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NOTES

ETHICAL PROBLEMS RAISED BY THE NEIGHBORHOOD LAW OFFICE

I. Introduction

The recently expanded federal expenditures to increase the availability of legal services through the operation of a neighborhood law office¹ have created several closely related problems involving ethics and professional standards. Basically, the concept of a neighborhood law office envisions the inclusion of a legal staff as an integral part of the operational framework of a lay corporation providing a wide variety of social services.² The peculiar problems of the law program derive from its method of operation. The neighborhood lawyer, who is precluded from engaging in any private practice and is not to receive a fee for any legal assistance, works in close coordination with lay workers in cultivating a public awareness of the existence of social aid and in particular, of the accessibility of legal services.³ Directed toward the lower-income group and the economically deprived, the project is a well-reasoned attempt to make the poor man appreciate that many of his problems have legal significance, that there are competent lawyers readily available to assist him, and that the legal process itself can be fair and sensitive to the enforcement of his rights.⁴ In short, the program aims at fostering an appreciation among the lower levels of society that the law constitutes something other than that unfriendly enigmatic force represented by the policeman or the collection agency. As a singular form of educational and preventive law, the concept of the neighborhood law office must be placed in its proper context as a creative experiment to solve a problem which has long plagued the legal profession — the successful extension of "justice" to all levels of society.

1 Economic Opportunity Act of 1964, 78 Stat. 508, 42 U.S.C. 2701 (1964). The Office of Economic Opportunity has predicted that by June 30, 1966, at least two hundred projects for the provision of legal services to the economically poor will have been financed. N.Y. Times, Nov. 8, 1965, p. 37.

2 See generally OFFICE OF ECONOMIC OPPORTUNITY, HOW TO APPLY FOR A LEGAL SERVICES PROGRAM 2-6 (1966); Address by Julian Riley Dugas, Director of Neighborhood Legal Services Project of Washington, D.C., to National Legal Aid and Defender Association Conference, Washington, D.C., November 18, 1965; Frankel, *Experiments in Serving the Indigent*, 51 A.B.A.J. 460, 462 (1965); Paper delivered by Charles J. Parker, President, New Haven Legal Assistance Ass'n, Inc., *The Problem Posed for the Legal Profession by Extended Legal Service Programs*, National Conference on Law and Poverty, Washington, D.C., June 23, 24, and 25, 1965. Although the neighborhood law project is a comparatively new program, the concept has been in existence since 1939. For a discussion of the early development of this idea, see Abrahams, *Twenty-Five Years of Service: Philadelphia's Neighborhood Law Office Plan*, 50 A.B.A.J. 728 (1964); Abrahams, *The Neighborhood Law Office Plan*, 1949 Wis. L. Rev. 634.

3 FIRST SEMI-ANNUAL REPORT OF THE NEIGHBORHOOD LEGAL SERVICE PROJECT: UNITED PLANNING ORGANIZATION 8 (Washington, D.C., June 30, 1965) (United Planning Organization is the parent corporation of the Washington, D.C., neighborhood law office program); Grosser, *The Need for a Neighborhood Legal Service and the New York Experience*, CONFERENCE PROCEEDINGS: THE EXTENSION OF LEGAL SERVICES TO THE POOR 73-81 (Department of Health, Education and Welfare, 1964) (hereinafter referred to as HEW CONFERENCE); Parker, *The New Haven Model*, HEW CONFERENCE 87-93; Wells, *The Boston Neighborhood House Proposal*, HEW CONFERENCE 81-86. See generally WALD, LAW AND POVERTY 1965; REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY (Washington, D.C. June 23-25, 1965).

4 *Ibid.* See also Cahn & Cahn, *The War On Poverty: A Civilian Perspective*, 73 YALE L. J. 1317, 1334-52 (1964); Grosser, *Need For a Neighborhood Legal Service and the New York Experience*, 15 BUFFALO L. REV. 146, 148 (1965).

However, the execution of such a program raises several inter-related ethical problems: (1) Does it contravene the restriction imposed upon lay intermediaries by impairing the relation between attorney and client and by fostering a conflict of interest? (2) Does it violate the traditional rule which prohibits a corporation from practicing law? (3) Does it encourage illegal solicitation and the stirring up of litigation? (4) Does the implementation of the plan promote the "commercialization" of the legal profession? It shall be the purpose of this note to illustrate that the policy and fears which underlie both the case law and the applicable canons of legal ethics were not meant to circumscribe the activities of the neighborhood law office.

II. Lay Intermediaries and the Unauthorized Practice of Law by a Corporation

A. Lay Intermediaries

Typically, the neighborhood law office functions as a semi-autonomous component of a non-profit corporation which coordinates the overall anti-poverty program in the selected community. The neighborhood law office, as an independent operating division of a program offering a wide spectrum of integrated social services, maintains its own board of directors usually composed of members of the local bar.⁵ Through the non-profit corporation which finances the entire project, the legal division works in close conjunction with other lay agencies which provide non-legal services to lower economic groups with the result that there exists a close liaison between social workers and the neighborhood lawyer.⁶ The close integration between the lawyer and the corporation, and the fact that the project is funded by the corporation, raise a serious question as to whether or not such an arrangement constitutes the control of an attorney by a lay intermediary. The doctrine which condemns the existence of a "lay intermediary" is clearly expressed in Canon 35 of the Canons of Professional Ethics of the American Bar Association:

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 indigents are not deemed such intermediaries.⁷

⁵ See, e.g., FIRST SEMI-ANNUAL REPORT OF THE NEIGHBORHOOD LEGAL SERVICES PROJECT: UNITED PLANNING ORGANIZATION 2-4 (Washington, D.C., June 30, 1965). Parker, *op. cit. supra* note 2, at 18-25.

⁶ See Bennett, *Paths to Mutual Understanding and Cooperation*, HEW CONFERENCE 154; Downs, *Providing the Social Worker with Legal Understanding: Specific Need*, HEW CONFERENCE 140; Shapiro, *Specific Technique for Providing Social Workers with Legal Perspective*, HEW CONFERENCE 148. See generally WALD, *op. cit. supra* note 3.

⁷ Canon 35, ABA, CANONS OF PROFESSIONAL ETHICS (1966) (This and all subsequent citations to the Canons are to the latest edition of vol. III of the Martindale-Hubbell Law Directory.) See also ABA Committee on Unauthorized Practice of Law, *Informative Opinion No. A of 1950*, 36 A.B.A.J. 677 (1950).

The problem of whether the corporation which funds the neighborhood law office is a "lay intermediary" within the meaning of Canon 35 has been decided in *Azzarello v. Legal Aid Soc'y*,⁸ where it was held that a legal aid society and its defender department which referred indigents to lawyers working on a salary arrangement with the society was not an illegal "lay intermediary" but rather a "charitable society" within the exception of Canon 35.⁹ As a non-profit corporation similarly dedicated to the free extension of legal services to the indigent, the lay agency which finances the neighborhood law program is clearly within the protection of Canon 35.

B. The Unauthorized Practice of Law By A Corporation

The corporation which funds the neighborhood law program faces an ancillary problem: As a corporation which is subsidizing the extension of legal services, is it engaged in the unauthorized practice of law? The antipathy of the Bar and the resistance of the courts to the arrangements by which a lay organization hires and employs attorneys are both based upon the fear that the interposition of a lay agency between attorney and client might seriously impair the relationship, and that it might encourage a conflict of interest for the attorney because he receives his compensation from the corporation and not from the client.¹⁰ To accurately determine the validity of such considerations and their applicability to the corporation involved with the neighborhood law project, it is necessary to examine the specific types of legal service plans which have been struck down by the courts and disapproved of by the Bar. It will be shown that as a charitable organization, the corporation does not threaten the interests protected by the canons and that, in view of the United States Supreme Court decisions in *NAACP v. Button*,¹¹ and *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*,¹² a plan such as the neighborhood law office is within the constitutional protections of the first and fourteenth amendments. In considering the issue of the unauthorized practice of law by a corporation, it is necessary to look to two analogous situations.

1. Corporations Providing Legal Services

The blanket proscription placed upon the practice of law by a corporation¹³ was clearly enunciated in the leading case of *In re Cooperative-Law Co.*¹⁴ which held that a corporation, organized for profit and admittedly engaged in the providing of legal services, was engaged in the unauthorized practice of law. The court focused upon the attorney-client relationship:

8 117 Ohio App. 471, 185 N.E.2d 566 (1962).

9 *Id.* at 570.

10 DRINKER, *LEGAL ETHICS* 162-63 (1953). See also Canon 47, ABA, *CANONS OF PROFESSIONAL ETHICS* (1966) which provides a lawyer shall not allow his name or services to be used in connection with the unauthorized practice of law by any lay agency.

11 371 U.S. 415 (1963).

12 377 U.S. 1 (1964), noted at 40 *NOTRE DAME LAWYER* 477 (1965).

13 See *e.g.*, CONN. GEN. STAT. ANN. § 51-88 (1958); LA. REV. STAT. §37:213 (1964); MASS. GEN. LAWS ANN. ch. 221, § 46 (Supp. 1965); MINN. STAT. ANN. § 481.02(2) (1958); N.H. REV. STAT. ANN. § 311:11 (1955); N.J. STAT. ANN. §2A:170-78 (1953); OHIO REV. CODE ANN. §1701.03 (Page repl. vol. 1964); PA. STAT. ANN. tit. 17 § 1608 (1962); UTAH CODE ANN. §78-51-40 (1953).

14 198 N.Y. 479, 92 N.E. 15 (1910).

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant.¹⁵

The Supreme Court of Illinois has similarly struck down an arrangement whereby a bank employed attorneys who performed a variety of legal services and collected attorney fees therefor.¹⁶ The same result was reached in *Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n*,¹⁷ where a credit association selected attorneys to make collections for its customers, fixed the fees, controlled all correspondence between attorney and client, and shared compensation from the collections without the customers ever knowing the identity of the attorneys.

The proscription laid down in *Cooperative* and *Richmond* has been consistently interpreted to include any corporation which furnishes legal services incidental to its principal business.¹⁸ The rationale underlying this position of the courts was cogently exposed in *State Bar Ass'n v. Connecticut Bank & Trust Co.*¹⁹ where the Supreme Court of Errors of Connecticut enjoined a bank which performed many legal services pursuant to its fiduciary duties through its salaried attorneys. Noting the position of the attorney who was primarily serving his employer (bank) and not the client (customer), the court concluded that "as [the corporation] cannot practice law directly, it cannot do so indirectly by

15 *Id.* at 483-84, 92 N.E. at 16. See also *In re* Opinion of the Justices, 289 Mass. 606, 613, 194 N.E. 313, 317 (1935), where the Supreme Court of Massachusetts noted:

The relation of an attorney to his client is pre-eminently confidential. In addition to adequate learning, it demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity, and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites.

See ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 303 (1961).

16 *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 474, 176 N.E. 901, 907 (1931): "The right to practice law attaches to the individual and dies with him. It cannot be made the subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance." See also *In re Otterness*, 181 Minn. 254, 232 N. W. 318 (1930), where it was held that a corporation cannot hire an attorney to conduct a general law practice for others for pay where the fees earned are received as income and profit by the corporation.

17 167 Va. 327, 189 S.E. 153 (1937). *Cf. In re Shoe Mfrs. Protective Ass'n*, 3 N.E.2d 746 (Mass. 1936); *Hospital Credit Exch., Inc. v. Shapiro*, 186 Misc. 658, 59 N.Y.S.2d 812 (Munic. Ct. N.Y. 1946); ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 294 (1958).

18 *People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922). *Doughty v. Grills*, 37 Tenn. App. 63, 260 S.W.2d 379 (1952); *Alamo Title Co. v. San Antonio Bar Ass'n*, 360 S.W.2d 814 (Tex. Civ. App. 1962); *San Antonio Bar Ass'n v. Guardian Abstract and Title Co.*, 156 Tex. 7, 291 S.W.2d 697 (1956); See also *DRINKER, op. cit. supra* note 10, at 161-62.

19 146 Conn. 556, 153 A.2d 453 (1959), *modifying* 145 Conn. 222, 140 A.2d 863 (1958). See also, *Frazee v. Citizens Fidelity Bank and Trust Co.*, 393 S.W.2d 778 (Ky. App. 1965). For similar decisions see *Annot.*, 85 A.L.R.2d 184 (1962).

employing competent lawyers to practice for it, since that would be an evasion which the law will not tolerate."²⁰

The evil at which these cases are directed is clearly not present in the operation of a neighborhood law office. Here the courts are attacking the *business* of supplying the legal services of attorneys by an unlicensed lay agency to others for a consideration. It becomes strikingly apparent that such schemes as those examined *supra* by their very nature engender a divided loyalty upon the attorney which lends itself to a conflict of interest and an alteration of the personal trust which must exist between a lawyer and his client. The personal attention and dedication which the law demands of a lawyer toward his client is clearly jeopardized by the interposition of a corporate intermediary in the context of these cases. The fear which underscores these decisions is plainly unwarranted in the situation of the neighborhood lawyer who is instructed to devote himself solely to the interests of his client.²¹ Although in detecting a conflict of interest these decisions turned on the fact that the attorney was receiving his fees from his employer, the absence of monetary interests in the neighborhood law program does not automatically preclude it from a conflict of interest. The neighborhood lawyer must be entirely free to advance his client's interests without fear of recrimination. As one authority has expressed it:

Every legal program must be as independent of outside influence as is possible. This means that while the legal service must be willing to coordinate its activities with the community action program and social agencies, it must be independent in its control and operation. In this way, the program will remain free to litigate cases involving not only private and public groups represented on the board of directors of the community action agency but conceivably, even the agency itself.

Moreover, the legal service must be willing and free to handle the most controversial cases. Lawyers representing affluent clients do not hesitate to challenge government statutes and regulations or the economic interests of even the most powerful groups. Our duty to not only the poor but to our profession demands that legal programs do no less for those who cannot afford to pay.²²

20 140 A.2d at 870-71. *But cf.* McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399 (1951) wherein the author states that a substantial portion of the bar is of the opinion that such corporate practice should be permitted.

21 See, e.g., FIRST SEMI-ANNUAL REPORT OF THE NEIGHBORHOOD LEGAL SERVICES PROJECT: UNITED PLANNING ORGANIZATION 3 (Washington, D.C., June 30, 1965): "Both the UPO Board of Trustees and the NLSP Board of Directors are precluded specifically from interfering in any manner with the attorney-client relationship once such a relationship is properly established between a client and an attorney on the staff of NLSP." See also Grosser, *supra* note 4, at 151-52:

[T]hose on the Board who urge discretion in dealing with the city and predict dire consequences for the organization are complemented by the legal advisory committee, which reminds the Board that once a lawyer has undertaken to represent a client (under policy set by the Board) the ethics of his profession permit nothing to interfere with the diligent pursuit of his client's interest.

22 Address by Theodore M. Berry, Director of Community Action Program, Office of Economic Opportunity, to the National Conference on Law and Poverty, June 23, 24, and 25, 1965, p. 7. See also, Anderson, *Legal Services and The War on Poverty*, 10 RES GESTAE 5, 7 (1966):

The culture of poverty is such that conflict between a legal service client and a government agency represented on the local CAP board, or even with the OEO itself, is not unlikely. Avoidance of any conflict of interest necessitates a clear separation between the legal services program and the CAP corporation—the lawyer

The relation of the neighborhood lawyer to his client will be the subject of a careful judicial scrutiny, and interference by anyone associated with the project must be avoided at all costs.

2. Membership Organizations Providing Legal Services to Members

The same reasons which have prompted the courts to forbid corporations to furnish legal services incidental to their principal business have been applied with equal force to non-profit membership organizations which retain lawyers to render services for their members as a group. Such arrangements have customarily been termed "group legal services" and have been defined as,

legal services performed by an attorney for a group of individuals who have a common problem or problems, or who have joined together as a means of best bargaining for a predetermined position, or who have voluntarily formed, or become members of an association with the aim that such association shall perform a service to its members in a particular field or activity, or through common interests it appears that the organization can gain a benefit to the members as a whole.

Examples of such organizations are labor unions, employer organizations, trade associations, teachers' groups, civil service employees or any body politic, members of a social club or of an automobile club, fraternal organizations and numerous other such associations. Included also may be groups who associate themselves for the purpose of establishing a plan of prepaid legal services to be rendered to individual members thereof, whether or not the members have a common interest in a certain field of activity.²³

Despite the absence of any dues, or formal contract of membership, the neighborhood law committee may be considered to be analogous to such a membership since those who seek the services of the neighborhood lawyer are bound together by common interests — their indigency and their need for legal representation. Moreover, because questions involving the attorney-client relationship, conflicts of interest and the unauthorized practice of law are squarely in issue in any type of membership organization retaining or recommending counsel for its members, a discussion of the interpretations placed by the courts upon such arrangements is most relevant.

must be free to pursue his client's interest against the Welfare Department or the Mayor without regard to their "presence" on the CAP board.

The attorney-client relation also extends to protection against disclosure by the neighborhood lawyer to social workers with whom he is working. This problem is recognized by the Washington project:

The attorney-client privilege forbids the revelation of what a client says in confidence by NLSP lawyers to workers in other social programs, even if this might be thought to be socially valuable. . . . [T]he lawyer's duty to his client may require NLSP lawyers to counsel litigating an issue where a UPO-sponsored program will take the opposing side. The fact that any NLSP client can get review of the standards of the free legal service provided him through the D.C. Bar Grievance Committee means that NLSP cannot share its responsibility with UPO for complete adherence to the lawyers' canons of professional ethics.

ATKESON, REPORT TO NLSP BOARD OF DIRECTORS: RELATIONS OF OTHER UNITED PLANNING ORGANIZATION (UPO) PROGRAMS TO NEIGHBORHOOD LEGAL SERVICE PROGRAM (NLSP) 8-9 (Washington, D.C., May 1, 1965). See also Canon 6, ABA, CANONS OF PROFESSIONAL ETHICS (1966) (Adverse Influences and Conflicting Interests).

²³ *Group Legal Services*, 39 CAL. S.B.J. 639, 661 (1964).

Group legal service plans fall generally into three categories: (1) Employers or labor unions which directly provide legal services to their employees or members;²⁴ (2) Organizations which engage lawyers who extend services to members of the organizations in their individual matters; (3) Organizations which recommend services of attorneys not employed by the organization who charge reduced fees to organization members.²⁵ The latter two bear relevance for purposes of the neighborhood law committee.

Such arrangements have consistently been disapproved by the courts. A plan according to which apartment house owners paid dues to an association in exchange for legal services relating to problems arising out of their common interests as apartment house owners has been held violative of the ban on the practice of law by a corporation.²⁶ In *People ex rel. Courtney v. Association of Real Estate Taxpayers*,²⁷ a non-profit association was formed by interested real-estate owners to resist burdensome property taxes through litigation. The association collected annual dues, selected certain attorneys and controlled the institution of suits. Despite its non-profit nature, the Supreme Court of Illinois relied heavily on *People ex rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*,²⁸ to conclude that a corporation cannot practice law: "The fact that the respondent was a corporation organized not for profit does not vary the rule."²⁹ Similarly, a non-profit motor club which offered legal services to its members who might be arrested for violations of a motor vehicle law, has been found to be improperly engaged in the business of hiring lawyers to practice law for its members.³⁰ Under a similar scheme, an automobile association showed that it never hired attorneys but merely recommended them and took no part in the management of the case, but was nevertheless held engaged in the illegal practice of law.³¹ The court considered the association to be a lay intermediary, "selling"

24 This type of arrangement is often forbidden by statute. See e.g., MD. CODE ANN. art. 27, § 14 (Supp. 1965). See Note, *The Emergence of Lay Intermediaries Furnishing Legal Services to Individuals*, 1965 WASH. U.L.Q. 313, 316.

25 Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*. 63 COLUM. L. REV. 973, 980 (1963).

26 *Dworken v. Apartment House Owners Ass'n*, 28 Ohio N.P. (n.s.) 115 (C.P. 1930). *aff'd*, 38 Ohio App. 265, 176 N.E. 577 (1931).

27 354 Ill. 102, 187 N.E. 823 (1933). *But see* *Vitaphone Corp. v. Hutchinson Amusement Co.*, 28 F. Supp. 526 (D.Mass. 1939).

28 344 Ill. 462, 176 N.E. 901 (1931). See text accompanying note 16 *supra*.

29 354 Ill. 102, 110, 187 N.E. 823, 826 (1933).

30 *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935). See also *People ex rel. Chicago Bar Ass'n v. Motorists' Ass'n*, 354 Ill. 595, 188 N.E. 827 (1933) (nonprofit corporation organized to provide its members legal services in defending inquests and arrests and in taking care of insurance, providing advice and other legal services, held engaged in unlawful practice of law); *Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936) (motor club maintaining collection agency and law department through which free legal advice was given to members improperly engaged in the practice of law); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R.I. 122, 179 Atl. 139 (1935) (proprietors of automobile service association contracting with customers to furnish legal advice and assistance relating to the operation of an automobile to be rendered by an attorney selected by the association are illegally practicing law). For a criticism of these decisions which reject arrangements providing legal services by a non-profit association, see Weihofen, *Practice of Law by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119 (1934). See also, Leviton, *Automobile Club Activities: The Problem from the Standpoint of the Bar*, 5 LAW & CONTEMP. PROB. 11 (1938).

31 *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936). *But see In re Thibodeau*, 295 Mass. 374, 3 N.E.2d 749 (1936). See also, ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 8 (1925).

the services of certain lawyers pursuant to the promotion of its own membership:

The member does not buy legal services of the attorney. The respondent buys and pays for legal services in behalf of all its members. It could not furnish those services in conformity to its contracts with its members unless it was dealing in the purchase and sale of legal services to be rendered by lawyers in its behalf and upon its credit. This method of conducting its business conclusively stamps the activities of the respondent as the unauthorized practice of the law. It buys and sells the practice of the law on a commercial basis as essentially as a merchant buys and sells his wares.³²

A corporation organized for the collection of accounts receivable due its members which employs an attorney and sends agents into the business community to solicit members who are given legal defense in all civil or criminal actions brought against them in exchange for their membership fee, has similarly been adjudged to be illegally practicing law.³³

Again, it is clear that the pecuniary advantage which an association enjoys because of its capacity to afford its members legal representation lends itself toward condemnation as a commercial promotion of legal services. In order to maintain a sufficient membership so that competent attorneys may be retained, an association, be it non-profit or not, is forced to actively encourage people to join. The effect is the lay solicitation of legal business for the attorneys representing the association. Under such a three-party arrangement, the client selects the intermediary and not his attorney who is selected by the association. Moreover, the attorney is not compensated according to the quality of work rendered, time spent, etc. — the traditional criteria according to which attorneys are normally paid.³⁴ While it is true that the neighborhood lawyer is also salaried and receives no compensation directly from the client, such a practice has been condoned because of a superseding public policy. Thus in *Azzarello v. Legal Aid Soc'y*³⁵ a legal aid society employed attorneys on a salary basis to render legal assistance gratuitously to indigents. In holding that the Society was not engaged in the unauthorized practice of law, the Court emphasized that,

The need for the services of a lawyer is one of the realities of life in a democratic state. Ours is a government of law. The rights of all are thus defined and to maintain and protect such rights, recourse to the courts and those licensed to practice law is a frequent and necessary occurrence.³⁶

32 *Id.* at 50, 3 N.E.2d at 274. *But see* *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920 (Iowa 1958) (no violation of attorney-client relation where insurer selects and pays attorney to represent insured in prosecuting his claim).

33 *State ex rel. Lundin v. Merchants Protective Corp.*, 105 Wash. 12, 177 Pac. 694 (1919). See also *In re Gill*, 104 Wash. 160, 176 Pac. 11 (1918). See generally Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, 72 HARV. L. REV. 1334 (1959).

34 See Canon 12, ABA, CANONS OF PROFESSIONAL ETHICS (1966) (Fixing the Amount of the Fee).

35 117 Ohio App. 471, 185 N.E.2d 566 (1962).

36 *Id.* at 476, 185 N.E.2d at 569. Significantly, the court found that the attorney-client relation remained purely confidential even though the client did not select his own personal attorney:

The lawyer who renders the service for the indigent person is his lawyer, the relationship is that of attorney and client to whom the lawyer owes the same fidelity as if the client was able to pay the proper fee and the client had engaged the services of the lawyer himself. *Id.* at 478, 185 N.E.2d at 570.

This decision exposes the legal significance which has been placed upon the purposes of a legal aid organization — the social value of the interest which is being served.

III. A Constitutional Dimension Is Added

The decision of the United States Supreme Court in *NAACP v. Button*³⁷ suddenly removed the question of the recommendation of lawyer by lay agents in membership organizations from the narrow battleground of Canon 35 and the unauthorized practice of law, and placed it within a broad constitutional framework. Although the decision was primarily concerned with solicitation of legal business,³⁸ the court was also confronted with serious problems of lay intermediaries and practice of law by corporations. The NAACP, as a purely non-profit corporation dedicated to the advancement of the civil rights of the Negro, was actively participating in a program to promote and guide litigation which might benefit its cause. Pursuant to its resistance to integration, the Virginia legislature expanded the scope of that state's barratry statute so as to include within its definition of solicitation of legal business the acceptance of employment or compensation from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it.³⁹ In a divided opinion, Mr. Justice Brennan, speaking for the majority, held that the amended statute abridged the freedoms of the first amendment protected against state action by the fourteenth.⁴⁰ The Court focused upon the desirability of the purposes of the NAACP's program — the elimination of racial discrimination:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.⁴¹

Although the legal staff of the organization directed actions pertaining to racial discrimination, offered the services of attorneys elected and paid by it, and controlled the conduct of such litigation, the Court ruled these were modes of expression and association protected by the first and fourteenth amendments, that the statute infringed the rights of petitioner and its members and lawyers to associate "for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."⁴² The Court refrained from an explicit determination of the impact of its decision upon former precedents banning lay intermediaries⁴³ but raised serious doubts as to their validity:

³⁷ 371 U.S. 415 (1963).

³⁸ See text accompanying notes 51 *et seq.*, *infra*.

³⁹ 371 U.S. 415, 423-24 (1963).

⁴⁰ *Id.* at 428-29.

⁴¹ *Id.* at 429.

⁴² *Id.* at 428.

⁴³ See, *e.g.*, *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935); *People ex rel. Courtney v. Association 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).

We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights.⁴⁴

It is submitted that the constitutional right of an indigent to be made aware of the availability of legal assistance is of equal constitutional significance as that of a Negro to be channeled to the legal staff of the NAACP. There can be no basis for a distinction between the rights of a racial minority and those of an economic minority within the meaning of the first amendment.

While placing this group activity within the protection of the first amendment, the Court immeasurably expanded the thrust of its holding by also considering the traditional arguments employed to condemn the use of lay intermediaries and succinctly noted: "Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, . . . derives from the element of pecuniary gain."⁴⁵ As monetary considerations were found absent in the structure of the NAACP and its legal staff, the Court found no violation of the prohibition against lay intermediaries. It has been suggested that by its preoccupation with considerations of pecuniary gain, the Court seriously undermined the future applicability of Canon 35 to many lay intermediaries previously condemned.⁴⁶ However, as a non-profit charitable organization actively engaged in a laudable effort to bring legal facilities to the economically deprived, the neighborhood law office and the corporation with which it operates appear to be within the *non-constitutional* as well as the constitutional basis of *Button*.

The constitutional blessing bestowed upon the NAACP as a lay intermediary in *Button* was magnified by the same Court in *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*⁴⁷ which extended the same protection to the conduct of personal injury litigation. Here the Court was faced with a more objectionable arrangement than in *Button*. At issue was the 1930 plan of the Brotherhood of Railroad Trainmen which was avowedly created to secure for union members their rights under the Federal Employer's Liability Act. According to the plan, the United States was divided into sixteen regions and the Brotherhood selected, on the advice of local lawyers and federal and state judges, a lawyer or firm in each region known for honesty and competence in representing plaintiffs in railroad personal injury litigation. A representative of the union would contact a worker who had been injured, suggest that the claim not be settled until a lawyer had been informed and recommend a lawyer whom the Brotherhood had selected for that region. The plan had been successfully attacked on several occasions as impairing the attorney-client relation and as vio-

44 371 U.S. 415, 442 (1963).

45 *Id.* at 441.

46 See Note, *Group Legal Services*, 79 HARV. L. REV. 416, 420 (1965); Note, *The Emergence of Lay Intermediaries Furnishing Legal Services to Individuals*, 1965 WASH. U.L.Q. 313, 324; see generally Note, *The South's Amended Barratry Laws: An Attempt to End Group Pressure Through The Courts*, 72 YALE L.J. 1613 (1963).

47 377 U.S. 1 (1964).

lative of Canon 35's prohibition against lay intermediaries.⁴⁸ Citing *Button* as its point of departure, the Court broadened the first amendment protections of free speech, petition and association to include this particular form of intermediary:

The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right to assist and advise each other.⁴⁹

The Court felt strongly that it was necessary to protect the associational right of the member "to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest."⁵⁰ Whereas the neighborhood legal project is arguably within the "political expression" protection of *Button*, surely it is effectuating a "basic public interest" by assisting indigents in enforcing rights granted them under all federal laws, and is not to be considered a threat to legal ethics under the rule handed down in *R.R. Trainmen*.

In sustaining a non-profit intermediary which employed attorneys and another which recommended certain attorneys, the Supreme Court has unmistakably enunciated a constitutional protection which envelops the activities of the neighborhood law office in its demanding task of extending legal services to the destitute.

IV. Solicitation, Advertising and the Stirring Up of Litigation

The worthy objective of providing effective legal service to persons otherwise without the means or foresight to seek legal assistance necessarily requires adequate means for distribution and dissemination of information to make publicly known the accessibility of legal services and to educate the community in basic legal rights so that its members may identify potential legal difficulties. The public's general ignorance of the law as an effective means for redress of their grievances may even require more affirmative action by the neighborhood lawyer:

A neighborhood lawyer may desire, as part of a community action education program, to give lectures to indigenous groups on their legal rights and on the availability of free legal services; to advise individuals

48 *In re O'Neill*, 5 F. Supp. 465 (E.D.N.Y. 1933); *Hulse v. Brotherhood of R.R. Trainmen*, 340 S.W.2d 404 (Mo. 1960); *State v. Lush*, 170 Neb. 376, 103 N.W.2d 136 (1960); *Doughty v. Grills*, 37 Tenn. App. 63, 260 S.W.2d 379 (1952); *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508 (1950); *In re Petition of Committee on Rule 28 of the Cleveland Bar Ass'n*, 15 Ohio L. Abs. 106 (Ohio App. 1933). *But see Atchison, T. & S. F. Ry. v. Jackson*, 235 F.2d 390 (10th Cir. 1956); *Dombey, Tyler, Richards & Grieser v. Detroit, T. & I. R.R.*, 226 F. Supp. 345 (S.D. Ohio 1964); *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508, 514, 518 (Carter J., dissenting) (Traynor, J., dissenting).

49 377 U.S. 1, 6 (1964).

50 *Id.* at 7.

in such meetings to engage in litigation concerning welfare, landlord-tenant, and other problems affecting them; to encourage them to organize block clubs, cooperatives, or other groups which may later take legal actions against various abuses. He may go further and invite them to use his service in such litigation. He may also wish to utilize the closer community contacts of other personnel of the poverty program such as social workers and community organizers hired from among the poor themselves; he may desire to educate them to spot real or potential legal difficulty and to bring the person affected to him for counsel.⁵¹

Such a program encompasses several integrated activities and immediately poses the question of whether such practices would result in neighborhood lawyers soliciting, advertising and stirring up litigation within the prohibitions of Canons 27 and 28.⁵²

Historically, the ban on advertising and solicitation grew out of an assumption that the members of the legal profession constituted an exclusive fra-

51 WALD, *op. cit. supra* note 3, at 100.

52 Canon 27, ABA, CANONS OF PROFESSIONAL ETHICS (1966), provides:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended; with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; foreign language ability; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Standing Committee on Law Lists may be treated as evidence that such list is reputable.

It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office, to so use the designation "patent attorney" or "patent lawyer" or "trademark attorney" or "trademark lawyer" or any combination of those terms.

Canon 28, ABA, CANONS OF PROFESSIONAL ETHICS (1966), states:

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 disreputable 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, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

ternity and that such practices were undignified for men of such a high calling.⁵³ Today solicitation has come to mean the advertising for any employment either directly, or indirectly through agents,⁵⁴ and is often prohibited by statute.⁵⁵ Solicitation has been condemned on the theory that it stirs up litigation, encourages nonmeritorious claims, corrupts public officials, cheapens the image of the legal profession, and harms the client.⁵⁶ Although not condemned at common law,⁵⁷ solicitation has grown out of the common law offenses of champerty, maintenance and barratry.⁵⁸

The problem created by the neighborhood law committee however is one of indirect solicitation occurring when a lay intermediary, uncontrolled by the dictates of the canons of legal ethics, advertises and promotes the availability of certain lawyers to handle certain kinds of claims. Such a practice allows a lay organization to encroach upon the potential legal business of the independent practitioner who is forbidden to advertise or solicit.⁵⁹ Such arrangements, which encourage unfair competition by their very nature, have repeatedly been struck down.⁶⁰ The issue is thus presented whether the lay corporation, whose field workers inform indigents of the availability of the legal facilities and refer them to the neighborhood law office, is engaged in illegal solicitation.

In a few isolated instances, solicitation, advertising and the stirring up of litigation by non-profit intermediaries have been permitted because of the social desirability of their objectives.⁶¹ Moreover, past opinions of the American Bar

53 DRINKER, *op. cit. supra* note 10, at 210.

54 See *In re Cohn*, 10 Ill.2d 186, 139 N.E.2d 301 (1957) (lawyer not allowed to permit an investigator to carry contract forms which he entices injured parties to sign before conferring with any attorney). See also, ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 147 (1935).

55 See, e.g., MINN. STAT. ANN. § 481.03 (1958); S.C. CODE § 56-145 (1962).

56 See generally Note, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958).

57 See *Chreste v. Louisville Ry.*, 167 Ky. 75, 180 S.W. 49, 53 (Ky. App. 1915).

58 It is important to distinguish and identify these offenses and their inapplicability to the neighborhood law project. Barratry has been defined as the criminal offense of stirring up litigation with the malicious motive of oppressing or harassing another no matter how well founded the suit may be. *State v. Chitty*, 17 S.C.L. (1 Bailey) 379 (1930). Champerty has been described as "a bargain with a plaintiff or defendant, *campum partite*, to divide the land or other matter sued for between them, if they prevail at law: whereupon the champertor is to carry on the party's suit at his own expense." 4 BLACKSTONE, COMMENTARIES 135. "Maintenance is . . . an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. . . ." *Id.* at 134-35. As a non-profit corporation dedicated only to informing people of lower-income classes of the availability and propriety of legal services, the neighborhood law project lacks all the required elements necessary to constitute one of these common-law offenses. This is not to say however, that the neighborhood lawyer is completely more immune from such charges than is any licensed attorney. But if he operates within the framework of the neighborhood law office and the guidelines set by it, he is without the ambit of the proscriptions contained in barratry, champerty and maintenance.

59 DRINKER, *op. cit. supra* note 10, at 218; Hardman, *Solicitation and Advertising and the Corporate Client*, 17 BUS. LAW. 603 (1962); Llewellyn, *The Bar's Trouble, and Poulitices — and Cures*, 5 LAW & CONTEMP. PROB. 104, 112-13 (1938); *Report of the Standing Committee on Unauthorized Practice of the Law*, 75 A.B.A. REP. 242 (1950).

60 See, e.g., *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935); *Dworkin v. Apartment House Owners Ass'n*, 28 Ohio N.P. (n.s.) 115 (C.P. 1930), *aff'd*, 38 Ohio App. 265, 176 N.E. 577 (1931).

61 *In re Ades* 6 F. Supp. 467 (D. Md. 1934) (lawyer may volunteer services to litigant accused of murder and without financial means); *Gunnels v. Atlanta Bar Ass'n*, 191 Ga. 366, 12 S.E.2d 602 (1940) (bar association permitted to offer its services free of charge to persons victimized by usurious moneylender.) The American Bar Association has approved a plan by

Association's Committee on Professional Ethics and Grievances indicate that the activities of the neighborhood law program would be similarly approved on the same basis. In sanctioning the plan of a local bar association by which several means of advertisement were employed to acquaint the lay public with the expert service the legal profession is able to render, the Committee said:

We recognize a distinction between teaching the lay public the importance of securing legal services preventive in character and the solicitation of professional employment by or for a particular lawyer. The former tends to promote the public interest and enhance the public estimation of the profession. The latter is calculated to injure the public and degrade the profession.⁶²

A subsequent opinion condoned a lawyer reference service established by another local bar association, provided that the service was made available to all members of the bar, because of the desirability of giving the layman an understanding of the benefits of legal services.⁶³ It is significant that the lawyers there had a direct pecuniary interest in the education of the public as to the advisability of seeking an attorney but the Committee felt that this interest was outweighed by a more important public policy:

While the fact that incidental benefits may flow to the members of the profession does not condemn such a plan, the primary object thereof, if it is to be advertised, must be benefit to the public and not to the members of the profession or any particular or selected group thereof.⁶⁴

Although the Committee has rejected a practice according to which several lawyers advertised and solicited professional employment at reduced rates for persons unable to pay the usual fees because the solicitation specifically named the lawyers,⁶⁵ a similar plan which did not name the lawyers involved has been

which attorneys associated with the American Liberty League publicly advertised free legal services to those challenging the constitutionality of New Deal legislation. ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 148 (1935). The language of this opinion brings the neighborhood law project squarely within its protection:

The Canon proscribing the solicitation of business is aimed at commercialization of the profession. It announces the principle that the practice of the law is a profession and not a trade, and that the effort to obtain clients by advertisement is beneath the dignity of the self-respecting lawyer. It has to do, moreover, with the effort to obtain remunerative business—the endeavor to increase the lawyer's practice with the end in view of enlarging his income. It certainly was never aimed at a situation such as this, in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed. *Id.* at 311. (Emphasis added.)

See also Rt. Hon. Lord Parker, *The Development of Legal Aid in England Since 1949*, 48 A.B.A.J. 1029 (1962), for a discussion of the English system according to which a person in need of legal services can obtain them from a lawyer whose fees will be paid out of a public fund—all under the careful supervision of the solicitors' organization, the Law Society. See generally Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L. J. 574 (1949).

62 ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 179 (1938).

63 ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 227 (1941).

64 *Id.* at 458.

65 ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 191 (1939).

approved. In granting approval, the committee stated its rationale thusly:

We are of the opinion that the plan here presented does not fall within the inhibition of the Canon. No solicitation for a particular lawyer is involved. The dominant purpose of the plan is to provide as an obligation of the profession competent legal services to persons in the low-income groups at fees within their ability to pay . . . There is to be no advertisement of the names of the lawyers constituting the panel. The general method and purpose of the plan only is to be advertised.⁶⁶

Again the lawyers involved were receiving compensation from their clients directly but the Committee was of the opinion that the social interest in educating the public as to the necessity of legal services was more important. The protection afforded by these opinions should apply most directly to the neighborhood law committee where the lawyer receives no compensation other than his salary. It is important however to point out that the standards of indigency employed by the neighborhood law office must be such that the practice of the individual lawyer who relies heavily on the lower-income group will not be invaded.⁶⁷ In such a case, the special consideration given the neighborhood law office as a protected form of legal aid would be inapplicable since there is no public interest in providing free legal services to someone who is already capable of paying for them.

It becomes clear that the inhibitions of Canons 27 and 28 are directed at the abuse of professional self-aggrandizement and that by serving a very worthwhile purpose, the neighborhood law project is not ethically objectionable:

[I]t may be suggested that traditional notions about solicitation do not fit comfortably the plight of the poor and the alienated. Programs of consumer and slum tenant education may generate "legal business," to be sure,

⁶⁶ ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 205 (1940).

⁶⁷ The Washington, D.C., project sets a standard of \$55.00 per week take-home pay for a single person, \$70.00 per week take-home pay for a married couple, and, for families with dependent children \$70.00 per week take-home pay plus \$15.00 per week for each dependent. FIRST SEMI-ANNUAL REPORT OF THE NEIGHBORHOOD SERVICES PROJECT: UNITED PLANNING ORGANIZATION 5 (Washington, D.C., June 30, 1965). The New Haven project screens applicants on the basis of standards applied by the municipal legal aid bureau. Parker, *The New Haven Model*, HEW CONFERENCE 91. The Office of Economic Opportunity explicitly provides: "The standard should not be so high that it includes clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter." OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES 19 (1966). If the guidelines set down are adhered to, it appears that no serious economic competition will result:

That portion of the bar which draws clients from slum neighborhoods will doubtless feel threatened by such an institution as the neighborhood law firm. Experience both with CPI and with New York's Mobilization for Youth indicates that the fears of economic competition need not materialize and that, in fact, a strong cooperative relationship between the local bar and the neighborhood legal services is likely to evolve. Such cooperation is indeed necessary, and it may be of great utility for the neighborhood firm not only to refer clients to local attorneys, but also to utilize local attorneys in a consultative and auxiliary capacity in order to reduce the case load it would otherwise have to carry.

Cahn and Cahn, *The War On Poverty: A Civilian Perspective*, 73 YALE L. J. 1317, 1349 (1964). But see Gerhart, *Practicing Law: The Case for the Individual Practitioner*, 43 A.B.A.J. 793 (1957).

but this is a world away from the evils against which the relevant canons were drawn.⁶⁸

The rigid prohibition which the law has placed upon the extension of legal services through a lay organization has been severely criticized by several commentators on the ground that strict adherence to such a principle unduly hampers the availability of urgently needed legal services to people of little income.⁶⁹

The related issues of unprofessional solicitation and stirring up of litigation also reached the United States Supreme Court in *Button v. NAACP*⁷⁰ and *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*.⁷¹ In *Button*, as has been stated *supra*, the NAACP was actively engaged in encouraging certain forms of litigation and recommending its own attorneys and that such activities were judicially sanctioned as "modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics."⁷² The majority ruled that the Virginia statute prohibiting solicitation of legal business by any organization was an unconstitutional restriction upon the use of litigation to inform people of their legal rights and liabilities: "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."⁷³ Solicitation was thus sustained as "a means of achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country."⁷⁴ Surely the protection extended to the organizational activity of the NAACP would include the form of solicitation and encouragement of litigation undertaken by the neighborhood law project. The urging of Negroes to redress their racial grievances through litigation deserves constitutional protection no more than do the rights of the impoverished to professional assistance to identify their legal problems and be directed to sources of help. Since recourse to litigation is thus found to be within the freedoms of speech and association of the first amendment, within this context the solicitation and encouraging of litigation by the indigent is the employment of a "constitutionally privileged means of expression to secure constitutionally guaranteed civil rights."⁷⁵

It is most significant that although the *Button* Court rested its holding primarily upon constitutional grounds, it also fortified its decision by defending the activities of the NAACP on ethical grounds: "[F]or a lawyer to attempt to reap gain by urging another to engage in private litigation . . . seems to be the

68 Frankel, *Experiments in Serving the Indigent*, 51 A.B.A.J. 460, 463 (1965).

69 See generally Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973 (1963); Turrentine, *Legal Service for the Lower-Income Group*, 29 ORE. L. REV. 20 (1949); Weihofen, *supra* note 30.

70 371 U.S. 415 (1963). See text accompanying notes 37-46 *supra*.

71 377 U.S. 1 (1964). See text accompanying notes 47-50 *supra*.

72 371 U.S. 415, 428-29 (1963).

73 *Id.* at 429.

74 *Ibid.*

75 *Id.* at 442.

import of Canon 28”⁷⁶ but, “Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain.”⁷⁷ By identifying the condemned conduct of Canon 28 in terms of pecuniary gain and malicious intent, the Court lends further support to the effect that solicitation of the neighborhood law project, where the lawyers are salaried and receive no compensation for advancing litigation, is beyond the ambit of the unethical proscriptions of the Canons.

The exemption accorded the solicitation and stirring of litigation in *Button* was expanded in *R.R. Trainmen* where the Supreme Court held that a non-profit intermediary could send agents to visit injured workers, advise them of their legal rights, and systematically refer them to union-sponsored attorneys for representation in litigation under the Federal Employer’s Liability Act. It must be pointed out that although the attorneys of the Brotherhood were not directly employed as such, the union could nevertheless exert substantial economic pressure upon them by its power to channel and direct the litigation of its members. The Brotherhood claimed it had broken all financial ties with the regional counsel since previous decisions which considered the plan violative of solicitation standards were based in large part on the fee-splitting agreements which existed between the union and the regional counsel.⁷⁸ While the activities of the Brotherhood did not appear to fall within the narrow guidelines of *Button* — the sanction of solicitation and the stirring up of civil rights litigation as a constitutionally protected form of political expression — the United States Supreme Court found that solicitation by an organization of the personal injury claims of its members in order to avoid their victimization by unscrupulous claims agents and incompetent attorneys should also be placed within a constitutional framework:

The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right to assist and advise each other.⁷⁹

Surely the associational right which is advanced by informing residents of low-income neighborhoods of their problems and facilitating their representation before courts, administrative agencies and welfare boards is as valid as that of advising railroad workers of the pitfalls in immediate settlements of their personal

⁷⁶ *Id.* at 441.

⁷⁷ *Id.* at 443.

⁷⁸ See *e.g.*, *In re O’Neill*, 5 F. Supp. 465 (E.D.N.Y. 1933) (15% for attorney, 5% for union); *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508 (1950) (19% for attorney, 6% for union); *In re Brotherhood of R.R. Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958) (25% for attorneys who paid investigators on a *quantum meruit* basis). The union in the present case claimed however, that it had severed all financial ties with the regional counsel in accordance with the rules set forth in *In re Brotherhood of R.R. Trainmen*, *supra*.

⁷⁹ 377 U.S. 1, 6 (1964).

injury claims.⁸⁰ Indeed, the language of the Court impliedly expands the scope of its holding beyond the mere protection of a particular lay organization's right to recommend attorneys for personal injury litigation under a certain federal statute:

Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, . . . and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics.⁸¹

The evil which the Court is trying to correct, that created by ignorance of laymen as to their "rights granted them under federal laws," is vividly present in the slum areas where the uninstructed poor live in constant unawareness of their rights under the law.⁸²

By means of a newly discovered constitutional dimension, the decisions in *Button* and *R.R. Trainmen* have unquestionably altered the historical structure of the law regulating the lay intermediary, solicitation and the stirring up of litigation. Admittedly, the courts should restrain schemes involving solicitation, advertising, stirring, etc., which plainly encourage fee-splitting arrangements and the promotion of purely commercial interests while not advancing any appreciable public interest.⁸³ However, the majority in *Button* and *R.R. Trainmen* have appreciated the unsoundness of a sweeping proscription upon all solicitation and that some forms of legal service satisfy a genuine need for adequate legal assistance which would otherwise remain unfulfilled. The neighborhood law program focuses upon the individual benefit to the client and carefully avoids any possible aggrandizement of staff attorneys. By infusing constitutional elements of elasticity into the canons, the Supreme Court has set forth ascertainable guidelines within which the neighborhood law program, as a non-profit corporation dedicated to the free education of residents of low-income neighborhoods, may effectively operate.⁸⁴

80 For a discussion of the evils and abuses which faced an injured railway worker, see Bodle, *Group Legal Services: The Case For BRT*, 12 U.C.L.A. L. REV. 306 (1964). Compare paper delivered by Allison Dunham, *Consumer Credit Problems of the Poor: Legal Assistance as an Aid in Law Reform*, National Conference on Law and Poverty, Washington, D.C., June 23, 24 and 25, 1965; Paper delivered by Hon. Justine Polier, *The Legal Needs of the Poor, Problems Involving Family and Child*, National Conference on Law and Poverty, Washington, D.C., June 23, 24, and 25, 1965; WALD, LAW AND POVERTY 1965: REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY 6-41 (Washington, D.C., June 23-25, 1965).

81 377 U.S. 1, 7 (1964).

82 See Wickenden, *The Indigent and Welfare Administration*. HEW CONFERENCE 41-49.

83 See text accompanying notes 16-30 *supra*.

84 It must be noted that the Supreme Court did not expressly approve solicitation but only the advising and recommending of certain attorneys. Upon remand of the *Brotherhood* case, the lower state court of Virginia distinguished between recommendation and solicitation, approving only the former, and thus gave the opinion of the Supreme Court its narrowest possible interpretation. But the distinction between the active recommendation and solicitation is basically illusory. See Note, *The Emergence of Lay Intermediaries Furnishing Legal Services to Individuals*, 1965 WASH. U.L.Q. 313, 328. One commentator has predicted that the approval set down in the *Brotherhood* decision will soon be extended to profit-making organizations as well. Markus, *Group Representation by Attorneys as Misconduct*, 14 CLEV.-MAR. L. REV. 1, 21 (1965).

V. Commercialization

Underscoring the ethical considerations associated with the unauthorized practice of law by a corporation, and the lay intermediary who solicits legal business, is the fear that by channeling the legal problems of a designated group of society to the neighborhood law office, the traditional practice by which a layman selected his own personal attorney and paid him directly from his own pocket will be abandoned, thereby effectuating a detrimental "commercialization" of the profession. However, consideration must be given to the inescapable fact that strict adherence to a literal interpretation of the canons is no longer workable if the poor man is to be afforded effective legal assistance.⁸⁵ In fact, the present rules on solicitation and advertising have prompted one author to remark that the rules themselves unduly restrict a member of the public in the selection of an attorney qualified to handle his particular legal problem:

The basis for both the *Button* and *BRT* decisions is the recognition of the need for competent and reliable attorneys; a need which, by and large, the Bar has either ignored or not satisfactorily fulfilled. Neither the hat-pin method of selecting an attorney from the classified pages of a phone book, nor the referral system provided by the lawyers' referral services, meets the exigency of those in legal difficulty for a lawyer in whose integrity, interest, and competence they can have trust and confidence. No corporation would select an attorney by either of these devices and there is no reason to believe that ordinary citizens are willing to do so. The Bar's preoccupation with the problems of solicitation and channeling from a purely intra-professional viewpoint has served in many instances to obfuscate the real needs of people for adequate legal representation.⁸⁶

The former Solicitor General of the United States has similarly challenged the applicability of traditional ethical restrictions which obstruct lawyers in making assistance available to those in need of it:

Is there really sufficient reason for the profession to condemn lay referrals of persons who would otherwise not seek any legal assistance at all? Should it really constitute improper solicitation of business for an attorney to offer his services to the members of an organization composed largely of people who would not know where to turn for legal aid—and probably could not afford to retain it individually—even if they knew where to look?⁸⁷

The president-elect of the American Bar Association has also admitted that, "all too few of the existing Legal Aid offices are actually covering the requirements of their own localities. Many are hampered by poorly paid and inadequate staff; others are badly directed by distinterested or inactive boards of

⁸⁵ See Schwartz, *Forward: Group Legal Services In Perspective*, 12 U.C.L.A.L. Rev. (1964), 279 at 288:

Individual members of the public are simply not familiar with the competence of individual attorneys in urban areas, and it needs no grand exposition to point out that urbanization, which has now encompassed some sixty percent of the population, continues to increase without any sign of slackening.

⁸⁶ Bodle, *supra* note 80, at 323.

⁸⁷ Address by Archibald Cox, former Solicitor General of the United States, to Illinois State Bar Ass'n, St. Louis, Missouri, June 18, 1965, p. 6.

directors."⁸⁸ The Director of the Office of Economic Opportunity has noted: "Fortunately, there is a growing awareness across this country that the poor have been deprived of their just rights under the law and that effective, aggressive and competent legal services have not been readily available to them."⁸⁹ Indeed, it is clearly the consensus of opinion that present legal aid facilities are painfully deficient and that a glaring need for legal services remains unsatisfied.⁹⁰ Moreover, it is significant that the policy underlying professional ethics is the protection of the *public* and not that of the *attorney*—that the public is entitled to competent advice and undivided allegiance in being represented by qualified lawyers dedicated to its interests.⁹¹

The American Bar Association itself is not rigidly opposed to new developments in the extension of legal aid; several of its spokesmen have expressed an awareness that the present system of legal aid is ineffective and that the bar must not be intransigent to change. The past President of the American Bar Association has said:

But to my fellow lawyers, I point out that the precise and detailed standards as expressed in our canons are immutable. They require and are receiving a thorough and thoughtful re-evaluation. . . . No one can say at this point what changes will be recommended. We can be certain that in an area so difficult and delicate no solutions satisfactory to all will be found. Yet this audience may be assured that the American Bar Association is not afraid of change.⁹²

The prohibitions against the corporate practice of law and the extension of legal services by a lay intermediary are based upon judicial concern that the attorney-client relation be preserved and that no conflict of interest arise which might hamper the lawyer's performance for his client.⁹³ It is the fostering of commercial competition within the profession that is condemned by the canons involving solicitation, advertising and the stirring up of litigation. The neighborhood law program merely facilitates the creation of an attorney-client relationship; its

88 Marden, *Equal Access to Justice: The Challenge and the Opportunity*, 19 WASH. & LEE L. REV. 153, 155 (1962).

89 Shriver, *The OEO and Legal Services*, 51 A.B.A.J. 1064, 1065 (1965).

90 See generally BROWNELL, *LEGAL AID IN THE UNITED STATES* 33 (1951); AMERICAN BAR ASSOCIATION: *REPORT OF THE STANDING COMMITTEE ON LAWYER REFERRAL SERVICE* (February, 1965); HEW CONFERENCE 17-71; WALD, *op. cit. supra* note 80, at 46-52; Anderson, *Legal Services and The War On Poverty*, 10 RES GESTAE 5 (1966); Cahn and Cahn, *supra* note 67; Carlin and Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1964); Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A.L. REV. 438 (1964); Christensen, *Lawyer Referral Service: An Alternative to Lay-Group Legal Services?* 12 U.C.L.A.L. REV. 341 (1964); Cox, *Poverty and the Legal Profession*, 54 ILL. B.J. 12 (1965); Dunham, *op. cit. supra* note 80; *Report of the Standing Committee on Group Legal Services*, 39 CAL. S.B.J. 652 (1964); Polier, *op. cit. supra* note 80; Reich, *The New Property*, 73 YALE L.J. 733 (1964).

91 *Report of Committee on Unlawful Practice of the Law*, 33 N.Y.S.B.J. 354, 355 (1961). See also *In re Baker*, 8 N.J. 321, 85 A.2d 505, 514 (1951):

[T]he underlying purpose of regulating the practice of law is not so much to protect the public from having to pay fees to unqualified legal advisors as it is to protect the public against the often drastic and far-reaching consequences of their inexpert legal advice.

92 Powell, *The Response of the Bar*, 51 A.B.A.J. 751, 781 (1965).

93 *In re Cooperative-Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910); DRINKER, *LEGAL ETHICS* 1962-63 (1953).

activities in informing and advising economically deprived people of free legal services by competent attorneys occur in a non-commercial context and are not an abuse at which the canons are directed. Fears that if allowed to flourish, the neighborhood law program will effectuate a "commercialization," "institutionalization" or "socialization" of the Bar are ill-founded. Rather the Bar, and the profession as a group, must thoughtfully view the neighborhood law program as an effective instrument by which a responsible profession can discharge its duty to the desperate needs of the poor without violating the spirit of the canons of professional ethics.

VI. Conclusion

An overwhelming body of social legislation, operating through a most intricate institutional framework, has been recently enacted in an effort to alleviate the plight of the poor — legislation which depends for its success upon a meaningful extension of the rule of law to all levels of our society. The legal profession must recognize the irrefutably established fact that present legal aid programs have been deficient. The profession must capture the spirit of the recent anti-poverty legislation and conscientiously cooperate with this new attempt at increasing both the accessibility and the quality of legal facilities for the poor.

The Supreme Court has recently legalized two similar departures from the traditional ban on lay intermediaries, solicitation, advertising and the stirring up of litigation, and in the process has placed paramount importance upon the responsibility of society to provide all its members with adequate legal representation. In effect, the Supreme Court has declared that the canons of ethics are not inflexible rules of conduct and must give way to programs which advance a public interest. Indeed a strict adherence to the status quo is no longer reasonable; the neighborhood law program must be measured within the context of the problem for which it was created — the provision of legal counsel for the indigent. Admittedly, the program must be conducted within the bounds of its expressed guidelines, cautiously preserve the independent relationship between attorney and client and draw the line between the protection afforded lawyers informing people of their legal rights and the ban on stirring up litigation for one's personal benefit. The gratuitous furnishing of legal aid to the poor and unfortunate transcends a literal interpretation of the canons and does not threaten the dignity and independence of the individual attorney. We must heed the unfulfilled cry of *Gideon* and recognize that the right to counsel necessarily encompasses the right of *access to counsel*.

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