Liability Act,⁵ to lawyers selected and designated by the Brotherhood.

The Virginia Bar sought and procured an injunction from the Virginia State Courts prohibiting the Brotherhood from continuing its plan. The Brotherhood resisted the action of the Bar on the grounds that the First and Fourteenth Amendments, guaranteeing free speech, association, petition and assembly, barred the State from interfering with its maintenance of a Legal Aid Department for the benefit of its members. It appealed the State Court's proscriptions to the U. S. Supreme Court. The Supreme Court agreed that the Brotherhood's program of providing legal assistance to its members for the vindication of federal statutory rights was within the purview of, and protected by, the First and Fourteenth Amendments to the Constitution. It, accordingly, vacated the decree and reversed the judgment of the Supreme Court of Appeals of Virginia.

The Court stated that the principles it had enunciated in *NAACP v. Button*,⁶ upholding the right of the National Association for the Advancement of Colored People to recommend attorneys to persons involved in matters directly related to the purposes of the Association, and to hire attorneys for litigants involved in civil rights litigation, were applicable to the Railroad Brotherhood. It observed that, ". . . the Constitution protects the associational right of the members of the union precisely as it does those of the NAACP."⁷ It also ruled that, ". . . lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge."⁸

The Court acknowledged that States have broad powers to regulate the practice of law and noted the State's and Bar's interest in Canons of Ethics prohibiting the encouragement of warrantless litigation, exploitation of the profession by a lay agency, and aiding the unauthorized practice of law. Still, the Court held that in the absence of a showing of substantive evils flowing from the Brotherhood's activities, the

⁵ 35 Stat. 65, 45 U.S.C. §§ 51-60.

⁶ 371 U.S. 415 (1963).

⁷ Brotherhood of Railroad Trainmen, *supra* note 1 at 8.

⁸ *Ibid.*

First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers.⁹

The Court's approach to the union's connection with the practice of law assures that the constitutional rights guaranteed by the First and Fourteenth Amendments are not so broad as to permit their exercise in a manner to cause actual, rather than speculative, damage to the public or the profession. The State's interests in the regulation of the profession for the purpose of maintaining high ethical standards has not been denied. Rather, it has been affirmed, subject only to the constitutional imperative that the control exercised must be on the basis of necessary protection, and not merely on the remote hypothesis of potential harm.

Hostility to union efforts to provide legal services to their members continued even after the Court's opinions in *Button* and *Trainmen*.¹⁰ This hostility was felt by the United Mine Workers of America, District 12, when the Illinois State Bar Association moved to prohibit it from hiring an attorney on a salaried basis to represent its members to prosecute Workmen's Compensation claims before the Illinois Industrial Commission. The Illinois Bar and Courts saw a significant difference between the practice of a union recommending an attorney to its members and the hiring of an attorney to service members. In their view, the former practice was protected by the Federal Constitution, but the latter constituted the unauthorized practice of law beyond the reaches of the protections afforded by the Federal Constitution.¹¹

The United Mine Workers petitioned for certiorari on the grounds that the Court's Decree prohibiting it from employing attorneys on a salaried basis to represent members with Workmen's Compensation Claims, and other claims which the members may have under the laws of Illinois, abridged First and Fourteenth Amendment rights upheld by the Court in *Button* and *Trainmen*. The Court granted certiorari.¹²

⁹ *Id.* The Supreme Court refused the petition for rehearing joined in by some forty-eight bar associations expressing distress at the violence done to traditional and universally held principles of legal ethics, and to the authority of the State to regulate and control the legal profession.

¹⁰ Mr. Raymond Reisler, once head of the Unauthorized Practices of Law Committee of the Bar Association reported that the American Bar Association did not elect to intervene in the *Button* case recognizing its unique civil rights aspect; he further suggested that Brotherhood was confined to its facts, ". . . interesting but hardly reliable as judicial precedent supporting wide open group legal services in conflict with the Canons." See (ABA) Unauthorized Practice News, Vol. 33, No. 4, p. 14.

¹¹ *In re Brotherhood of R.R. Trainmen*, *supra*, note 2, citing *People ex rel. Courtney v. Assn. of Real Estate Taxpayers*, 354 Ill. 102, 187 N.E. 823 (1933); *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936); *Richmond Assn. of Credit Men, Inc. v. Assn. of Richmond*, 167 Va. 327, 189 S.E. 153 (1937). Reisler, *op. cit. supra*, note 10, hailed the State Court decision as a "unanimous landmark decision—defending the sanctity of the personal lawyer-client relationship against the interposition of the group as lay intermediary."

¹² *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 386 U.S. 941 (1967).

On review of the record, the Court concluded that the Illinois Supreme Court interpreted the Court's opinions in *Button* and *Trainmen* too narrowly and that, under the principles announced in those cases, the First and Fourteenth Amendments gave the United Mine Workers the right, "to hire attorneys on a salaried basis to assist its members in the assertion of their legal rights."¹³ The Court found no significant difference between a union recommending an attorney or hiring an attorney. In either instance, the Court pointed out, the attorneys "economic welfare is dependent to a considerable extent on the good will of the union. . . ." ¹⁴ The Court would not justify a State's prohibition of the constitutional right of members of a union to aid one another in the assertion of legal rights upon the remote possibility of abuse and harm.

The right of associations to provide their members with legal services appears to be as broad as the freedom of assembly and discussion protected by the First and Fourteenth Amendments. These freedoms "are not confined to any field of human interest"¹⁵ and are of the same dimension in matters of local or national interest.

Dissenting Justices Clark and Harlan share the apprehensions of the organized bar and warn that upholding the right of unions to recommend attorneys, and to hire attorneys, to provide legal services to their members will result in lowering the quality of legal representation, and ". . . relegates the practice of law to the level of the commercial enterprise. . . ." ¹⁶ Others find in these opinions, ". . . a drastic change in time-honored concepts regarding the practice of law and the attorney-client relationship."¹⁷ Time honored principles held to be overturned include, the direct relationship between attorney and client; the recognition that a lawyer's services may not be purchased and resold at a profit; that the undivided allegiance of an attorney precludes his representation or the acceptance of compensation from anyone whose interests may be adverse to that of his client; and that legal services may not be advertised, bought, or solicited.¹⁸ Misgivings notwithstanding, the right of labor unions to maintain group legal service plans is established.

No Conflict in Exercise of the Prerogative

The Bar Associations' expressed fears that no man can work for two masters, particularly an attorney who is paid by a labor organization yet works for the individual member, will not and should not act to inter-

¹³ 339 U.S. 217 (1967).

¹⁴ *Ibid.*

¹⁵ *Thomas v. Collins*, 323 U.S. 516, 531 (1944).

¹⁶ *Brotherhood of Railroad Trainmen*, *supra*, note 1 at 9.

¹⁷ *American Bar Association, Standing Committee on Unauthorized Practice of the Law*, Volume XXXIV, No. 1, p. 20 (1968).

¹⁸ *Id.*, at 21.

fere with the establishment of group legal service by unions. The insistence that individual members' interests will be sacrificed remains unsupported.¹⁹ Members do not acknowledge that there is any appreciable danger that the attorney employed by the union will attempt to sacrifice the interests of the member to further that of the union. In practically all instances, the interest of the individual and the group coincide. Where the union supplies the services of the attorney, neither the union nor the attorney have a financial stake in individual law suits. It is in the interests of both that the individual member using the services be satisfied. Members of a union will not continue to assess themselves to pay attorneys' fees or to have their dues used for such purposes if they are convinced that the attorney employed does not have their interest at heart.²⁰

In examining the oft quoted assertion that the allegiance of a lawyer to his client would be disrupted through the employment of the lawyer by a group, the editors of the Harvard Law Review concluded that: ²¹

Such arguments depend upon the highly speculative proposition that a lawyer will not give the same amount of care to a group-referred client as he would to an 'ordinary' client. But the personal attention that an attorney gives a client would seem to depend more on the lawyer's character than on the means by which the client comes to him. While a strong lawyer-client relationship is desirable, it is unlikely that group practice arrangements will weaken such relationships to any substantial extent. This possible disadvantage of group practice plans, standing alone, is not likely to be held sufficient to override the right to associate.

The union members' reliance upon union furnished attorneys grew, in part, from experience with individual attempts to realize the substantive benefits of collective bargaining agreements. Many courts developed the view that only the union had standing to seek enforcement of its collective bargaining agreements.²² This view was carried over into interpretations of Section 301 of the Labor Management Relations Act. Section 301 was frequently held to have not conferred jurisdiction in

¹⁹ See, e.g., Weihofen, Practice of Law by Non-Pecuniary Corporations: A Social Utility, 2 U. Chi. L. Rev. 119 (1934); Note, Practice of Law by Lay Organizations Providing the Services of Attorneys, 72 Harv. L. Rev. 1334, 1344 (1959); Note, Group Legal Services, 79 Harv. L. Rev. 416, 420 (1965).

²⁰ Justice Black in United Mine Workers notes that:

In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, or 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.

²¹ Note, 79 Harv. L. Rev. 416, *op. cit. supra*, note 19 at 422.

²² See *Volguardsen v. Southern Amusement Co.*, 156 So. 678 (La. App. 1934); *Milk Wagon Drivers Union v. Associated Milk Dealers*, 42 F.Supp. 584 (N.D. Ill. 1941); *MacKay v. Loew's, Inc.*, 192 F.2d 170 (9th Cir. 1950). See also generally, Annot., Labor Agreement—Employees Rights, 18 A.L.R. 2nd 352 (1951).

Federal Courts over suits brought by an individual member asserting a violation of a Collective Bargaining Agreement.²³ Of necessity, unions were required to supply individual members with the services of an attorney where the litigation sought to vindicate the contractual rights of the individual members. There is not a single recorded instance in which it was contended that the union obtained attorney had failed to diligently or properly represent the individual union member.

Experience teaches that the courts and the bar will develop appropriate protections for the public and the individual litigants where the attorney is referred or procured by the union. Ethical considerations will continue to be significant. It is certain that on a case to case basis rules will be developed to resolve actual conflicts of interest and prevent the commercialization of the practice of law.²⁴ It may safely be said that union maintenance of group services has not adversely affected the standards of the profession and is not likely to cause them to deteriorate.

The Limitations on the Exercise of the Prerogative

The need for workers to have an opportunity to be apprised of legal rights and to secure the services of a lawyer at a price the workers can afford to pay is well understood by labor unions.²⁵ It is recognized that only the relatively wealthy can afford consistently to consult a lawyer. Scholars have long pointed out that two-thirds of the families of workmen have never employed a lawyer,²⁶ and that the cost of involvement in a major legal problem would be catastrophic. The causes of inadequate legal representation for the typical labor union member are summarized by Professor Archibald Cox as follows:²⁷

²³ Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1953); Schotte v. International Alliance, etc., 84 F.Supp. 669, aff'd 182 F.2d 158 (9th Cir. 1950); International Assn. of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959); Copra v. Suro, 236 F.2d 107 (1st Cir. 1956); United Protective Workers v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952).

²⁴ See Highway Truck Drivers & Helpers v. Cohen, 182 F.Supp. 608, 617 (E.D.Pa.), aff'd 284 F.2d 162 (3d Cir. 1960), cert. denied, 365 U.S. 833 (1961); Nelson v. Johnson, 212 F.Supp. 233, 241-42 (D. Minn. 1963); Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962); Holdeman v. Sheldon, 204 F.Supp. 890, 892-93 (S.D.N.Y.), aff'd per curiam, 311 F.2d 2 (2d Cir. 1962); Moschetta v. Cross, 48 L.R.R.M. 2608 (D.D.C. 1961); Alvino v. Bakery Workers, 48 L.R.R.M. 2609 (D.D.C. 1961).

²⁵ See, e.g., Carlin, and Howard, Legal Representation and Class Justice, 12 U.C.L.A. L. Rev. 381, 386-423 (1965), (collecting and analyzing earlier authorities); Schwartz, M., Foreword: Group Legal Services in Perspective, 12 U.C.L.A. L. Rev. 279, 286-295 (1965); Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 Colum. L. Rev. 973 (1963); Committee Report on Group Legal Services, 39 Cal. S.B.J. *infra*, note 28; Clark, and Corstvet, The Lawyer and the Public: An A.A.L.S. Survey, 47 Yale L. J. 1272 (1938); Llewellyn, the Bar's Troubles, and Poulitces—And Cures?, 5 Law and Contemp. Prob. 104 (1938); Koos, The Family and the Law (1949); Iowa State Bar Ass'n., Lay Opinion of Iowa Lawyers (1949).

²⁶ Masotti and Corsi, Legal Assistance for the Poor, 44 J. Urban Law 483, 486 (1967).

²⁷ Cox, Poverty and the Legal Profession, 54 Ill. B. J. 12, 14-15 (1965).

. . . [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics.

The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require. It is not that fees are too high. Rendering skilled advice requires time and training that deserve adequate compensation. The cost of maintaining law offices is constantly rising. Litigation, especially where investigatory work is necessary, is expensive at best. Paying even modest legal fees puts an almost unbearable burden not only upon the poverty-stricken who obviously cannot bear the cost but also upon millions in low and middle income groups, unless the case happens to be one in which the potential recovery is large enough to merit a contingent fee. With the low and middle income groups the financial problem is not much different from that of hospital or surgical costs, which overwhelmed family after family before the days of group insurance; the need arises suddenly, the cost is disproportionate to income and no savings have been accumulated against the contingency. This economic segment of society taken as a class, however, can afford to, and should therefore, pay for legal services if some way can be found of spreading and sharing the costs. Indeed, the devising of acceptable methods would seem to offer many advantages for the profession.

Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or within the limited ability to pay. . . .

Though they recognize the need for providing services for their members, historically, unions have not, except in the areas of work connected disabilities, sought to provide their members with legal services. Even the United Mine Workers' plan of providing a lawyer at the union's expense to represent claimants under State Workmen's Compensation Acts has not been widely emulated. In those few instances where unions have tried to provide the full range of legal services for their members, the programs were eventually abandoned.²⁸

More than four years have elapsed since the Supreme Court's decision in *Trainmen*, and one year since its decision in *United Mine Workers*. There has not during this period developed a rush by unions to engage salaried attorneys for the purpose of representing their members

²⁸ The Los Angeles Culinary Industry had collective bargaining agreements under which employers paid an annual sum to a legal aid Trust Fund which hired a panel of five lawyers, on an hourly basis, for the purpose of giving union members legal advice on civil problems. See California Bar Assn., Committee on Group Legal Services, *Group Legal Services*, 39 Cal. SBJ 639, 670-75 (1964).

The New York Hotel Trades Counsel, for a two year period, retained a salaried lawyer to advise its members on any legal problem that the members brought to the attorney. Most of the problems handled by this attorney, as well as the legal aid panel, concerned the debtor-creditor and landlord-tenant relationships.

in general, civil, or criminal litigation. The unions' failure or inability to establish group plans for providing legal services for their members is not attributable to disinterest. Rather, the real limitation on the establishment of group legal service by unions is economic. Most unions, local unions in particular, are usually hard pressed to find the money needed to provide necessary administrative services incidental to the policing of collective bargaining agreements. As collective bargaining agreements become more complex, the need for professional technical assistance grows. As Justice Frankfurter some time ago pointed out,

As a practical matter the employees expect their union not just to secure a collective agreement but more particularly to procure for the individual employee the benefits promised. If the union can secure only the promise and is impotent to procure for the individual employees the promised benefits, then it is bound to lose their support.²⁹

More and more unions are called upon to use the services of economists, statisticians, engineers, lawyers, and doctors, both in the negotiation and administration of collective bargaining agreements. The union's treasury will not stretch far enough to provide the members with general legal service. The time required of the attorney for legal service to the union in itself frequently strains the capacity of the union to engage those services. And, the rank and file shows no inclination to allow dues increases in order to fund a legal services plan.

The concept of group legal services suggested to many opportunities to fulfill the legal needs of the lower economic classes. While the unions now enjoy the judicial recognition of their right to practice group service, unfortunately, the economic status of most unions will continue to preclude them from the establishment or implementing of legal programs for their members.

²⁹ Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 457 (1955). See also Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood, 323 U.S. 210 (1944).