NOTES

THE EMERGENCE OF LAY INTERMEDIARIES FURNISHING LEGAL SERVICES TO INDIVIDUALS

The legal profession faces the emergence of a new medium for the furnishing of legal services: lay intermediaries.[1] Traditionally, intermediaries have been prohibited by the legal profession as unethical[2] and by the courts as the unauthorized practice of law.[3] The landmark Supreme Court cases of *NAACP v. Button*[4] and *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*,[5] in sanctioning two intermediary arrangements, have added a new dimension: the first amendment freedoms of speech, petition and association. As a result of these decisions a critical re-evaluation of the past proscriptions against lay intermediaries should be made and the ramifications of permitting intermediaries to provide legal services should be examined. The considerations involved in this analysis of intermediaries are (1) the interests of the legal profession, (2) the rights of individuals and (3) the interests of the organizations.

I. Types of Intermediaries

The traditional position of the legal profession toward intermediaries is incorporated in Canon 35 of the American Bar Association, Canons of Professional Ethics. "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which

1. A general definition of an intermediary is any lay agency, personal or corporate, which intervenes between client and lawyer and controls or exploits the professional services of a lawyer. See Canon 35, ABA, Canons of Professional Ethics. A California committee has coined the phrase "group legal services," meaning that legal services are being performed by a member of the bar for a group of individuals who have voluntarily formed or become a member of an organization, or for employees of a corporation or members of a labor union, or for a group who have combined for the purpose of establishing a plan of prepaid legal services. California State Committee on Group Legal Services, *Report*, 35 Cal. S.B.J. 710, 712 (1960).

2. See Canons 35 and 47, ABA, Canons of Professional Ethics.

3. It is an inherent power of the court to control and prevent the unauthorized practice of law by lay intermediaries. *E.g.*, Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Automobile Club v. Hoffmeister, 338 S.W.2d 348 (Mo. Ct. App. 1960); Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 Atl. 139 (1935).

4. 371 U.S. 415 (1963).

5. 377 U.S. 1 (1964).

intervenes between client and lawyer."[6] Similarly, Canon 47 prohibits the association of attorneys with the unauthorized practice of law by lay intermediaries.[7] These proscriptions have curtailed the establishment of intermediaries, but sufficient precedents exist to suggest that past arrangements and those that will arise should be divided into two distinct categories: (1) lay agencies providing legal services for financial gain and (2) organizations furnishing legal services to members or employees not for direct profit but for the benefit of the recipients.[8] This note will be concerned exclusively with the latter type.

Furthermore, the latter type can be subdivided into two broad patterns. The first and predominant arrangement, utilized primarily by membership organizations, offers legal services to members by directly employing at-

6. Canon 35 in its entirety reads:

> 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 his client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.
>
> A lawyer may accept employment from any organization, such as an association, club or trade association, to render legal services in any matter which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect of their individual affairs.

At the time of the adoption of this Canon, some dissenters were dissatisfied with the last paragraph. They argued that these organizations fulfilled a legitimate need of the public and that professional standards should change in the light of modern conditions. Special Committee on Supplements to the Canons of Professional Ethics, *Report*, 52 A.B.A. REP. 390 (1927).

The need and desire for this Canon was stimulated by Opinion 8 of the Committee on Professional Ethics and Grievances rendered in 1925, involving an automobile association offering legal services to its members. The Committee disapproved of the lawyers providing legal services to members because of the division of professional fees and the exploitation of the lawyers' professional services by the association. The opinion intimated that the association would be engaged in the unauthorized practice of law.

The widespread acceptance of the traditional viewpoint is evidenced by the fact that twenty-nine states have adopted this Canon officially by statute or court rule. In fourteen additional states it has been adopted by non-integrated State Bar Associations. BRAND, BAR ASSOCIATIONS, ATTORNEYS, AND JUDGES 847 (1956).

7. "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." Canon 47, ABA, CANONS OF PROFESSIONAL ETHICS.

8. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 U.C.L.A.L. REV. 438, 452 (1964); see Weihofen, *"Practice of Law" by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119 (1934). In the latter category financial gain, of course, may accrue to the recipients of the legal services and indirectly to the salaried employees of the organization. Also, some gain may accrue to the organizations, for example, by increasing their membership or funds. However, these gains are not derived from exploiting litigation for profit.

torneys. The principal reason for establishing such an association is that members have legal problems of common concern.[9] Another motivating force may be to secure a means of litigating for a predetermined position.[10] A third reason for joining together may be solely to establish a plan of prepaid insurance for legal services.[11] The basic traditional objection to these arrangements is that the professional services of the lawyers are controlled by the lay agency.[12]

The second and more subtle intermediary pattern arises when the organization recommends the services of a particular lawyer not employed by the organization.[13] The motivating forces for establishing this type of arrangement may be any one of the reasons discussed above. Under the second pattern, the danger of the intermediary exercising control over the attorney is lessened, but the arrangements are nevertheless prohibited.[14]

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9. See People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); People *ex rel.* Chicago Bar Ass'n v. Motorists' Ass'n, 354 Ill. 595, 188 N.E. 827 (1933); Hospital Credit Exch., Inc. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Munic. Ct. N.Y. 1946) (collection agency for non-profit hospitals for money due from patients); Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936); Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930) (non-profit organization for apartment house owners). The California Teachers Association retains legal counsel for its members in matters relating to the protection of professional rights or arising out of the members' employment. California State Committee on Group Legal Services, *Report,* 39 CAL. S.B.J. 639, 675-76 (1964) [hereinafter cited as *1964 California Report*]; *cf.* ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 168 (1937) (counsel for manufacturers' association rendered opinions on legal questions common to the members).

10. See NAACP v. Button, 371 U.S. 415 (1963) (litigation to effectuate civil rights of Negroes); People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933) (organization for testing constitutionality of members' real estate taxes).

11. No broad plan of prepaid insurance has been found although the arrangements cited in notes 9 and 10 *supra* are, in a limited sense, prepaid insurance. Proposals for legal expense insurance to be offered by profit-making organizations have been considered impractical. See generally *1964 California Report* 715-22.

12. From the perspective of the layman, restricting these arrangements may be made to appear unreasonable when the proposition is stated in the following manner:

> Can the average man, in order to obtain competent legal services at a reasonable price, join with other average men and through the medium of their association obtain such services and pay for them as a group at a lower cost per member than each would have to pay if he were to contract for such services as an individual?

Sterling, *Report of President for 1958-1959,* 34 CAL. S.B.J. 803, 807 (1959).

13. *E.g.,* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950) (en banc); *In re* Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); *cf.* San Antonio Bar Ass'n v. Alamo Title Co., 360 S.W.2d 814 (Tex. 1962); San Antonio Bar Ass'n v. Guardian Abstract and Title Co., 156 Tex. 7, 291 S.W.2d 697 (1956).

14. Cases cited note 13 *supra. Compare* In the Matter of Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936), *with* In the Matter of Maclub of America, Inc., 295 Mass. 45, 3

The strongest impetus to institute intermediary arrangements of either type has originated within labor unions.[15] However, such attempts have been thwarted by statutes,[16] by the legal profession[17] and by the courts. Notwithstanding these restrictions, there is evidence of the widespread practice of labor union lawyers handling personal legal problems of officials and members at union expense.[18] Analogous to the union intermediary problem are situations where profit-motivated corporations furnish legal services to their employees for the purpose of improving morale and reducing man-hour losses.[19] Though these plans are not designed to utilize litigation as a source of financial gain, they, like union arrangements, are barred by statute[20] and by the legal profession as the unauthorized practice of law.[21]

Statutory proscriptions of the practice of law by corporations were originally applied only to pecuniary corporations offering legal services for

N.E.2d 273 (1936). In both cases pecuniary organizations circulated lists of approved attorneys to dues-paying members and paid for their legal expenses when they became involved in litigation arising from the use of automobiles. In neither case did the lay agency know when a member had retained an attorney until a bill was presented nor did it take part in the management of the litigation. In *In the Matter of Maclub of America, Inc.*, the contracts with the members stated that the organization would *furnish* legal services while in *In the Matter of Thibodeau* the contracts were only to pay for the legal services. The court concluded in the former case that the intermediary controlled the professional services of the lawyers but held that this element was lacking in the latter case and consequently upheld the latter arrangement. The objectionable features of both arrangements were actually the exploitation of litigation for profit plus advertising on behalf of the approved attorneys.

15. See cases cited note 13 *supra*; Cleveland Bar Ass'n v. Fleck, 172 Ohio St. 467, 178 N.E.2d 782 (1961); 30 UNAUTHORIZED PRACTICE NEWS 132 (1964) (cites complaint alleging union employment of attorneys for workmen's compensation claims). A legal aid program was established by the Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Unions and the Restaurant-Hotel Employers' Association of Southern California, Inc., offering legal advice on a restricted number of civil matters and assistance in criminal cases. *1964 California Report* 679-81.

16. *E.g.*, MD. ANN. CODE art. 27, § 14 (1957); MO. REV. STAT. § 484.020 (1959); S.C. CODE §§ 56-142 (1952). *Contra*, PA. STAT. ANN. tit. 17, § 1612 (1956) (bona fide labor organization can give legal advice to its members in matters arising out of their employment).

17. ABA Committee on Unauthorized Practice of Law, *Informative Opinion No. A of 1950*, 36 A.B.A.J. 677 (1950).

18. Segal, *Labor Union Lawyers: Professional Services of Lawyers to Organized Labor*, 5 IND. & LAB. REL. REV. 343, 361 (1952).

19. During World War II a corporation employed attorneys to handle the personal legal problems of its employees. The corporation estimated that it saved 15,000 man-hours in one year besides bolstering the morale of the employees. *1964 California Report* 679-81.

20. For statutes see note 16 *supra*. *Contra*, PA. STAT. ANN. tit. 17, § 1608 (1956) (corporation may provide legal services to its members); MICH. STAT. ANN. § 21.311 (1935) (corporations or voluntary associations may employ attorneys to assist employees).

21. ABA Committee on Unauthorized Practice of Law, *supra* note 17, at 677.

financial gain[22] but have been extended to non-profit organizations.[23] The statutory rule that a corporation could not practice law was interpreted to prohibit the employment of attorneys to furnish legal services to third parties. The courts reasoned that corporations could not do indirectly, by hiring lawyers, what they could not do directly, practice law, and concluded that these arrangements involved the unauthorized practice of law.[24] By strictly applying this broad rule, the courts by-passed the policy issues which they would have been forced to face had they made an independent consideration of the beneficial or detrimental aspects of non-profit organizations furnishing legal services to their members.[25]

II. Rationale Behind Traditional Position

The blanket restriction imposed upon intermediaries has been based upon the conclusion that such methods of providing legal services would substantially injure the public and the legal profession. The detrimental effects propounded have been the impairment of the personal and direct attorney-client relationship, an increased possibility of conflicts of interest and divided allegiance, the undesirable consequences of advertising and soliciting, and the commercialization of the legal profession. These reasons have been offered as the basis for barring all intermediary arrangements, but whether they apply with equal validity to both non-profit organizations and to enterprises offering legal services for financial gain must be examined in order to evaluate the merits of the traditional viewpoint. Moreover, these abuses or undesirable consequences are present in varying degrees in every intermediary arrangement, and therefore the merits of each arrangement should be balanced against the detrimental aspects of the particular plan.

22. *E.g.*, People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); In the Matter of Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935); Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937). In the landmark case of In the Matter of Co-operative Law Co., *supra*, the court emphasized that the corporation would be organized "simply to make money" and would be guided only by "the sordid purpose to earn money for stockholders." *Id.* at 484, 92 N.E. at 16.

23. *Compare* People *ex rel.* Chicago Bar Ass'n v. Motorists' Ass'n 354 Ill. 595, 188 N.E. 827 (1933), *and* People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933), *with* People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, *supra* note 22.

24. Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935); Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930).

25. People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933); Hospital Credit Exch., Inc. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Munic. Ct. N.Y. 1946).

A. *Impairment of Attorney-Client Relationship*

Historically, each individual, using his own judgment, selected the particular attorney he wished to employ. However, if intermediaries employ attorneys to furnish legal services, the individual chooses only the intermediary or possibly between competing lay agencies, and the organization selects the attorney for the client. Nevertheless, after the intermediary initially brings attorney and client together, the forming of the relationship proceeds in the traditional manner with the acceptance of the undertaking by an attorney, and the approval of his services by the client.[26]

That the attorney-client relationship involves the highest trust and confidence is a basic premise of the legal profession. It has been urged that the employment of an attorney by a lay agency impairs this uniquely personal and trustworthy relationship.[27] The specter of a three party arrangement involving an attorney, a client and an ever present intermediary has fostered such misgivings. However, since the desired qualities of the attorney-client relationship are brought about wholly by the character of the attorney-client dealings, it would seem that trust and confidence could still prevail if present standards of professional conduct are observed notwithstanding the attorney's employment by a third party.

Another principal objection to intermediaries offering legal services is that the public will suffer a deterioration in the quality of services offered. Historically, the attorney received his compensation directly from his client. If intermediaries employ members of the bar, the attorneys do not receive their compensation from their clients, nor are their fees based upon traditional criteria, such as, the amount of time or skill required, or resulting benefits to the client.[28] The correlation between the criteria upon which compensation is based and the quality of legal services is probably not capable of accurate measurement, but the importance of the traditional viewpoint seems minimal, in view of the practices of corporations, the government and legal aid societies which compensate attorneys on an annual salary basis. These arrangements are flourishing and have not resulted in a noticeably inferior quality of professional services.

Also, it has been argued that the lawyer's ability to serve his client free

26. Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958). *But see* People *ex rel.* Courtney v. Association of Real Estate Taxpayers, *supra* note 25 (members made complainants without consultation beyond authorization of membership applications).

27. *E.g.*, People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933); In the Matter of Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935).

28. See Canon 12, ABA, CANONS OF PROFESSIONAL ETHICS.

from outside control would be jeopardized since he might be subject to the directions of the lay agency.[29] This apprehension of control and management of the stages and substance of litigation by individuals other than the client or his attorney seems warranted for instances have occurred where the organization, rather than the client, decided the issues to be litigated.[30]

An attorney must serve his client with undivided allegiance and must be free to exercise his judgment independently for the benefit of the party he represents. When purposes or policies of the lay agency are in opposition to those of the client, and the attorney is influenced by his employer's policies, the fears of divided allegiance, conflicts of interest and injury to the public are justified. If, however, a non-profit organization is established to serve the individual members, the coincidence of interests of the association and client reduces the likelihood of divided loyalties,[31] and, in most situations, lessens the possibility of a potential weakening in the attorney's ability to offer unbiased and independent advice. That conflicts of interests and divided allegiance will occur cannot be doubted,[32] but it seems that the public could be protected adequately by the existing standards of ethical conduct that require attorneys to terminate relationships with their clients when conflicts of interest do arise.[33]

B. *Solicitation and Advertising*

Professional standards of conduct governing members of the bar condemn solicitation, advertising and the fomenting of litigation.[34] However, inter-

29. Cases cited note 27 *supra;* Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937); ABA Committee on Unauthorized Practice of Law, *Informative Opinion No. A of 1950,* 36 A.B.A.J. 677 (1950).

30. NAACP v. Button, 371 U.S. 415, 447 (1963) (dissenting opinion); People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933).

31. NAACP v. Button, *supra* note 30, at 424; see People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930). *But see* NAACP v. Button, *supra* at 462-63 (dissenting opinion).

32. For example, suppose an NAACP lawyer is representing a Negro client in a voting-rights case. After receiving bomb threats and a warning of a possible loss of his job, the Negro suggests to his lawyer that he wishes to drop the case. The NAACP lawyer, aware that this case is vital to the civil-rights movement, is faced with the conflicts of interest and divided allegiance dilemmas.

33. See Canon 6, ABA, CANONS OF PROFESSIONAL ETHICS (adverse influences and conflicting interests); Canon 44, *id.* (withdrawal from employment as attorney).

34. Canon 27, ABA, CANONS OF PROFESSIONAL ETHICS (unprofessional to solicit by advertising); Canon 28, *id.*

> 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 . . . . It is disreputable . . . to breed litigation by seeking out those with claims for per-

mediaries, not subject to the ethical standards of the legal profession, have advertised to the public that they provide legal services.[35] The result is unfair competition with independent members of the bar who are prohibited from advertising their ability to provide the same services offered by intermediaries.[36] Furthermore, even if courts were able to exercise some control over the advertising of legal services by intermediaries, as is done with professional corporations of lawyers,[37] intermediaries would, nevertheless, be in an advantageous position for obtaining legal business within their specific areas by apprising their members of their legal services through meetings and intra-organizational publications.

The restraints on advertising are also partially predicated upon the interests of the legal profession in protecting the public, for through advertising it is likely that the most effective and resourceful advertisers, rather than the most competent attorneys, will obtain the bulk of the business.[38] Solicitation, too, is injurious to the public if clients are led to less competent attorneys.[39] The systematic soliciting plan of the Brotherhood of Railroad Trainmen illuminates the potential dangers to the public. Investigators, paid by the Brotherhood to urge injured members to employ particular attorneys approved by the organization, visited injured railroad workers in the hospital,[40] displayed evidence of large settlements obtained by other union members[41] and carried contracts of employment.[42] At one time the

sonal 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 . . . .

Although solicitation was not censured at common law (Chreste v. Louisville Ry., 167 Ky. 75, 180 S.W. 49 (1915)), the bar's restrictions were based primarily upon the objectionable consequences of stirring up litigation, inequitable distribution of legal business, and the commercialization of the profession. DRINKER, LEGAL ETHICS 210 (1953). See generally Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers,* 25 U. CHI. L. REV. 674 (1958).

35. 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); Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930).

36. Standing Committee on Unauthorized Practice of the Law, *Report,* 75 A.B.A. REP. 242 (1950).

37. See In the Matter of the Florida Bar, 133 So. 2d 554 (Fla. 1961).

38. Schwartz, Some Professional Problems of Law Practice 9 (1960).

39. *In re* Cohen, 10 Ill. 2d 186, 139 N.E.2d 301 (1956).

40. Columbus Bar Ass'n v. Potts, 175 Ohio St. 101, 191 N.E.2d 728 (1963) (injured employee signed employment contract while affected by opiates); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952).

41. *In re* Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958), Hulse v. Brotherhood of R.R. Trainmen, 340 S.W.2d 404 (Mo. 1960) (en banc); State *ex rel.* Beck v. Lush, 170 Neb. 376, 103 N.W.2d 136 (1960).

42. Atchison, T. & S.F. Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956); *In re* Brotherhood of R.R. Trainmen, *supra* note 41.

designated regional counsel were required to reimburse or kick-back a portion of their fees to the Brotherhood.[43] Even absent the requirement of reimbursements, the channeling of remunerative cases and the desire to continue to receive such litigation creates strong temptations for attorneys to make voluntary payments to the intermediary.

At the same time, the possible benefits to the public from soliciting—procurement of competent counsel and protection of legal rights—are manifested by the Brotherhood plan.[44] In the past, when the social goals of litigation were in the public interest, solicitation and the stirring up of litigation have been permitted.[45] Moreover, some advertising and solicitation by intermediaries tends to rectify public ignorance of legal rights and obligations.

C. *Commercialization*

The current prohibitions of the unauthorized practice of law by lay intermediaries arose primarily from experiences with commercial enterprises, such as banks, collection agencies and trust companies, furnishing legal services to their customers.[46] The courts readily enjoined these arrangements because they involved obvious commercialization and exploitation of litigation for profit.[47] Applying these same criticisms to organizations providing legal services not as a profit-making scheme, but as a service for the financial benefit of the recipients, seems inappropriate.[48] The collateral effect of offering legal services undoubtedly benefits the organization, for example by increasing membership or funds;[49] but it is certainly not clear that this is the kind of commercialization or exploitation of the legal processes that the profession and the courts seek to restrain.

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43. Cases cited note 73 *infra.*

44. See Bodle, *Group Legal Services: The Case for BRT,* 12 U.C.L.A.L. REV. 306-10 (1965).

45. NAACP v. Patty, 159 F. Supp. 503 (E.D. Vir. 1958), *rev'd on other grounds sub nom.* Harrison v. NAACP, 360 U.S. 167 (1959) (civil rights); Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 12 S.E.2d 602 (1940) (defending against suits by usurious money lenders); ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 148 (1935) (challenging New Deal legislation as unconstitutional).

46. See generally Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys,* 72 HARV. L. REV. 1334 (1959).

47. *E.g.,* State Bar Ass'n v. Connecticut Bank and Trust Co., 140 A.2d 863 (Conn. 1958); People *ex rel.* Illinois State Bar v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937).

48. *Compare* Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930), *and* Hospital Credit Exch., Inc. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Munic. Ct. N.Y. 1946), *with* cases cited note 47 *supra.*

49. Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 8 (1925).

The strict traditional position, failing to distinguish between profit and non-pecuniary organizations, has been severely criticized.[50] A leading scholar suggests that the bases for the traditional viewpoint barring all intermediary arrangements are the vested interests of the established members of the legal profession who fear a loss of income and a channeling of clients into fewer hands.[51] Perhaps more significant is the desire of the members of the legal profession to remain uncontrolled by lay intermediaries.

III. Interjection of the Protection of the First Amendment

The traditional treatment of the intermediary problem dealt exclusively with the interests of the legal profession and the states in maintaining high standards of ethical conduct and in protecting the public, but, unexpectedly in 1963, a new dimension, the freedoms of speech, petition, and association guaranteed by the first amendment, was added as a countervailing legal consideration.

In *NAACP v. Button*,[52] the activities of the NAACP, recommending attorneys retained by the organization and furnishing legal services for members and non-members, were judically sustained 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 . . . ."[53]

The NAACP, a non-profit membership corporation established to promote the civil rights of the Negro populace, was actively engaged in encouraging and assisting litigation that furthered its express purposes. The State of Virginia, as part of its "massive resistance" to integration, amended its statutes[54] regulating the professional conduct of attorneys so that any organization retaining lawyers was prohibited from soliciting legal business

50. Hildebrand v. State Bar, *supra* note 49 at 515, 521, 225 P.2d at 514, 518 (Carter and Traynor, JJ., dissenting opinions); Turrentine, *Legal Service for the Lower-Income Group*, 29 Ore. L. Rev. 20, (1949); Weihofen, *supra* note 8.

51. Drinker, Legal Ethics 167 (1953).

52. 371 U.S. 415 (1963).

53. *Id.* at 428-29.

In 1934, it was suggested that the freedom of assembly guaranteed individuals "the right to band together to employ a lawyer in their corporate name." Weihofen, *supra* note 8, at 131.

54. Six other Southern states passed similar legislation that classified the activities of the NAACP as barratrous. Ark. Stat. Ann. §§ 41-703 to -713 (Supp. 1964); Fla. Stat. Ann. §§ 877.01-.02 (Supp. 1964); Ga. Code Ann. §§ 26-4701 to -4703 (Supp. 1963); Miss. Code Ann. §§ 2049-01 to -08 (1956); S.C. Code Ann. §§ 16-521 to -525 (1962); and Tenn. Code Ann. §§ 39-3405 to -3410 (Supp. 1964).

in which it had no pecuniary right or liability.[55] The NAACP instituted legal action to have the amendments declared inapplicable to its activities or if applicable, unconstitutional. The Virginia Supreme Court held that the statute was constitutional as applied to the NAACP and that the state could prohibit the NAACP or its members from soliciting "legal business for their attorneys or any particular attorneys."[56] But at the same time, the court sustained the organization's right to inform its members of their rights and the advisability of asserting those rights. The Supreme Court of the United States, in a divided opinion, reversed, holding the statute unconstitutional.[57] The majority believed that the statutory prohibition of the solicitation of legal business in this context could be used as an instrument to impede NAACP members and lawyers from informing people of their legal rights and the advisability of asserting such rights, thereby infringing upon the freedom of expression preserved by the first amendment.[58]

A separate issue, not necessarily before the Court, yet nevertheless decided, was the legality of the NAACP's employment of a legal staff to handle litigation for its members and non-members, a manifest violation of Canon

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55 Chapter 33 amended and reenacted VA. CODE ANN. §§ 54-74, 54-78, 54-79 (1958 Replacement).

Section 54-74 provides in part:

(6) *"Any malpractice or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct,"* . . . shall . . . include the improper solicitation of any legal or professional business or employment, either directly or indirectly, or the acceptance of employment . . . from any . . . organization or association with knowledge that such . . . organization or association has violated any provision of article 7 of this chapter [which includes §§ 54-78 to 54-83.1] . . . . (amended parts underlined).

Section 54-78 provides in part:

(1) A *"runner"* or *"capper"* is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State or for any . . . organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceedings in which such . . . organization or association is not a party and in which it has no pecuniary right or liability, in the solicitation or procurement of business for such attorney at law . . . . (amended parts underlined).

Section 54-79 provides in part:

It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper as defined in § 54-78 to solicit any business for an attorney at law or such person, partnership, corporation, organization or association . . . . (amended parts underlined).

Canons 35 and 47, ABA, CANONS OF PROFESSIONAL ETHICS, were also incorporated into Virginia law. VA. SUP. CT. APP. R. pt. VI, Rule II, §§ 35, 47.

56. NAACP v. Harrison, 202 Va. 142, 164-65, 116 S.E.2d 55, 72 (1960).

57. NAACP v. Button, 371 U.S. 415 (1963), *reversing in part sub. nom.* NAACP v. Harrison, *supra* note 56.

58. Moreover, the breadth and vagueness of the statue made it capable of being used for "broadly curtailing group activity leading to litigation." NAACP v. Button, *supra* note 57, at 436.

35. Undoubtedly, the Court's decision was influenced considerably by the fact that the efficacy of the NAACP's overall program rested substantially upon approval of its legal arrangement. Prima facie, it seemed that the Court condoned this arrangement and created a narrow exception to Canon 35 because "in the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment. . . . It is thus a form of political expression."[59]

But, in addition, the Court founded its exception upon a far broader consideration—the absence of those abuses traditionally cited in support of the bar against intermediaries offering legal services. The effect of this approach is to engender serious doubt as to the future propriety of rigidly applying Canon 35 to prohibit all intermediary arrangements. First, the opinion stated that "objection to the intervention of a lay intermediary . . . derives from the element of pecuniary gain,"[60] and in this situation there was an absence of monetary considerations that might lead to subversion of the client's interests. Secondly, the majority felt that the similarity of interests of the NAACP and the Negro litigants dispelled the dangers of conflicts of interest or biased advice. The Court also found no showing of "any injurious intervention in or control of litigation."[61] Finally, commercialization of the legal profession was obviously not a valid criticism of this arrangement. Thus the Court concluded that the NAACP arrangement was justified within the traditional concepts of professional ethics. Whether the above reasoning would be applied to other intermediaries, especially where litigation was not a means of "political expression," was, however, left unsettled. The effect of repeated resort to this type of analysis would be to undermine the continuing vitality of Canon 35.

However, instead of relying upon the absence of the traditional abuses or dangers in intermediary arrangements, the Court expressly chose to rest its decision protecting the intermediary arrangement of the NAACP upon the first amendment freedoms of expression and association.[62] In effect, the conglomerate safeguards of the freedoms of expression, petition and association were expanded to encompass the legal arrangement of the NAACP.

The persuasive dissenting opinion, written by Justice Harlan and accepted by Justices Clark and Stewart, rejected the majority's expansive approach to the first amendment freedoms and would not have permitted the NAACP's legal arrangement. Although agreeing that the freedoms of association and expression were at issue, the gist of the dissent was that the state

59. *Id.* at 429.
60. *Id.* at 441.
61. *Id.* at 444.
62. See text accompanying note 53 *supra.*

had a paramount interest in the manner of legal representation within its territory[63] which far outweighed any potential or remote abridgement of first amendment freedoms. The dissent's position was based largely upon a finding of facts, the antithesis of the majority's appraisal, which supported the traditional reasons for barring intermediaries from furnishing legal services: (1) the NAACP's subjection of its attorneys to its ideological dictates might lead to conflicts of interest, divided allegiance and biased advice, (2) its control of "the form of pleading, the type of relief to be requested, and the proper timing of suits"[64] encroached upon normal attorney-client functions, (3) it fomented specific types of litigation and finally (4) there was an absence of personal contacts between staff lawyers and their clients. Moreover, the dissent's viewpoint was supported by the relevant state precedents.[65]

The full impact and import of *Button* became more evident by explanatory references concerning the case made in *Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar.*[66] The allusions made to *Button*[67] suggest that that holding will not be confined to legalize only intermediaries employing litigation as a means of political expression,[68] but might also be applied to sanction other intermediary arrangements where litigation is used to settle private disputes.

The issue confronting the Supreme Court in the *Brotherhood* case was analogous to one in *Button*: could a non-profit intermediary advise its members of their legal rights and systematically recommend particular attorneys?[69] At stake was the controversial plan of the Brotherhood of Rail-

63. NAACP v. Button, 371 U.S. 415, 455 (1963) (dissenting opinion).

64. *Id.* at 450 (dissenting opinion). Justice White in a separate opinion concurred with the dissent that these practices would not be constitutionally protected. He believed they were not present, however.

65. *Id.* at 458-60 & n.7.

66. 377 U.S. 1 (1964).

67. "In fact, in that case [*Button*], unlike this one, the attorneys were actually employed by the association which recommended them, and recommendations were made to nonmembers." *Id.* at 7. Commenting upon the practice of unions in England, the Court stated, "they [unions] retain counsel, paid by the union, to represent members in personal lawsuits, a practice similar to that which we upheld in *NAACP v. Button.*" *Id.* at 7. (Footnotes omitted.)

68. The dissenting opinion would have so limited the *Button* case.

69. Although the Brotherhood did not employ and directly compensate the lawyers, as in the NAACP arrangement, the objectionable features of the union's plan are not lessened. The regional counsel, dependent upon the intermediary as a source of business, are faced with the divided allegiance, conflicts of interest, and disinterested advice dilemmas. The undesirable consequences of advertising and soliciting are present. Furthermore, because the intermediary has control over the channeling of litigation, and hence can regulate the income of the designated counsel, pressures can be exerted upon the lawyers and their handling of particular litigation.

road Trainmen,[70] established in 1930 to realize the rights granted to railroad workers under the Federal Employer's Liability Act.[71] The Brotherhood, acting as an intermediary, designated approved counsel throughout the country and effected the attorney-client relationship by solicitation[72] and economic pressure.[73] Upon the grounds of freedom of association the Court, in a divided opinion, sustained "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" as "an inseparable part of this constitutionally guaranteed right to assist and advise each other."[74] The Court cited the *Button* case as support for its holding even though in *Button* freedom of expression was the primary consideration and the significance of freedom of association in reaching that decision was rather nebulous. The fact that forty-five bar associations across the country petitioned the Court for a re-

70. Previous to the plan, railroad employees with claims against their employers were often charged exorbitant fees by incompetent attorneys or were subjected to undue pressure from railroad claim agents to settle for unfair amounts. See generally Bodle, *supra* note 44, at 306-12.

71. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

72. Atchison, T. & S.F. Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956); *In re* O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933); Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); Hulse v. Brotherhood of R.R. Trainmen, 340 S.W.2d 404 (Mo. 1960) (en banc) (consent decree); *In re* Petition of Comm. on Rule 28 of Cleveland Bar Ass'n, 15 Ohio L. Abs. 106 (Ct. App. 1933); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952). *Contra,* Hildebrand v. State Bar, *supra* at 521, 225 P.2d at 518 (Traynor, J., dissenting opinion); Ryan v. Pennsylvania R.R., 268 Ill. App. 364 (1932). The court in *In re* Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958) sustained the Brotherhood's practice of informing members of the advisability of obtaining legal advice and its practice of recommending and referring litigation to attorneys designated by the union without explicitly condoning solicitation.

73. The Brotherhood fixed the maximum contingent fee charged by the regional counsel at a lower rate than the standard charge. Moreover, to offset the cost of the Legal Aid Department, the Brotherhood utilized the following progression of fee-splitting arrangements: Ryan v. Pennsylvania R.R., *supra* note 72 (contingent fee contract of 14% for attorney, 6% for union); *In re* O'Neill, *supra* note 72 (15% for attorney, 5% for union); Hildebrand v. State Bar, *supra* note 72 (19% to attorney, 6% to union); *In re* Brotherhood of R.R. Trainmen, *supra* note 72 (attorneys received 25% but required to pay investigators for services). In *In re Brotherhood of R.R. Trainmen,* all financial connection between the union and the regional counsel was enjoined and supposedly terminated although some doubt still prevails. See Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 7 (1964) (dissenting opinion).

74. Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, *supra* note 73, at 6. *But cf.* McCloskey v. Tobin, 252 U.S. 107 (1920) (constitutionality of statute forbidding solicitation upheld); Barton v. State Bar, 209 Cal. 677, 289 Pac. 818 (1930); Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97 (1933).

hearing of this case[75] can be attributed in part to the utilization by the Court of such an unorthodox interpretation of the freedom of association without substantial elucidation.

Lastly, the Court envisioned no "appreciable public interest" that justified barring the activities of the Brotherhood within the scope of Virginia's power to regulate the legal profession. In rebuttal, the dissenting opinion voiced support for the traditional viewpoint and emphasized the deleterious aspects of this arrangement, such as the lay agency's control over the appointment and dismissal of the attorneys, the fees to be charged and the handling of litigation, the gross abuses of channeling and soliciting and the commercialization of the legal profession.[76]

Reading the *Brotherhood* case in conjunction with *Button,* it is possible to forsee a fundamental transformation in the existing structure of the legal profession. Constitutional safeguards were employed to sanction two non-profit intermediary arrangements, one employing attorneys and the other recommending specific attorneys. The concept of freedom of association was expanded to encompass not only the right to belong and "to engage in association for the advancement of beliefs and ideas,"[77] but also implicitly to include the right systematically to recommend and refer litigation to specific attorneys.[78] Moreover, the shield of freedom of association includes "the right of the workers *personally* or *through a special department of their Brotherhood* to advise . . . what lawyer a member could confidently rely on . . . ."[79] Thus an organization or its members through the freedom of association vested in the individual members may engage in certain activities that would be illegal if done by individuals divorced from any association.[80]

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75. 30 UNAUTHORIZED PRACTICE NEWS 92 (1964).

76. Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 9-12 (1964) (dissenting opinion).

77. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (compelled disclosure of membership lists would curtail freedom to associate); Bates v. City of Little Rock, 361 U.S. 516 (1960). See generally RICE, FREEDOM OF ASSOCIATION (1962).

78. Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); see NAACP v. Button, 371 U.S. 415 (1963).

79. Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, *supra* note 78, at 6. (Emphasis added.)

80. This paradox is best illustrated by an example. Suppose X, a member of the Brotherhood of Railroad Trainmen, doubted the competence of the regional counsel appointed by the Brotherhood but judged his brother, an attorney for thirty years, to be the "best in the business." Consequently, X visited each injured member of the union and recommended that he employ his brother to manage any claims against the railroad.

The motive, execution, and purpose of this scheme is identical to the arrangement in the Brotherhood case. It is conceded that the conception of this plan originates from an individual and the Brotherhood plan is the result of the combined efforts of the organiza-

Neither the *Brotherhood* nor *Button* case specifically states that solicitation by the organization is protected. A distinction was made between (1) recommending and (2) urging, advocating or soliciting, permitting only the former. Upon remand of the *Brotherhood* case, the lower Virginia court adhered to this distinction, decreeing that advice and recommendation were permissible but explicitly barring solicitation and channeling.[81] However, it is unrealistic to classify as something other than solicitation the habitual and systematic recommendation of specific attorneys without any request for such recommendation.[82] Yet, the practice of the Brotherhood approved by the Supreme Court entails exactly such "recommendations." Moreover, it is highly unlikely that the Brotherhood will merely recommend its regional counsel rather than effectively advocate their employment.[83]

The interjection of constitutional rights into the area of group legal services has created an urgent need for a rewriting and re-evaluation of the ethical standards of the legal profession embodied in Canons 28,[84] 35,[85] and 47.[86] The scope of constitutional protection covering attorneys, lay intermediaries, and the activities of members of such organizations has not been well defined. The initiative of the legal profession to establish its own guidelines of professional conduct has been challenged. In rewriting the Canons of Ethics the bar should take cognizance of the rights of individuals, the duty of the profession to serve the public, and the interests of intermediary organizations.

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tion. But the right of the members to advise and recommend is a personal right, free from rigid compliance to the dictates of the organizational hierarchy.

X is clearly soliciting; yet his activities are seemingly protected for "the right of the workers personally . . . 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 advise and assist each other." Existing rules condemning solicitation have been designed to prevent exactly this type of channeling and commercialization of the legal profession. A fortiori, the linkage of members of the legal profession to a department of a union with the power to channel an enormous volume of litigation is susceptible to corruption, favoritism, and political and economic pressures.

81. 30 UNAUTHORIZED PRACTICE NEWS 296-98 (1964).

82. COSTIGAN, THE LEGAL PROFESSION AND ITS ETHICS 359 (1933).

83. Brief for Respondent, pp. 20-40, Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); Brief for Respondent (Petition for Rehearing), pp. 3-10, *id.*

84. See note 34 *supra.* Particular attention should be paid to the criteria propounded by the Supreme Court. "Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation." NAACP v. Button, 371 U.S. 415, 439 (1963). (Footnotes omitted.) "Even more modern . . . regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest." *Id.* at 440. (Footnotes omitted.)

85. Canon cited note 6 *supra.*

86. Canon cited note 7 *supra.*

IV. Necessary Safeguards

To illustrate future problems connected with intermediaries some hypothetical examples will be utilized.

(1) Two enterprising young attorneys, suffering financially because of intra-legal competition, conceive the Apartment House Owners Association, a non-profit organization whose purpose is to furnish legal services to all dues-paying members for legal matters connected with the common interests (leases, evictions, etc.) of the members. The attorneys fix their annual compensation to include any excess income above expenses and at a minimum annual salary of $25,000. The organization attracts five thousand interested parties.[87]

The first question that must be answered is whether all non-profit organizations may employ attorneys to represent their individual members in personal law suits. *NAACP v. Button*[88] hints that such arrangements are acceptable if traditional standards of ethics (excluding Canons 35 and 47) are not violated and the organization's policies are in accord with the interests of its members.[89] However, the holding in *Button* is doubtful authority for the above proposition because of the inextricable significance of the freedom of expression in that case. The constitutional right espoused in the *Brotherhood* case protects the freedom to associate and to recommend specific attorneys but does not guarantee the organization's right to employ attorneys, although the Court suggested that this practice would be sustained.[90] Thus the Court has not yet sanctioned the employment of attorneys by all non-profit organizations.

If the employment of attorneys by non-profit intermediaries would be permitted, the decision would have far-reaching consequences if based upon constitutional grounds, *i.e.*, protected by the combined safeguards of the first amendment freedoms of speech, petition, and association. The result of such a decision would be to overturn a significant body of state law barring intermediary arrangements.[91] But if the concept of first amendment

87. Although the similarity to Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930) is obvious, it should not be inferred that this actually occurred in that situation.

88. 371 U.S. 415 (1963).

89. See p. 324 *supra.*

90. See note 67 *supra.*

91. People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); People *ex rel.* Chicago Bar Ass'n v. Motorists' Ass'n, 354 Ill. 595, 188 N.E. 827 (1933); People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933); Hospital Credit Exch., Inc. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Munic. Ct. N.Y. 1946); Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930).

freedoms is not expanded to permit non-profit intermediaries to employ attorneys, the bar associations and state courts would be left to decide individually whether the public interest necessitated the broad prohibition presently existing. It is submitted that a blanket ban is unduly restrictive and that the social utility of each arrangement should be balanced against the possible injury to the public and the legal profession.

Finally, if non-pecuniary intermediary arrangements are to be allowed, restrictions will have to be imposed in order to prevent subterfuges for financial gain. A minimum requirement for every approved arrangement should be that it is primarily designed to benefit the members and not to obtain clients and pecuniary gain for those controlling the organization.[92] An organization established by the members is more likely to fall into this category than a plan instituted by individual attorneys.

(2) Assume the Brotherhood of Railroad Trainmen is permitted to retain attorneys. The Brotherhood enlarges its legal staff to enable it to represent and advise dues-paying members in all civil matters. The purpose of the plan is to assure the railroad workers of competent counsel to protect and enforce their legal rights.

In the *Button* case, the scope of litigation was confined to matters of significance to the entire membership, issues transcending the personal interests of the individual parties involved.[93] Similarly, advice relating to matters common to all members of trade associations could be made by attorneys employed by the association.[94] The sphere of litigation in the *Brotherhood* case involved matters of a recurring nature that were common to the members, and also that were peculiar to the group's common bonds;[95] the purview of litigation provided in most intermediary arrangements will probably fall within this classification.[96] Confining the permissible scope of

92. See Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950) (Carter, J., dissenting opinion).

93. Compare People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933) (constitutionality of real estate taxes imposed upon all members was attacked).

94. ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 168 (1937); *id.*, Opinion 273 (1946). Both opinions stressed that legal advice could not be given on individual problems of the members.

95. Both *Button* and *Brotherhood* were limited to litigation involving federal rights but it is illogical to assume that the protection of the first amendment will be restricted in such a manner so as not to include state rights and obligations.

96. *E.g.*, People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); People *ex rel.* Chicago Bar Ass'n v. Motorists' Ass'n, 354 Ill. 595, 188 N.E. 827 (1933); Hospital Credit Exch., Inc. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Munic. Ct. N.Y. 1946); Dworken v. Apartment House Owners Ass'n, 28 Ohio N.P. (n.s.) 115 (C.P. 1930).

litigation in this manner offers to the intermediary and the individuals the benefits of volume, specialization, and resulting efficiency.

In the hypothetical case above, the breadth of litigation has widened and the resulting impact upon the existing institutions of the legal profession becomes more pronounced. If, for example, the Brotherhood's attorneys drafted wills for the members, it might be difficult to justify barring these legal services solely on the ground that these needs did not arise out of the common bonds that brought the members together. The legal services are still being handled by members of the bar and are offered not for profit but for the benefit of the recipients. Extending this reasoning to its logical end, the protection of all legal rights should fall within the range of permissible activities by intermediaries.[97] It is at this point that the legal profession would be seriously alarmed at the potentially voluminous shift of litigation from independent practitioners to intermediaries.

(3) As a result of a collective bargaining agreement, General Matters Corporation is to provide free legal services as a fringe benefit for its one hundred thousand employees. The corporation decides to employ its own staff of attorneys to represent employees.[98]

If the employees' union had undertaken to employ attorneys to provide legal services, the opinion in the *Brotherhood* case suggests that this arrangement would be approved.[99] Is the situation any different because the burden of expense has been shifted to a profit-making corporation? The corporation would have a bona fide interest in improving morale and saving actual man-hours of work by preventing legal entanglements.[100] If the corporation would offer legal services not directly for profit and if the attorney-client relationship were personal and direct with no conflicts of interest, approval of this type of plan has been suggested.[101] However, there are persuasive arguments against permitting these arrangements. Difficulties might arise in separating the corporation's legal department from the legal department for the employees. Control of one office might spread to control over both for the financial interests of the corporation. There is nothing to assure the employees that the corporation will secure the most competent attorneys. Also, the cost burden may be shifted to the general public instead of falling

97. Public policy arguments would probably prevent intermediaries from furnishing legal services for criminal and divorce cases because providing unlimited legal services in such instances might encourage crimes or divorces.

98. A survey of the legal profession revealed evidence that situations do exist where corporations furnish legal services for their employees in spite of general prohibitions. McCracken, *Report on Observance by the Bar of Stated Professional Standards,* 37 VA. L. REV. 399, 418 (1951).

99. See note 67 *supra.*

100. See note 19 *supra.*

101. DRINKER, LEGAL ETHICS 163 (1953); *1964 California Report* 727.

upon the recipients of the legal services. Another factor to be weighed before endorsing these arrangements is the magnitude of the disruptive effect upon the existing institutions, individual offices and law firms, providing legal services. In addition, the independence of the legal profession would be reduced significantly.

CONCLUSION

The failure of existing legal units to meet the needs of middle and lower income classes has been revealed by surveys,[102] recognized by the legal profession,[103] and noted by scholars.[104] Understandably, the public is turning to a new medium to fill the gap in needed legal services. The increasing individual association with and confidence in groups have led to substantial reliance on these organizations for the legal services which in the past had been acquired on an individual basis. However, the attempts by these organizations to offer legal services[105] have been obstructed by the legal profession's strict adherence to the sanctity of the traditional individual lawyer-client relationship.

Professional standards of ethics are flexible guidelines by which the profession believes it can most effectively serve the public interest and fairly administer justice while preserving the dignity of the profession. The standards barring intermediaries must be re-examined in the light of changing

102. *The Lawyer and the Public: An A.A.L.S. Survey,* 47 YALE L.J. 1272 (1938); KOOS, THE FAMILY AND THE LAW at i (1948).

In England, the gap between the need for legal services by the lower-income groups and the actual procuring of such services has been lessened by a government-sponsored plan under the Legal Aid and Advice Act of 1949. A basic premise of this plan is that no one should be deprived of legal advice or legal representation because of a lack of means. The essential elements of the plan are that individuals are required to pay according to what they can afford, the members of the legal profession are directly remunerated by the State, only a limited number of civil actions are within the scope of the plan, and the administration of the system is controlled by the legal profession. Although the government acts as an intermediary, the plan has not been attacked as undermining the ethics of the legal profession or the normal attorney-client relationship. This reference to the English plan is made not to suggest that the plan might be practical here in the United States but to emphasize the recognized difficulties of lower-income classes in obtaining legal services and to mention one response to the problem. DUCHAMEL, SOME PILLARS OF ENGLISH LAW 168-73 (1959); Lund, *The Legal Aid and Advice Scheme,* 4 RECORD OF N.Y.C.B.A. 77 (1949); Smith, *English Legal Assistance Plan: Its Significance for American Legal Institutions,* 35 A.B.A.J. 453 (1949).

103. See ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 191 (1939); *id.,* Opinion 205 (1940).

104. 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).

105. "There seems to be a growing recognition of the desire of associations, whether for profit or otherwise, to retain the services of an attorney and have him available for representation of individual members of the group." McCracken, *supra* note 98, at 418.

conditions and the inadequacies of the present system. In the past, exceptions to the prohibition against intermediaries have been made. The public interest in providing legal services for the indigent necessitated the approval of legal aid societies.[106] Economic utility was the basis for permitting the incorporation of lawyers.[107] Liability insurance companies are allowed to employ attorneys to defend actions against individual policyholders, although these arrangements violate the Canon prohibiting intermediaries. Justification has been premised on the common financial interest of insurer and insured,[108] but in fact situations arise where this element is lacking[109] and where conflicts of interest are present.[110] If the *raison d'etre* for an organization is the benefit of its members through aid in legal matters, is this not as compelling an argument as a common financial interest to insure competent and loyal, legal representation?

Moreover, intermediaries may remedy some of the weaknesses in traditional relationships between the public and the legal profession. It has been argued that intermediaries increase the public's awareness of legal problems, expedite the contacting process, and reduce legal costs.[111] These factors must outweigh the policies comprehended by the traditional norms if intermediaries of a limited nature are to be permitted. The first essential step towards effecting an attorney-client relationship is recognition of a legal

106. *E.g.*, N.J. REV. STAT. §§ 2A: 170-82 (1953); MICH. STAT. ANN. § 21.311 (1937); LA. REV. STAT. § 37:213 (1964); Azzarello v. Legal Aid Soc'y, 117 Ohio App. 471, 185 N.E.2d 566 (1962).

A new approach to the problem of providing legal services to the indigent has resulted from the passing of the Economic Opportunity Act of 1964. As part of government-sponsored community-action programs, non-profit neighborhood offices, employing attorneys, will offer legal assistance to the indigent in civil matters peculiar to the poverty-stricken, such as fraudulent finance practices, welfare benefits, etc. An essential element of the plan will be the education of the underprivileged in their legal rights by speeches, advertising, and solicitation. Although the traditional arguments for prohibiting intermediaries—potential lay control over lawyers and litigation, divided allegiance, conflicts of interest, solicitation and the stirring up of litigation—are especially applicable to this evolving plan, the public welfare has transcended the importance of the traditional ethical standards of the legal profession. See *The Role of the Bar Association of St. Louis in the Anti-Poverty Program Under the Economic Opportunity Act*, St. Louis B.J., Spring 1965, pp. 11-25.

107. In the Matter of the Florida Bar, 133 So. 2d. 554 (Fla. 1961) (lawyers permitted to practice in corporate form to gain tax benefits); ILL. ANN. STAT. ch. 106½, §§ 101-110 (Smith-Hurd Supp. 1962); OKLA. STAT. ANN. tit. 18, §§ 801-19 (Supp. 1962) (Professional Corporation Act).

108. Matter of Kelsey, 186 App. Div. 95, 73 N.Y. Supp. 860 (1919); ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 282 (1950).

109. *E.g.*, American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (1954) (coverage limit of policy exhausted).

110. *E.g.*, O'Morrow v. Borad, 27 Cal. 2d 794, 167 P.2d 483 (1946).

111. *1964 California Report* 662. See generally *id.* at 660-69.

problem. Through advertisements, meetings or personal associations, intermediaries create or reinforce public awareness of problems requiring legal assistance. The education of the public with respect to legal rights and obligations is unquestionably desirable. Intertwined with creating awareness of legal problems is the informing of individuals of the easy accessibility of competent attorneys. Recognition by the legal profession of this problem of contacting is manifested by the increasing number of lawyer referral systems. Intermediaries expedite and simplify the difficult process of choosing and contacting dependable and trustworthy attorneys.

Perhaps the most important function of intermediaries is to offer individuals more economical legal services. Membership organizations, supported by dues, utilize the insurance principle of spreading the risk. Also increased volumes of business in specialized areas produce efficiency of operation. In fact, intermediaries may offer the only access to legal representation in areas of the law where the expenses of legal services may exceed the financial rewards of redressing one's rights.[112] But a result of reducing the cost of legal services and increasing the accessibility of attorneys might be to provoke unnecessary litigation which otherwise would be settled privately by the parties.

A final caveat must be considered. Intermediaries could have a potentially profound influence upon the role of the legal profession in our society. The preservation of an independent legal profession enables the members to advocate reforms and solutions for political and social issues based solely upon their individual convictions.[113] Group legal services would add to the creeping abridgement of the independence of lawyers from partisan interests. Subtle restrictions upon freedoms of expression and action would be imposed upon those members of the legal profession forced to maintain the security and image of loyal and dedicated employees.[114] Moreover, the subjection of attorneys to the control of lay agencies and the concomitant removal of these lawyers from intra-legal competition for clients eliminates the inducement to enhance one's reputation among potential clients by entering positions of civic responsibility, legislative roles and political offices.[115] Ultimately, increasing numbers of the legal profession would be motivated to further the interests of organizational employers and their constituents in contrast to dedication to the general public welfare.

112. See People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); People *ex rel.* Chicago Bar Ass'n v. Motorists' Ass'n, 354 Ill. 595, 188 N.E. 827 (1933); Dworken v. Cleveland Auto. Club, 29 Ohio N.P. (n.s.) 607 (C.P. 1931).

113. See HURST, THE GROWTH OF AMERICAN LAW 366-67 (1950).

114. See Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar,* 35 A.B.A.J. 89, 171 (1949).

115. See BLAUSTEIN & PORTER, THE AMERICAN LAWYER 98 (1954).