A Labor Union’s Right to Recommend Selected Attorneys To Its Injured Members Is Protected By the First And Fourteenth Amendments

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CONSTITUTIONAL LAW—SOLICITATION—
LABOR UNIONS

A Labor Union’s Right To Recommend Selected Attorneys To
Its Injured Members Is Protected By The First And
Fourteenth Amendments.

Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia
State Bar, 84 Sup. Ct. 1113 (1964).

The Virginia State Bar obtained an injunction against the
Brotherhood of Railroad Trainmen in the Chancery Court of
the City of Richmond, Virginia, enjoining it from maintaining
its legal aid plan in Virginia.1 The injunction was issued on
the ground that the Brotherhood’s activities constituted the
solicitation of legal business and the unauthorized practice of
law in that it resulted in the channeling of all, or substantially
all, the workers’ claims to lawyers chosen by the Brotherhood’s
Department of Legal Counsel. The Bar relied on the common
law, the Canons of Ethics of the American Bar Association,2
and several Virginia statutes prohibiting the unauthorized prac-
tice of law.3 The Supreme Court of Appeals of Virginia af-
firmed, over objections that the injunction abridged the Broth-
erhood’s rights under the First and Fourteenth Amendments,
which guarantee freedom of speech, petition and assembly. The
Supreme Court granted certiorari “to consider this constitutional
question in the light of our recent decision in N.A.A.C.P. v.
Button . . . .”4 Held: Judgment and decree vacated and the case
remanded. The First and Fourteenth Amendments protect the
right of the members, through their Brotherhood, to maintain
and carry out their plan for advising workers who are injured
to obtain legal advice and for recommending specific lawyers,
who, if accepting employment under the plan, have a like con-
stitutional protection which the state cannot abridge. Broth-

1. The suit was brought against an attorney designated the Brotherhood’s
regional counsel and an investigator employed by the Brotherhood, but they
were not served with process and are not parties.
2. Canons 28, 35, and 47 which have been adopted into the rules of the
Supreme Court of Appeals of Virginia, 171 Va. xviii. The Canons of Ethics
to which the Bar refers prohibit respectively stirring up of litigation, control
or exploitation by a lay agency of professional services of a lawyer, and aiding
the unauthorized practice of law.
set the qualification for the practice of law in the State and provide for in-
junction against “running, capping, solicitation and maintenance.”
84 Sup. Ct. 1113, 1114 (1964).

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INTRODUCTORY BACKGROUND

In the early days of our railroads, railroad work was extremely dangerous for the railroad employee. It has been noted, for example, that the odds against a natural death for a brakeman in 1888 were almost four to one. The average life expectancy of a switchman in 1893 was only seven years after the beginning of his employment with the railroad.5

To combat some of the hazards of railroad work, Congress, in 1893, passed the Safety Appliance Act.6 In 1906 Congress enacted a Federal Employers' Liability Act,7 covering all employees of common carriers by rail engaged in interstate or foreign commerce. This act was held unconstitutional as exceeding the power of Congress in that it applied to employees who were themselves engaged in intrastate commerce at the time of injury.8 However, two years later, in 1908, a second Federal Employers' Liability Act9 limited to employees who were themselves in interstate or foreign commerce was held constitutional10 and is now in effect, with of course, certain amendments. It must be noted that the most important single group of employees not covered by the workmen's compensation acts are those of railroads. For more than forty years there has been discussion of some system similar to the workmen's compensation acts to cover injuries in the course of railway labor,11 but in the main railroad unions have been satisfied with the present statutes, and it is their opposition which has operated chiefly to prevent any change.12

Having these federal statutes on the books and the recovery of damages by an injured railroad employee or his survivors were

5. Id. at 1115.
7. 34 Stat. 232 (1906).
two entirely different propositions however. The talented and skillful legal staffs of the railroads soon made it readily apparent that the legal representation available to the trainmen was leaving much to be desired.\textsuperscript{13} The situation was so bad that the Government employed the Attorney General's office to file \textit{amicus curiae} briefs in the First and Second Employers' Liability Cases.\textsuperscript{14} As the U. S. Supreme Court has described the situation, "Injured workers or their families often fell prey on the one hand to persuasive claims of adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar."\textsuperscript{15}

It was in this environment that the trainmen's union known as the Brotherhood of Railroad Trainmen conceived and put into motion a legal aid plan aimed at combating claim agent harassment and the securing of competent specialized legal service on a par with the railroads' counsel, at a price below that of most practitioners.\textsuperscript{16} While the Brotherhood's plan was novel in its inception, its interest in the railroader was not. The Brotherhood has worked hard to promote and protect the welfare of trainmen and their families since 1883, being founded for that specific purpose. The Brotherhood and other railroad unions were instrumental in the passage of the Safety Appliance Act and the Federal Employers Liability Act.\textsuperscript{17}

\textbf{THE BROTHERHOOD'S LEGAL AID PLAN}  
\textit{1930 - 1959}

In 1930, to implement its legal aid plan, the Brotherhood of Railroad Trainmen established a Legal Aid Department, which has since been renamed Department of Legal Counsel. Under the legal aid plan the United States was divided into sixteen regions. Within each region, a lawyer or firm was selected by the Brotherhood to represent trainman plaintiffs or their survivors


\textsuperscript{17} Brotherhood of R.R. Trainmen v. Virginia \textit{ex rel}. Virginia State Bar, 84 Sup. Ct. 1113, 1114 (1964).
in railroad personal injury cases. These lawyers were selected on the basis of their reputation for honesty and professional capabilities, on the advice of local lawyers and federal and state judges.\textsuperscript{18} In addition, the plan provided an investigation service with regional investigators to find and report facts and to obtain evidence whenever a claim appeared.\textsuperscript{19} When a trainman was injured or killed, the plan required a local Brotherhood officer go to him or to his widow or children and advise them not to settle the claim without first consulting a lawyer.\textsuperscript{20} This local officer would tell the claimant that the best counsel to consult was the counsel selected by the Brotherhood for that area.\textsuperscript{21} In fact, the constitution of the Brotherhood prescribed that each local lodge should appoint someone to fill out an accident report and to advise the claimant that the regional counsel would give legal advice without charge.\textsuperscript{22} This appointed advisor usually made it a practice to carry the necessary contract for the retention of the regional counsel when he contacted the claimant, as did the investigators employed by the Brotherhood.\textsuperscript{23} While it was not compulsory for the trainman or his surviving family to follow the Brotherhood’s advice as to counsel, strong and continuous recommendations were made.\textsuperscript{24} In some instances, if the claimant did not agree to sign the contract, he and his spouse were taken on an expense-free trip to the regional counsel’s office by the investigator. If the claimant was a widow, the investigator’s wife accompanied her. In either event, and regardless of the outcome of the trip, the regional counsel paid the expenses of the trip for the claimant and the investigator.\textsuperscript{25} At times, the investigator received a gratuity from the regional counsel for bringing in a case, often $100 to $150.\textsuperscript{26} In addition to these personal contacts, persistent recommendations were made to Brotherhood members not to settle a claim without con-

\textsuperscript{18} Id. at 1115.
\textsuperscript{19} Hildebrand v. State Bar of Cal., 36 Cal.2d 504, 506, 225 P.2d 508, 511 (1950).
\textsuperscript{21} Ibid.
\textsuperscript{22} \textit{In re} Brotherhood of R.R. Trainmen, 13 Ill.2d 391, 392, 150 N.E.2d 163, 165 (1958).
\textsuperscript{23} Id. at 393, 150 N.E.2d at 166.
\textsuperscript{24} Hildebrand v. State Bar of Cal., 36 Cal.2d 504, 506, 225 P.2d 508, 511 (1950).
\textsuperscript{25} \textit{In re} Brotherhood of R.R. Trainmen, 13 Ill.2d 391, 392, 150 N.E.2d 163, 166 (1958).
\textsuperscript{26} Ibid.
sulting an attorney, preferably the regional counsel, in various journals, circulars, and meetings.27

The arrangement between the Brotherhood and its regional counsel required the regional counsel to advance all necessary costs of court, fees for expert witnesses, expenses of medical examinations, and all similar expenses for the conduct of the litigation for the claimant.28

Over the years the original retention procedure was modified twice. The original plan in 1930 called for the claimant to execute a single contract directly with the regional counsel on forms approved by the Legal Aid Department, based on a 20 per cent contingent fee and stipulating that the attorney must turn over one-fourth of the fee obtained to the Brotherhood for the maintenance of the Legal Aid Department.29

As a result of the first modification to the original plan the claimant was required to execute two contracts; one with the regional counsel for a fee of 19 per cent of the net settlement, and the other with the Brotherhood for 6 per cent of the net settlement as a charge for investigating services.30

The second modification of the fee procedure was put into effect in 1946 and allowed the attorney to handle the case under a single fee retention contract for 25 per cent of the recovery. Under this arrangement, the attorney agreed to pay the investigators from the Brotherhood's Legal Aid Department on a quantum meruit basis.31 In addition, the expenses of the Legal Aid Department were to be pro-rated among the sixteen regional councils on the basis of their gross fees.32 Expenses of the Legal Aid Department included maintaining a staff of five administrative personnel, a research analyst, and a number of regional investigators. Another expense of the Legal Aid Department was the cost for “floor time” at Brotherhood conventions.33 Thus, the regional counsels paid for the work done for them by regional investigators, the overall expenses of maintaining the Legal Aid Department, and the Legal Aid Department’s representation at conventions.

28. Ibid.
29. Ibid.
30. Ibid.
31. Ibid.
33. Ibid.
There can be no doubt but that the tide has turned in favor of the railroad worker in his claims against the railroads. Plaintiffs now recover in practically all of the cases, and verdicts for the most part have been substantial.34 This result is due perhaps, in great measure, to favorable interpretation of the Federal Employers Liability Act by the United States Supreme Court;35 but, the legal aid plan of the Brotherhood of Railroad Trainmen can undoubtedly be given some of the credit.

SOLICITATION, ADVERTISING, AND LEGAL ETHICS

The proscription of advertising and solicitation by lawyers has its roots in the training received by the young Americans who travelled to England in the eighteenth and nineteenth centuries to become barristers. The atmosphere prevailing in England at that time was that the practice of law was a public service and not a means by which to earn an income. Because the barristers of that day did not practice for pecuniary gain, there was no reason for them to compete with one another for clients.36 Thus, the only spirit of competition was that between opposing counsel in a given case.37 Since only the sons of wealthy families studied law, they too could well afford to entertain such a lofty principle. This philosophy, combined with the extremely close comradeship the students enjoyed at the Inns of the English Courts, materially contributed to this non-competitive attitude which was brought back to this country by the returning students.38 As a result, this ancient view was firmly entrenched in our legal system long before the Canons of Professional Ethics of the American Bar Association expressly approved the prohibitions against advertising and solicitation.39

There are several dominant reasons advanced in support of the prohibition of advertising and solicitation. First, there is the theory that lawyers would actively engage in "stirring up

36. DRINKER, LEGAL ETHICS 210-11 (1953).
39. E.g., People v. Taylor, 32 Colo. 250, 75 Pac. 914 (1904); People v. MacCabe, 18 Colo. 186, 32 Pac. 280 (1893).
litigation". This could be particularly dangerous to the public welfare in the area of domestic relations and probate matters. Second, there is the danger of fraudulent claims being instigated by unscrupulous lawyers seeking out unscrupulous clients. Third, there is a danger of corruption of public officials such as policemen, physicians, or employees of hospitals or newspapers, who, for pay, would perhaps give more attention to the demands of the soliciting lawyer than to their own jobs. Fourth, it is suggested that solicitation and advertising would be detrimental to the entire legal profession. It is reasoned that the profession would lose its traditional dignity and hard-earned respect and reputation. It is not unreasonable to assume the public would quickly lose respect for the profession if it felt lawyers were primarily seeking financial gain rather than the achievement of justice. Logically enough, disrespect for the entire legal process and orderly government could follow. A further detriment might be the concentration of business in the hands of a relatively small number of well-advertised lawyers or firms.

Fifth, it is feared that harm could come to the client by attorneys "overreaching", "overcharging", and "underrepresenting." The idea of overreaching is that solicitation could prevent free choice to an unknowledgeable client or one that is mentally unprepared to engage the services of a lawyer, such as an injured person just admitted to a hospital, or members of a bereaved family still suffering from the shock of losing a loved one. Overcharging could result from the soliciting and adver-

40. A Critical Analysis of Rules Against Solicitation By Lawyers, 25 U. CHI. L. REV. 674 (1958) [Hereinafter cited as Critical Analysis]. But see POUND, THE SPIRIT OF THE COMMON LAW 134 (1921): "It will not do to say to the population of modern cities that the practical cutting off of all petty litigation, by which theoretically the rights of the average man are to be maintained, is a good thing because litigation ought to be discouraged... In truth, the idea that litigation is to be discouraged, proper enough, in so far as it refers to amicable adjustment of what ought to be adjusted, has its roots chiefly in the obvious futility of litigation under the conditions of procedure which have been obtained in the immediate past... Moreover, there is danger that in discouraging litigation we encourage wrongdoing, and it requires very little experience in the legal aid societies in any of our cities to teach us that we have been doing that very thing." (Emphasis added.)
41. For cases encouraging divorce litigation see 9 A.L.R. 1500 (1920).
42. Cases on "heir hunting" are collected in 171 A.L.R. 351 (1947).
43. Critical Analysis 678.
44. Id. at 680.
45. Id. at 681.
47. Critical Analysis 681.
49. Critical Analysis 682.
50. Critical Analysis 683.
tising lawyer's expenses in maintaining an adequate solicitation network.\textsuperscript{51} Underrepresentation is predicated on the presumption that it might be more profitable for professional "ambulance chasers" to operate on a high volume low return basis than to consider the best interests of each client.\textsuperscript{52}

For each of the arguments in support of the prohibition of solicitation and advertising there are counter-arguments and counter-theories equally potent and strong enough to make one ponder whether absolute proscription of solicitation is either wise or necessary. It has been suggested, for example, that advertising and solicitation should be permitted because the right to practice a profession includes the right to use all lawful means to justify and promote success; that today the vast majority of lawyers practice law to earn their livelihood; and that people with just claims may lose their rights by defaulting through ignorance or as a result of adjusters who secure premature releases.\textsuperscript{53}

What the courts, bar associations, and various committees on ethics have found to be violative of the various rules of court and statutes prohibiting advertising and solicitation ranges from the obvious to the abstruse, and the spectrum is wide and controversial.\textsuperscript{54} For example, in its Opinion 284, the American Bar Association Committee on Ethics disapproved the listing of a lawyer's name with distinctive type in the alphabetical section of a telephone directory.\textsuperscript{55} This opinion reversed a previous opinion that recognized alphabetical sections of a telephone directory are not designed to enable readers to select a lawyer, but are used by one to find the lawyer whom he had already chosen.\textsuperscript{56} Another example, this one of a less debatable nature, is found in a recently decided New York case where the respondent, an attorney, was censured by the court for violating Canon 27 of the Canons of Professional Ethics of the American Bar Association adopted by the New York State Bar Association

\textsuperscript{51} Ibid.
\textsuperscript{52} Luther, \textit{supra} note 37, at 555.
\textsuperscript{53} \textit{Id.} at 554; \textit{Critical Analysis} 674-85; See \textit{Hicks, Organization and Ethics of Bench and Bar} 261-269 (1932).
\textsuperscript{54} See \textit{Drinker}, \textit{op. cit. supra} note 36, at 210-73; Annot. 39 A.L.R.2d 1055 (1955) where cases involving advertising have been collected; Annot. 69 A.L.R.2d 859 (1959) where cases involving solicitation of personal injury actions have been collected; Annot. \textit{supra} note 41, at 1500; Annot. \textit{supra} note 42, at 351.
\textsuperscript{55} \textit{Drinker}, \textit{op. cit. supra} note 36 at 246.
\textsuperscript{56} \textit{Ibid.}
in 1909.\textsuperscript{57} The respondent's violation was the maintenance of a sign approximately 16 feet long and 2 feet high, bearing the legend "LAW OFFICE" in block letters and his name in script. The sign, placed over the street level store in which he maintained his law office, was illuminated at night by means of two white neon bars—one along the top and the other along the bottom. In addition, the store front, which consisted of two large plate glass windows of the retail store variety, contained two neon tubing signs—one in red and one in green—spelling out "LAW OFFICE" and the respondent's name respectively.

The penalty for soliciting legal business has been as severe as disbarment,\textsuperscript{58} and the same has been true for violating the ethical standards of the law profession by advertising.\textsuperscript{59} The courts generally agree that the purpose of a disbarment proceeding is not to punish the attorney but rather to protect the court itself\textsuperscript{60} and to relieve the public of a member of the legal profession who is unfit to serve as such because of his poor professional character.\textsuperscript{61}

One might logically question exactly where the line is drawn or whether indirect solicitation by practicing lawyers, for example, is undesirable. To illustrate, it is a well known fact that numerous lawyers are active participants in politics at all levels; then too, many lawyers make speeches at various meetings, and many are engaged in civic work. Likewise, many lawyers belong to social clubs where potential clients are met. Should these activities and associations also be frowned upon and curtailed as falling within the scope of culpable solicitation? In placing his name before the public as being active in political, religious, fraternal and other affairs, the lawyer is indirectly soliciting.\textsuperscript{62} It appears that the more crude and direct forms of solicitation have been restrained, while the more indirect and subtle methods have not.\textsuperscript{63}

\textsuperscript{58} \textit{E.g., State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N.W. 32 (1934); In re Welch, 156 App. Div. 470, 141 N.Y.S. 381 (1931).}
\textsuperscript{59} \textit{E.g., Mayer v. State Bar, 2 Cal.2d 71, 39 P.2d 206 (1934); In re Schwarz, 195 App. Div. 194, 186 N.Y.S. 535 (1921).}
\textsuperscript{60} \textit{See Ex Parte Wall, 107 U.S. 265, 273 (1882); State v. Jennings, 161 S.C. 263, 266, 159 S.E. 627, 629 (1931); State v. Holding, 1 McCord 379, 381 (S.C. 1821).}
\textsuperscript{61} \textit{See In re Sacher, 206 F.2d 388 (2d Cir. 1953); State v. Jennings \textit{supra} note 60 at 266, 159 S.E. at 629; State v. Holding, \textit{supra} note 60 at 381.}
\textsuperscript{62} \textit{Luther, \textit{supra} note 37, at 554.}
\textsuperscript{63} \textit{Ibid.}
Further, one might also reflect upon the significance of certain inroads that apparently have been made in the traditional prohibitive theory of solicitation and advertising. For example, publicity and advertising used by banks, trust companies and tax experts has to some degree given laymen an advantage in areas in which they share interests with the lawyer.64 This in turn has been responsible for the relaxation of the no-advertising rule to the extent of sanctioning such plans of group advertising as bar association advertising and the lawyers referral plan.65

Do these inconsistencies and trends indicate that it is time for a re-evaluation of the rules prohibiting all advertising and solicitation? Certainly this writer is not suggesting that the rules be so relaxed that the kind of problem presented by "ambulance chasing", which was so serious in the 1920's, be given fertile ground in which to blossom again.66 But should not a more practical and realistic approach be taken towards solicitation and advertising by bringing the rules more in line with the present needs of the practicing attorney and the public?67

APPLICABLE SOUTH CAROLINA STATUTES
AND RULES OF COURT

Pertinent provisions of the Code of Laws of South Carolina (1962) for the purposes of this comment are:68

§ 56-96. Inherent power of Supreme Court to regulate practice of law; §§ 56-96 to 56-100 cumulative.—The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbaring attorneys at law is hereby recognized and de-

64. Ibid.
65. Ibid.
66. For an excellent account of the problem of "ambulance chasing" see Nationwide War on "Ambulance Chasers", 14 A.B.A.J. 561 (1928).
67. For highly enlightening material on legal ethics to include solicitation and advertising see 7 U. Fla. L. Rev. 375 (1954). This is a symposium edition devoted entirely to a reproduction of the proceeding of a nationally attended legal ethics institute held at the University of Florida. Some scholars have argued for relaxation in the application of the canons of ethics to some group programs. See, e.g., Drinker, The Ethical Lawyer, 7 U. Fla. L. Rev. 375, 383, (1954); Turrentine, Legal Service for the Lower-Income Group, 29 Ore. L. Rev. 20, 29-30 (1949). See also Llewellyn, The Bar's Troubles, and Polities—and Cures?, 5 LAW & CONTEMP. PROB. 104 (1938).
68. It is clear that statutes prohibiting solicitation of employment, either personally or through others, have been upheld as constitutional. The cases have been collected in Annot. 53 A.L.R. 279 (1928). See, e.g., People v. Meola, 193 App. Div. 487, 184 N.Y.S. 353 (1920).
clared. The authority conferred on that court in §§ 56-96 to 56-100 shall be deemed as cumulative thereto.\(^69\)

§ 56-97. Supreme Court may promulgate rules and regulations concerning practice of law.—The Supreme Court may from time to time prescribe, adopt, promulgate and amend such rules and regulations as it may deem proper (a) defining and regulating the practice of law, (b) determining the qualifications and requirements for admission to the practice of law, (c) prescribing a code of ethics governing the professional conduct of attorneys at law and (d) prescribing the procedure for disciplining, suspending, disbarring and reinstating attorneys at law.

§ 56-142. Practice of law by corporations and voluntary associations.—It shall be unlawful for any corporation or voluntary association ... (c) to hold itself out to the public as being entitled to practice law or render or furnish legal services or advice or to furnish attorneys or counsel or render legal services of any kind in actions or proceedings of any nature or in any other way or manner, .... Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished in the discretion of the court.

§ 56-145. Soliciting business illegal.—It shall be unlawful for any person or his agent, employee or anyone acting on his behalf to solicit or procure through solicitation, either directly or indirectly, legal business or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services. Any person violating any provision of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished in the discretion of the court.

§ 56-146. Fees not to be split with laymen.—It shall be unlawful for any person, partnership, corporation or association to divide with or receive from, or to agree to divide with or receive from, any attorney at law or group of attorneys at law, whether practicing in this state or elsewhere,

either before or after action brought, any portion of any fee or compensation charged or received by such attorney at law or any valuable consideration or reward as an inducement for placing or in consideration for having placed in the hands of such attorneys at law, or in the hands or another person a claim or demand of any kind for the purpose of collecting such claim or bringing action thereon or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors at law to divide between themselves the compensation to be received. Any person violating any of the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished in the discretion of the court.

Pertinent provisions of the Rules of the Supreme Court of South Carolina adopted pursuant to §§ 56-96 to 56-99, S.C. Code 1962, for the purposes of this comment are:

Rule 32. Standards of professional conduct for attorneys. The present Canons of Professional Ethics of the American Bar Association are hereby adopted and established as the standards of professional conduct for all attorneys heretofore and hereafter admitted to practice in the Courts of South Carolina.

Rule 33. Canons of professional ethics. Adopted by the American Bar Association as amended to May 1956.70

... . . . .

27. Advertising, direct or indirect. 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 . . . offend the traditions and lower the tone of our profession and are reprehensible; . . .

28. Stirring up litigation, directly or through agents. 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

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70. The Canons of Professional Ethics adopted by the American Bar Ass'n were adopted as a rule by the Supreme Court of South Carolina in 1956.
indictable at common law. It is disreputable ... 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, ....

34. Division of fees. No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

35. Intermediaries. 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 .... A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in 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 to their individual affairs.

47. Aiding the unauthorized practice of law. 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.

THE LEADING CASES

In re O'Neil\textsuperscript{71} (1933)—The respondent, an attorney, was regional counsel for the Brotherhood of Railroad Trainmen and had functioned in accordance with the Brotherhood’s legal aid plan. The respondent’s conduct was found to be unprofessional and violative of Canon 28 of the Canons of Ethics of the New York State Bar Association dealing with stirring up litigation, directly or through agents, and he was censured. As regional counsel the respondent’s contract of retainer had provided for a contingent fee of 20 per cent, one-quarter of which

\textsuperscript{71} 71. 5 F. Supp. 465 (E.D.N.Y. 1933).
the respondent paid to the Brotherhood for the maintenance of its Legal Aid Bureau. The court observed that during the proceeding the Brotherhood's fee plan had been altered to provide for two contracts of employment to be procured by the regional counsel—one for 15 per cent to secure his fee and the other whereby the client employs the Legal Aid Department of the Brotherhood to investigate the claim for 5 per cent of the net settlement. The court said that it could see no difference in principle between the two contractual arrangements, and added that any cases the respondent had on the calendar of the court, in which he was retained under such contracts, would not be permitted to proceed until he specifically demonstrated that he had been retained under a new agreement as to which there had been no interest, express or implied, direct or indirect, upon his part, in the payment by his client of any sum to the Brotherhood. The necessity for such independence of function, the court pointed out, was clearly set forth in Canon 35 of the Code of Ethics prohibiting intermediaries and requiring personal and direct relationship between lawyer and client.72

Hildebrand v. State Bar of California73 (1941)—This was a proceeding by Hildebrand, an attorney, for a review of a recommendation made by the Board of Bar Governors that he be suspended from the practice of law for 6 months. The petitioner was charged with four counts of violating the Bar's rules concerning solicitation. The charge on the fourth count grew out of his position as regional counsel for the Brotherhood of Railroad Trainmen. The evidence showed a local Brotherhood officer had informed a trainman who had lost an eye in a railroad accident of the Brotherhood's Legal Aid Department and discussed with him the petitioner's role as regional counsel. The local official thereafter wrote the petitioner requesting him to communicate with the injured party. The petitioner called on

72. Prior to this case, in Ryan v. Pennsylvania R.R., 268 Ill. App. 364 (1932), a regional counsel for the Brotherhood sought to assert a lien for professional services rendered pursuant to the Brotherhood's legal aid plan. The Illinois court upheld the contract, praising the scheme as being in the public interest. The court said: "After a careful consideration of all the facts we are satisfied that these contentions and arguments are without merit, and we feel impelled to say that the assertion that the Brotherhood, through its legal aid department is akin to an ambulance chaser and the petitioner was a beneficiary of an unethical and unlawful system of obtaining clients, is unworthy of the able lawyers who made it." Another case decided about the same time as In re O'Neill and with a like result is In re Committee on Rule 28, 15 Ohio Law Abs. 105 (1933).

73. 18 Cal.2d 816, 117 P.2d 860 (1941).
the injured party on two occasions, once at a hospital and once at his home two months later. During the latter visit the petitioner exhibited some photostatic copies of bank checks indicating past amounts of recoveries and other such data. At that time, the petitioner also agreed to lend the injured man a sum of money monthly to meet his living expenses pending the outcome of the case. The petitioner and the railroader entered into an agreement whereby the latter was to employ the petitioner, the petitioner's compensation to be based on the amount which he could obtain in excess of that theretofore offered him in settlement ($5,500.00). Petitioner obtained a settlement of $8,500.00, whereupon the injured party, to avoid paying the petitioner's fee, lodged a complaint against the petitioner with the Bar Association. The court dismissed the fourth charge (as well as the other three) on the ground that the testimony by the injured railroadman was colored by self-interest and animosity. The court observed that such charges must be sustained by convincing proof and to a reasonable certainty, and any doubts must be resolved in favor of the accused.

It must be noted that the court did not go into the basic plan of the Brotherhood of Railroad Trainmen, dealing only with the facts of this particular case.

*Hildebrand v. State Bar of California*74 (1950)—The petitioners in this proceeding were regional counsel for the Brotherhood of Railroad Trainmen who had operated in accord with the Brotherhood's legal aid plan. The Board of Governors of the State Bar had recommended that they be disciplined (one to be suspended for four months and the other two to be publicly reproved) for violating rules of the Bar prohibiting solicitation of professional employment. This proceeding was an appeal from the Board of Governor's recommendation. The court concluded that the petitioners' contractual relationship with the Brotherhood as a part of the basic service plan of the Legal Aid Department was overall solicitation of legal employment contrary to established standards. The petitioners argued that their case was distinguished from the *O'Neill* case in that their fee procedure (admitted by the petitioners as having been adopted as a result of the *O'Neill* decision) called for only one contract, for 19 per cent of the net settlement, to be executed by them and that one with the client. The other contract, for 6 per cent

74. 36 Cal.2d 504, 225 P.2d 508 (1950).
of the net recovery, was presented to the client by a representative of the Brotherhood. The court, however, decided that the contracts were dependent one upon the other and constituted one overall transaction involving the compensation between regional counsel and the Brotherhood as a fee-splitting device. It must be noted that the court did not rule on the petitioners’ further claim that the fee-splitting criticism was no longer a factor since it had been superseded by a new single contract arrangement for a 25 per cent contingent fee running wholly in favor of the attorney, who paid therefrom the Brotherhood’s investigators on a quantum meruit basis, on the ground that this was not the practice at the time of the misconduct. The court did comment, however, that under either fee arrangement the general channeling of legal work continued as a prevailing feature in the Brotherhood’s undertaking with the petitioners. The court held that the petitioners’ participation in the Brotherhood’s plan was improper but, because of the absence of a prior decision in the court’s jurisdiction, the ends of justice could best be served without disciplinary action, their holding to serve prospectively as a guide.

There were two dissenting opinions written, both of which strongly expressed the view that the petitioners were not guilty of illegal solicitation of employment or fee-splitting. The dissenting opinions were based on several considerations, one of which was the overall worthiness of the Brotherhood’s legal aid plan to assist its members in obtaining competent counsel at reduced fees. It was noted that the essential objectives of the plan was not to obtain clients for an attorney but to assist the members of the Brotherhood in a matter of vital concern to them, that the Brotherhood is merely a group of persons interested in protecting themselves in the event of injury and it is merely incidental that in so doing a benefit results to the attorney. The dissenting justices also made reference to several activities they considered analogous to the petitioners’ activities; for example, the liability insurance field where the insurer agrees to defend the insured in any action arising out of a policy and retains control over the litigation, including the employment of an attorney; legal aid bureaus for indigent persons which urge the use of their free services; various associations such as those of contractors, banks, and merchants who employ attorneys to represent them and furnish advice to members on matters of general and common interest and even pay
a portion or all the expenses incident to handling a case of common interest; medical aid plans where doctors have joined in a plan to give medical care at a fixed amount to solicited members.

The dissenting justices also disagreed with the majority on the fee-splitting issue, stating that to consider the arrangement as such was contrary to the facts in that the contract for the 6 per cent investigation fee ran straight to the Brotherhood and the attorney had nothing to do with it. It was noted that the contractual arrangement was no different than if each member would execute a contract with the Brotherhood that in the event he used the services of the Legal Aid Department at any time in the future he would pay therefor 6 per cent of his recovery, that in either case the relation between that charge and the attorney's fees for his services are wholly independent. Justice Carter expressed his overall sentiments thus:

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. Canons of Ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct that in other cases would be injurious to the effective discharge of the profession's duties to the public.

In support of the Brotherhood's plan and modus operandi, Justice Traynor was of the opinion that it neither lowered the dignity of the legal profession, nor led railroad employees to incompetent counsel, nor interfered with the personal requirements of the attorney-client relationship, nor deprived the Brotherhood members of the right to reject the regional counsel and retain another attorney, nor posed a danger that the attorney would be faced with conflicting allegiances, because there was no conflict in interests between the Brotherhood and its members.

Doughty v. Gills75 (1952) — The defendants, two investigators for the Brotherhood of Railroad Trainmen, were enjoined by the court from referring or sending injured railroad workers or their survivors to the regional counsel for the purpose of employing the regional counsel to handle their claims in accordance with the Brotherhood's legal aid plan. The court concluded that this constituted solicitation and the defend-

75. 37 Tenn. App. 63, 260 S.W.2d 379 (1952).
ants' actions in doing so resulted in aiding and abetting the illegal practice of law. The court's holding was specifically limited to the activities of the two defendants, stating that since neither the Brotherhood nor the regional counsel were parties in the action they were not undertaking to rule on their activities per se.

In re Brotherhood of Railroad Trainmen76 (1958)—This was a motion on behalf of the Brotherhood of Railroad Trainmen for a declaratory judgment requesting a ruling that the conduct of the Brotherhood and the lawyers who serve as regional counsel was neither illegal nor unprofessional. The motion disclosed that disciplinary proceedings against a regional counsel and his associates were pending. The fee arrangement considered in this case provided for regional counsel charging a fee of 25 per cent of the amount recovered in each case, whether recovery was by settlement or by judgment. The arrangement further provided that regional counsel would advance for the claimant all court costs, investigation costs, costs of doctor's examinations, and share with the other regional counsels the total cost of operating the Legal Aid Department of the Brotherhood. The court declared the arrangement between the Brotherhood and the attorneys serving as regional counsel illegal and unprofessional in light of a statute which provided, "It shall be unlawful for any person not an attorney at law to solicit for money, fee, commission, or other remuneration directly or indirectly in any manner whatsoever, and demand or claim for personal injuries or for death for the purpose of having an action brought thereon, or for the purpose of settling the same."

In giving its guidance as to what the Brotherhood might properly do to achieve its legitimate objectives without tearing down the standards of the legal profession the court outlined the following points: (1) The Brotherhood could maintain a staff to investigate injuries to its members. (2) The Brotherhood could make reports of investigations available to claimants. (3) The Brotherhood's legal aid staff could be financed directly by the members of the Brotherhood. (4) The Brotherhood could make known to its members, generally and also individually, as claimants, the advisability of obtaining legal advice before making a settlement as well as the names of attorneys who in its opinion possess the capacity to handle such claims success-

76. 13 Ill.2d 391, 150 N.E.2d 163 (1958).
fully. (5) Employees of the Brotherhood could not carry contracts for the employment of any lawyer or photostats of settlement checks received for claimants in the past. (6) No financial connection of any kind between the Brotherhood and any lawyer would be permissible. (7) No lawyer could properly pay any amount to the Brotherhood or any of its departments, officers, or members as compensation, reimbursement of expenses or gratuity in connection with the procurement of a case. (8) The Brotherhood could not fix the fees to be charged for legal services to its members.

On the strength of a 1982 decision in a lower appellate court which strongly approved the Brotherhood's practices on the basis of public policy, this court concluded its decision by recommending the pending disciplinary action against the regional counsel and his associates be dropped, and the Brotherhood was given until July 1, 1959, to reorganize its legal aid program in compliance with their guidelines. 78

ANALYSIS AND CONCLUSION

In analyzing the instant case, it is important to note that the Court was careful to point out the Brotherhood was objecting only to the provisions of the decree which enjoined it "... from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; ... or in any other manner soliciting or encouraging such legal employment of the selected lawyers; ... and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers ...." 79 Significant also, in this respect, is the Court's statement in footnote 9: 80

Certain other provisions of the decree enjoined the Brotherhood from sharing counsel fees with lawyers whom it

78. In 1956, two years prior to this decision, three cases involving the Brotherhood's legal aid plan were decided: in Atchison, T & S. F. Ry. v. Jackson, 233 F.2d 390 (10th Cir. 1956) the court disapproved of the Brotherhood's plan as contrary to legal ethics (dictum); the court likewise disapproved of the Brotherhood's plan in the case of In re Heirsch, 10 Ill.2d 357, 140 N.E.2d 823 (1956), but because of lack of competent evidence and other factors the defendant, a regional counsel, was discharged. The Brotherhood's plan was again disapproved in Openack v. McDonald, No. 144823, Wash. Super Ct., (1956).
80. Id. at 1116.
recommended and from countenancing the sharing of fees by its regional investigators. The Brotherhood denies that it has engaged in such practices since 1959, in compliance with a decree of the Supreme Court of Illinois. See In re Brotherhood of Railroad Trainmen, . . . . Since the Brotherhood is not objecting to the other provisions of the decree except insofar as they might later be construed as barring the Brotherhood from helping injured workers or their families by recommending that they not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood, it is only to that extent that we pass upon the validity of the other provisions. Because of our disposition of the case, we do not consider the Brotherhood's claim that the findings of the court [on sharing of fees] were not supported by substantial evidence.

Thus, it is very clear the Court's decision did not include consideration of the fee sharing issue that was decided adversely to the Brotherhood in the two courts below—just as other courts who previously considered the union plan had decided the issue.81 Left unanswered by the Court is the question of what importance a financial arrangement between the regional counsel and the Brotherhood would have on the legality of the overall plan. A clue to the Court's feeling on the union-lawyer relationship, and the rights pertaining thereto can be found in this observation in the instant case: "It is interesting to note that in Great Britain unions do not simply recommend lawyers to members in need of advice; they retain counsel, paid by the union, to represent members in personal lawsuits, a practice similar to that which we upheld in N.A.A.C.P. v. Button, . . . ."82

81. See, e.g., In re Brotherhood of R.R. Trainmen, 13 Ill.2d 391, 150 N.E.2d 163 (1958). For excellent material on the Supreme Court and the right of free speech and press see Annot. 93 L.Ed. 1151 (1948); Annot. 2 L.Ed.2d 1706 (1957).

82. Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 84 Sup. Ct. 1113, 1117 (1964). As this Court is apparently suggesting, proponents of the Brotherhood program have urged that since similar practices are condoned in England they should not be objectionable in this country. However, two significant differences exist in the British legal profession. First, the contingent fee is forbidden. Second, the legal profession in England is partially socialized. See Cheatham, Cases on the Legal Profession 517 (2d Ed. 1955). The interposition of the government into the attorney-client relationship and the nonexistence of the contingent fee may suggest the reason for British leniency toward such programs. See also Turrentine, supra note 67, at 30; Weihofen, "Practice of law" by Non-Pecuniary Corporations: A Social Utility, 2 U. of Chi. L. Rev. 119 (1934). One outstanding writer in the area of legal ethics apparently favors the British system of labor unions retaining legal counsel on a permanent basis to advise their members. See

https://scholarcommons.sc.edu/sclr/vol16/iss4/6
Considering the Supreme Court's recent decision in the Button case, which thwarted Virginia's attempt to restrain certain NAACP activities on the ground that they constituted solicitation of legal business, it is not at all surprising that the Brotherhood elected to put its oft-litigated legal aid plan to the ultimate test, this time on constitutional grounds to secure the ultimate stamp of legality on a plan previously weakened by state courts on the basis of solicitation. There can be no doubt but that the Brotherhood correctly interpreted the full meaning and implications of the Court's stand in the Button decision. In the instant case, the Court, speaking through Mr. Justice Black said:

Only last term we had occasion to consider an earlier attempt by Virginia to enjoin the National Association for the Advancement of Colored People from advising prospective litigants to seek the assistance of particular attorneys. In fact, in that case, unlike this one, the attorneys were actually employed by the association which recommended them, and recommendations were made even to nonmembers .... We held that "although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State failed to advance any substantial regulatory interest, in the form of substantive evils flowing from the petitioner's activities, which can justify the broad prohibitions which it has imposed." In the present case the State again has failed to show any appreciable public in-

Drinker, Legal Ethics 167 (1953): "The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services, would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in hands of fewer lawyers. These features do not commend the profession to the public." Courts have repeatedly refused to sanction programs calling for the interposition of even a non-profit intermediary into the attorney-client relationship however. See, e.g., People ex rel. Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill.: 50, 199 N.E. 1 (1935). In this country courts have found objectionable the possibility that close ties between the lay organization and the lawyer may dissipate the degree of personal responsibility felt toward the individual client. Thus, an automobile club may not furnish a lawyer to represent its members: American Auto. Ass'n v. Merrick, 117 F.2d 23 (D.C. Cir. 1940). A union might, however, enter the insurance business, since then its own money would be at stake and it would be litigating in its own behalf. See Hicks and Katz, The Practice of Law by Laymen and Lay Agencies, 41 Yale L. J. 69, 93 (1921).


terest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers. The Brotherhood’s activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP.

From these words it seems clear that the Court is recognizing the fact that the right of speech under the First Amendment is not absolute. One has merely to reflect on the laws relating to slander, libel, perjury, false advertising, obscenity and other such laws to satisfy this premise. But, the Court adds, in order to qualify a person’s right to speak, a substantial danger to the public interest must be shown. The specific question that remains is whether the evils that surround fee splitting by an attorney, if in fact this was a current practice under the Brotherhood’s legal aid plan, would have been sufficient danger to the public interest to justify limiting the union members’ right of speech for a superior state interest. The Court seems to make clear that if the state had shown an appreciable danger to the public by the Brotherhood’s activities, the Brotherhood would not have had the unlimited protection of the First Amendment. Mr. Justice Clark and Mr. Justice Harlan, dissenting, were of the opinion that substantial evil could result from upholding the Brotherhood’s plan—enough to “bring disrepute to the legal profession” and to “encourage further departures from the high standards set by canons of ethics as well as by state regulatory procedures and ... be a green light to other groups who for years have attempted to engage in similar practices.”

The Brotherhood’s policy of advising injured members to obtain legal advice and of recommending its regional counsel was obviously not considered to be solicitation.

86. Courts have found fee splitting extremely obnoxious. Normally fee splitting is accompanied by other abuses. E.g., Columbus Bar Ass’n v. Agee, 175 Ohio St. 443, 196 N.E.2d 98 (1964) where the respondent, an attorney, was indefinitely suspended for splitting fees with a layman who funneled clients covered under workmen’s compensation to him. The respondent was also found guilty of violating other provisions of the code of ethics as forbidding the use of intermediaries, the solicitation of business through touters, and the stirring up of litigation through agents.
88. Id. at 1117.
Here what Virginia has sought to halt is not a commercialization of the legal profession. . . . It is not "ambulance chasing." The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of business.

The two dissenting Justices, however, were of the opinion that the Brotherhood's activities did constitute solicitation and was a "patent violation of the cardinal ethics of our profession." The dissenting opinion also distinguished Button from the instant case on the ground that the former involved the securing of constitutionally protected civil rights through court action, while the instant case involved personal injury litigation.

The Court plainly recognized that a state has broad powers to regulate the practice of law within its borders, but said in so doing a state "cannot ignore the rights of individuals secured by the Constitution."

In this writer's opinion, the Supreme Court, in handing down the instant decision and the Button decision, has struck a mighty blow at the traditional and perhaps too inflexible concepts of solicitation, and to the extent a state can control and regulate it. The Court's decision, absent the financial agreement issues, appears to be in accord with the minority views in the 1950 Hildebrand case, and the 1958 In re Brotherhood Illinois opinion. As stated above, exactly what significance the standard financial arrangements used by the Brotherhood in the past would have had on the Court's decision is unclear. Under the 1950 Hildebrand minority view no effect—under the 1958 Illinois In re Brotherhood view the same arrangement would have been enjoined. However, from a careful analysis of the Court's decisions in this and the Button case, as well as a careful study of all the arguments pro and con reflected in other court rulings on

89. Id. at 1118. Accord, In re Fisch, 269 App. Div. 74, 54 N.Y.S.2d 126 (1945); In re Axtell, 229 App. Div. 323, 242 N.Y.S. 18 (1930). Both of these cases involved an attorney's relationship with a labor union whereby personal injury cases were solicited for the attorney. In the former case the attorney was reprimanded; in the latter the attorney was suspended.
91. Id. at 1116, 1117.
the Brotherhood’s legal aid plan, and with an eye on the various inroads made in recent years on the strict rules against solicitation, this writer has been led to the inexorable conclusion that the Supreme Court’s decision would have been exactly the same if the financial arrangements used in the past had been in issue. There can be no doubt but that they were in issue in Virginia’s courts, but not on appeal. Further, this writer believes that the only consideration that would have caused the Court to deny the Brotherhood protection under the First Amendment would have been a definite and immediately ascertainable public danger: even more substantial than what could result from solicitation of this character.

Undoubtedly this case will serve as a legal blueprint for other unions and similar organizations and associations.

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