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Constitutional Law--Group Legal Practice--Unauthorized Practice of Law

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“uninvited ear,” not the “intruding eye.”⁴⁹ He wished to keep what he *said* private, and was justified in assuming that this would be the case.⁵⁰ Therefore, he was entitled to the protection afforded by the fourth amendment—freedom from unreasonable searches and seizures.⁵¹

A question left open in this case, and one which may prove to be important later, is raised in the Court's footnote 23. In this footnote the Court observed that the present decision was not concerned with eavesdropping in cases involving national security. In a concurring opinion,⁵² Justice White expressed the view that the warrant procedure should be dispensed with in cases of national security if eavesdropping is authorized by the President or Attorney General, stating for his only reason that successive presidents have authorized such surveillance to protect the security of the nation.⁵³

In rebuttal to this, Justice Douglas in a concurring opinion,⁵⁴ in which he was joined by Justice Brennan, raised the point that the President and Attorney General, because of their positions, are not detached from the problem of national security, and thus do not qualify as neutral magistrates. The fourth amendment draws no distinction between substantive offenses, and, therefore, none should be drawn here.⁵⁵ The point is well taken, and the argument convincing, and may prove to be the better view. At a time when international espionage is an acute problem, the question left open by the *Katz* case may call for an early answer.

John Charles Lobert

**Constitutional Law—Group Legal Services—
Unauthorized Practice of Law**

The Illinois State Bar Association sought to have a labor union enjoin from the practice of employing licensed attorneys on a salary basis to prosecute workmen's compensation claims for any

⁴⁹ *Katz v. United States*, 389 U.S. 347, 352 (1967).

⁵⁰ *Id.* at 352.

⁵¹ *Id.* at 359.

⁵² *Id.* at 362 (concurring opinion).

⁵³ *Id.* at 364 (concurring opinion).

⁵⁴ *Id.* at 359 (concurring opinion).

⁵⁵ *Id.* at 360 (concurring opinion).

union member who desired their services. The Bar Association asserted that this practice constituted an unauthorized practice of law. The trial court granted the injunction and the Illinois supreme court affirmed. Certiorari was granted by the Supreme Court of the United States. *Held*, judgment vacated. The union's practice was protected by the first and fourteenth amendments. *Dist. 12, UMW v. Illinois Bar Association*, 389 U.S. 217 (1967).

The situation presented in this case is a conflict between two important rights—the right of union members to have an adequate means of securing the compensation to which they are legally entitled and the right of a state to regulate the professional standards of the legal profession in order to maintain a high level of ethical conduct. An attempt must be made to balance these interests to adequately protect both rights while also protecting the interest of the general public. This is not easily accomplished and differences as to how best to achieve this balancing objective have arisen in most cases where these interests have clashed.

Union attempts to provide legal assistance for members is not a recent development. Union organization of legal aid departments arose shortly after the enactment of state or federal legislation which provided means for workers injured on their jobs to obtain compensation for the injuries. The need for some such assistance arose from the fact that workers were being victimized by unscrupulous claim adjusters or incompetent attorneys.¹ The activities of the legal aid departments did not long go unchallenged and were usually attacked as violating legal ethics and constituting the unlawful practice of law by a lay organization. An example of a legal aid department is that which was organized by the Brotherhood of Railway Trainmen to aid its members in the collection of F.E.L.A. claims against railroad companies. The department investigated claims and recommended employment of its regional counsel by the injured member or his surviving family. The lawyer who handled the case charged a fixed contingency fee and paid all costs and expenses including the cost of running the department.² This system was attacked in the courts on several bases. The lawyers involved were held to be guilty of unprofessional conduct

¹ *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 33 (1964).

² *In re Bhd. of R.R. Trainmen*, 13 Ill.2d 391, 393, 150 N.E.2d 163, 165 (1958).

and violation of the code of ethics;³ the system was enjoined;⁴ the union fact finding member was enjoined from carrying out his activities;⁵ and financial connection between the union and the lawyers was held to be unacceptable.⁶ In one case the system was disapproved, but the trial court's decision to allow the lawyer involved to prosecute the case was upheld.⁷ In *Hildebrand v. State Bar of California*,⁸ the system was held improper but the lawyers involved were not punished because there was no prior decision holding the activities to be improper.

There was one exception to the holdings that the system was illegal. The court in *Ryan v. Pennsylvania Railroad*,⁹ where a lawyer sought collection of his fee, upheld the Brotherhood of Railroad Trainmen's system of providing legal aid to its members. The court in a strongly worded opinion declared, "[W]e feel impelled to say that the assertion that the Brotherhood, through its legal aid department, is akin to an ambulaner and that the petitioner was a beneficiary of an unethical and unlawful system of obtaining clients, is unworthy of the able lawyers who made it."¹⁰ There were two strong dissents in the *Hildebrand* case which also found nothing illegal in the Brotherhood's practice. It was asserted that similar plans were allowed in connection with insurance companies, legal aid bureaus, and merchants' associations.¹¹ The object of the plan is primarily to aid members in obtaining competent legal advice at rates which they can afford and *not* to bring business to the attorneys or stir up litigation.¹² The compensation law is useless unless the members are able to use it.¹³ Finally, the plan has none of the evils that the rules against solicitation by a group are designed to prevent.¹⁴

The lower court cases in this area showed some disagreement, but mostly held the union legal aid plans to be in violation of the code

³ *In re O'Neill*, 5 F. Supp. 465 (E.D. N.Y. 1933); *In re Comm. of Cleveland Bar Ass'n*, 15 Ohio L. Abs. 106 (Dist. Ct. App. 1933).

⁴ *Hulse v. Bhd. of R.R. Trainmen*, 340 S.W.2d 404 (Mo. 1960); *State ex rel. Beck v. Lush*, 170 Neb. 376, 103 N.W.2d 136 (1960).

⁵ *Doughty v. Gills*, 37 Tenn. App. 63, 260 S.W.2d 379 (1952).

⁶ *In re Bhd. of R.R. Trainmen*, 13 Ill.2d 391, 398, 150 N.E.2d 163, 167 (1958).

⁷ *Atchison, T. & S. Fe Ry. v. Jackson*, 235 F.2d 390 (10th Cir. 9516).

⁸ 36 Cal. 2d 504, 225 P.2d 508 (1950).

⁹ 268 Ill. App. 364 (1932).

¹⁰ *Id.* at 373.

¹¹ *Hildebrand v. State Bar of California*, 36 Cal. 2d 504, 516, 225 P.2d 508, 515 (1950) (dissenting opinion).

¹² *Id.* at 517, 225 P.2d at 516.

¹³ *Id.* at 520, 225 P.2d at 518.

¹⁴ *Id.* at 527, 225 P.2d at 522.

of legal ethics. The more recent cases decided in the Supreme Court, however, have upheld the legal aid plans of associations. The first of these cases was *NAACP v. Button*¹⁵ decided in 1963. The NAACP had sued to enjoin the enforcement of Virginia's anti-solicitation statute. The Virginia Supreme Court of Appeals held that NAACP activities violated the statute. The NAACP encouraged the voluntary instigation of civil rights litigation, paid all litigation expenses, and provided a staff lawyer who was an expert in the field to handle the litigation. The lawyer was paid a per diem fee only for his services and controlled the conduct of the litigation.¹⁶ The Supreme Court held that these activities were forms of association and expression protected by the first and fourteenth amendments and could not be prohibited as improper solicitation of legal business.¹⁷ The first amendment not only protects abstract discussion but also vigorous advocacy of lawful ends. As used by the NAACP, litigation is a means of achieving equal treatment and is a form of political expression.¹⁸ The statute was found faulty because of vagueness which may lead to selective enforcement.¹⁹ The Court also found that the elements of malicious intent and pecuniary gain, evils sought to be controlled by anti-solicitation statutes, were not present in this case.²⁰ The state had shown no substantial regulatory interest to justify the broad prohibitions imposed.²¹ Justice Harlan, in a dissenting opinion, expressed the view that a reasonable state regulation regulating conduct associated with speech should be upheld.²² He felt that the statute sought to protect the personal relationship between lawyer and client and prevent a divided allegiance of the lawyer between the association and the individual litigant.²³

The protection of associational legal aid was extended the next year in *Brotherhood of Railroad Trainmen v. Virginia*.²⁴ The Brotherhood maintained a Department of Legal Counsel which recommended to members the names of lawyers to prosecute their injury claims. This resulted in the channeling of most claims to

¹⁵ 371 U.S. 415 (1963).

¹⁶ *Id.* at 420.

¹⁷ *Id.* at 428.

¹⁸ *Id.* at 429.

¹⁹ *Id.* at 435.

²⁰ *Id.* at 439.

²¹ *Id.* at 444.

²² *Id.* at 454 (dissenting opinion).

²³ *Id.* at 460 (dissenting opinion).

²⁴ 377 U.S. 1 (1964).

certain designated lawyers.²⁵ The Court held that this plan was protected by the first and fourteenth amendments. The union members had the right to consult with each other including the right to select a spokesman who gives the wisest counsel. This right encompassed the legal aid plan. The members were not engaging in the practice of law, nor were they soliciting business for the lawyers. The plan was no threat to legal ethics which the state might reasonably control.²⁶ Justice Clark in a strongly worded dissent reasoned that the decision lowered the level of the practice of law to that of a commercial enterprise and degraded the profession.²⁷ Special attorneys were not needed by union members to represent them.²⁸ The potential evil of the system is enormous and the system works to the disadvantage of the individual union member. Finally, the decision would encourage other further departures from high ethical standards.²⁹

*Dist. 12, UMW v. Illinois State Bar Association*³⁰ is the most recent of these Supreme Court cases. The union employed an attorney on a salary, which was his only compensation, to represent union members in their claims under the Illinois Workmen's Compensation Act. The union provided forms to its members to apply for legal aid, but they were free to employ other counsel. The attorney's only obligation was to be to his client, but he usually would have personal contact with the client only if no settlement could be made. The full amount of the award would go to the client.³¹ The Court once again held that the first and fourteenth amendments protected the plan. Laws which affect first amendment rights "cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."³²

In a dissenting opinion Justice Harlan suggested ways the union could achieve its goals within acceptable ethical conduct. These were to tell the members names of capable attorneys to assure they would have access to competent legal counsel, to reimburse members for expenses to protect them from crippling legal costs, and

²⁵ *Id.* at 2.

²⁶ *Id.* at 6.

²⁷ *Id.* at 9 (dissenting opinion).

²⁸ *Id.*

²⁹ *Id.* at 12 (dissenting opinion).

³⁰ 389 U.S. 217 (1967).

³¹ *Id.* at 221.

³² *Id.* at 222.

to rely on enforcement of the Illinois Compensation Act to protect against excessive legal fees.³³ His objections to the plan were that the lawyer may have little contact with his client, may want a quick settlement, may compromise for reasons not connected with the individual case, and may not appeal cases which should be appealed.³⁴ Justice Harlan concluded by insisting that the fact that no proven harm existed did not mean that the state could not attempt to prevent possible harm.³⁵

The three Supreme Court cases indicate an increasing tendency to balance the two competing interests involved in favor of group members in securing their legal rights over the interest of the state in maintaining high standards of ethics in the legal profession. Whether this will result in dire consequences such as those suggested by Justice Clark in his dissent in *Brotherhood of Railroad Trainmen v. Virginia* is yet to be determined. Much varied comment concerning group legal aid is available.³⁶ Whether the permissive attitude taken toward union legal aid plans will be extended to other groups must await tomorrow's judgments. In the past, group legal services offered by auto clubs,³⁷ taxpayer associations,³⁸ and credit groups³⁹ have been held to be the unlawful practice of law. Protection of individual rights, however *meritorious*, must not be at the expense of debasing ethical standards of the profession.

In the administration of justice, a proper and practical balance is to be maintained between these merging interests. Principles and arguments involved are to be carefully weighed in the interest of the public good. This objective cannot be accomplished simply by claims of undermining essential professional standards and charges of self interest.⁴⁰

³³ *Id.* at 228 (dissenting opinion).

³⁴ *Id.* at 232 (dissenting opinion).

³⁵ *Id.* at 233 (dissenting opinion).

³⁶ See Symposium, *Group Legal Services in Perspective*, 12 U.C.L.A. Law Rev. 279 (1964); Hourigan, *Group Legal Services—An Old Wine in a New Bottle*, 39 PENN. BAR ASS'N QUAR. 18 (1967).

³⁷ *In re Maclub of Am., Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936); *Rhode Island Bar Ass'n v. Automobile Serv. Ass'n*, 55 R.I. 122, 179 A. 139 (1935); *Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935).

³⁸ *People ex rel. Courtney v. Ass'n of Real Estate Tax-payers*, 354 Ill. 102, 187 N.E. 823 (1933).

³⁹ *Richmond Ass'n of Credit Men v. Bar Ass'n of Richmond*, 167 Va. 327, 189 S.E. 153 (1937).

⁴⁰ One commentator has observed concerning group legal services, "The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in the hands of fewer lawyers." H. DRINKER, *LEGAL ETHICS* 167 (1953).

Some modification of the code of legal ethics may be necessary to resolve this conflict of interests.⁴¹ As Justice Traynor well noted, "Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty."⁴²

John Reed Homburg

**Criminal Law—Misdemeanors—Indigent's
Right to Appointed Counsel**

D was charged with committing a misdemeanor. At the time of his arraignment he alleged he was financially unable to procure counsel. The court informed him that no counsel could be appointed and set the date for his trial. At the trial *D* offered no testimony, exhibits, or statements, and did not conduct cross-examination. He was found guilty and sentenced to a fine or *imprisonment in default of payment*. He paid the fine under protest and appealed. On appeal he was again denied appointed counsel. *D* then applied to the state supreme court for an alternative writ of mandamus. *Held*, writ issued and cause remanded to determine indigency. A defendant unable to procure counsel when he is charged with a misdemeanor punishable by incarceration is entitled to have counsel appointed to represent him. *State v. Borst*, 154 N.W.2d 888 (Minn. 1967).

The case raises the controversial question of the right of an indigent misdemeanant to have counsel appointed in his behalf in a state proceeding. The basis of such a right must come from the sixth amendment to the United States Constitution which in part provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."¹ This provision governs federal criminal proceedings and has been interpreted to mean that if the defendant cannot afford to retain counsel, such counsel must

⁴¹ For several months the American Bar Association has been giving consideration to a general revision of the statement of the standards of the legal profession, particularly through its Special Committee on Evaluation of Ethical Standards. *See* Comment, 53 A.B.A.J. 901 (1967).

⁴² *Hildebrand v. State Bar of California*, 36 Cal. 2d 504, 522, 225 P.2d 508, 519 (1950) (dissenting opinion).

¹ U.S. CONST. amend. VI.