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THE LEGAL PROFESSION ON TRIAL: 
GROUP LEGAL SERVICES

by George Moscone* and 
James S. Reed**

I

As our society becomes more congested and complex, more prosperous and mobile, its members, both individual and institutional, tend to come into conflict more often. Since resort to the legal apparatus is the established means of regulating relationships and resolving conflicts, there is a naturally resulting increase in the need for legal services.

Moreover, the developing awareness generated by sophisticated means of communication and nearly universal education has resulted in an increasing and sometimes violent focus on the rights of the individual. As the individual's demands for equal rights become more intense, the legal profession is increasingly pressured to respond—to make available proper, practicable, and economically feasible means for ensuring the enforcement of such rights. If the profession fails to respond to those demands from within, it will surely open itself to restructuring from without, by court decree, by legislative action,

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1 The right to counsel in criminal cases has been established by court decree. The key case was Gideon v. Wainwright, 372 U.S. 335 (1963), which overruled Betts v. Brady, 316 U.S. 455 (1942), and established in state courts the right to trial counsel in non-capital cases. A truly enlightened legal profession would have made this right a reality many years earlier; it is unfortunate that the Supreme Court was forced to make the decision and thereby appear ahead of the times. Progressive reforms brought about by the profession itself would do much to alleviate criticism of the courts. See also Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Johnson v. Zerbst, 304 U.S. 458 (1938).

2 A bill [Cal. A.B. 1692, Reg. Sess. (1968) (McMillan)] was introduced in the California Legislature in 1968 which would have authorized law students to make court appearances under supervision on behalf of a district attorney, public defender, or
by a general acceptance of legal services performed by laymen or lay organizations. More importantly, if society itself, acting through the legal profession, fails to respond to the reasonable demands of its members for legal equality, such failure, apart from constituting a moral injustice, will inevitably be a significant factor in increased civil turmoil and incipient revolt.

It is therefore abundantly clear that the single most important function of the legal profession today is that of providing proper and adequate legal services to all the people. To the extent that needed legal services are not readily and reasonably available, that function is not being properly performed and the dangers mentioned above become more vivid. To be sure, the government, the courts, and the legal profession have long recognized the importance of having trained counsel available if the ideal of equality before the law is to be attained. But past and present efforts, no matter how successful, do not justify complacency if that ideal has not been fully realized. Certain county counsel; there were many requests for amendments to the measure to also allow students to assist legal aid clinics and similar agencies. Although the legislation did not pass, it will certainly be introduced again in more sophisticated form and with better organized support. The State Bar is studying the matter and will submit proposals to the Legislature. A convincing argument can be made that such a measure would result in savings to the taxpayer, since it would reduce the constant pressure for increased staff in the public agencies benefited.

3 In 1958 the President of the State Bar of California appointed a Committee on Group Legal Services to study the problems presented by group service arrangements. Heafey, Message of the President, 33 CAL. S.B.J. 213 (1958). The Committee made note of the widespread operation of group legal services in California, including the following:

1. The California Teachers Association retains counsel to render a variety of legal services to the Association and to particular members on matters related to their profession. Standing Comm. on Group Legal Services, Report, 34 CAL. S.B.J. 318 (1959).
2. Counsel retained by corporations commonly perform legal services for officers and employees. Id.
3. Trade unions and their attorneys establish varied types of group services. The Committee made specific note of the plan established by the Brotherhood of Railroad Trainmen, which was disapproved in Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950). Id.


4 The widespread growth and acceptance of legal aid clinics, lawyer reference services, and public defenders are an indication of concern within government and the profession. The decisions regarding the right to counsel in criminal cases, such as Gideon, Miranda, Escobedo, Massiah, and Johnson, emphasize the vital importance most courts attach to the right to and availability of competent counsel.
Certainly, few will argue that it has.

There appear to be several reasons why the gap between the need and the response has not been bridged. The potential litigant may simply fear lawyers and courts and therefore be unwilling to take action, or he may not recognize that he has a problem subject to resolution by resort to legal counsel and the courts. This fear can be partially alleviated by use of normal educational channels. Another reason for the continued existence of the gap is that many persons do not know how to find a competent attorney in whom they can place their trust. This motivated the organized bar to implement the lawyer reference service program, which has been partially successful but certainly inadequate to solve the entire problem. Finally, there is the economic factor. Persons who cannot pay, or who cannot pay enough, will obviously not be accepted as clients by an attorney who must rely on fees for his income. It may be observed in this context that the person who cannot pay at all—the true indigent—will probably qualify for legal aid or the like, but one who cannot qualify as an indigent and yet is still unable to afford normal attorney fees is likely to remain without representation.

It is not our present purpose to demonstrate that there is in fact an unfilled need for more legal services. That has been amply demon-

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The Assembly Judiciary Committee of the California Legislature receives many letters each month from lay members of the public, which demonstrate the public's fear or ignorance. Most involve domestic, welfare, or wage garnishment problems. For example, a typical complaint might be from a wife whose husband is supporting children and a wife from a prior marriage. The former wife is now working at a job which pays well, and the dual obligation of the husband is making life unbearable in the second marriage. Usually the complaining wife castigates the court for "ruining" her husband in the divorce action and appeals to the addressee for relief. She is usually satisfied, however, by a simple reply explaining that the court will probably modify the support order in such circumstances and that legal aid services are available, if needed, for assistance in commencing the proper action.

6 Those providing legal services for the poor recognize more and more that offices must be established in the less affluent neighborhoods if such programs are to operate most efficiently. The San Francisco Neighborhood Legal Assistance Foundation, which has offices in five core areas within the city, operates on this principle.

7 See, e.g., Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 Colum. L. Rev. 973 (1963); Carlin & Howard, supra note 5; Standing Comm. on Group Legal Services, Report, 39 Cal. S.B.J. 639 (1964).

strated by studies beginning in the 1930's and by persuasive argument. It can be further demonstrated by mere observation. Suffice it to say that no one fails to recognize the need. The only differences are over the proper means of satisfying it.

II

The gap between the need and the response can be effectively bridged by implementation of a practicable, properly regulated system of group legal services. These services have been defined as:

Legal services performed by an attorney for a group of individuals who have a common problem or problems, or who have joined together as a means of best bargaining for a predetermined position, or who have voluntarily formed, or become members of an association with the aim that such association shall perform a service to its members in a particular field or activity, or through common interests it appears that the organization can gain a benefit to the members as a whole. Examples of such organizations are labor unions, employer organizations, trade associations, teachers' groups, civil service employees or any body politic, members of a social club or of an automobile club, fraternal organizations, and numerous other such associations. Included also may be groups who associate themselves for the purpose of establishing a plan of prepaid legal services to be rendered to individual members thereof, whether or not the members have a common interest in a certain field of activity.

It is helpful to understand that the “group” in question is the association of persons seeking legal services, not the attorneys who provide those services, and the beneficiary of the services is ordinarily the individual within the group and not the group itself.

The principal advantage of group legal services to the individual receiving them would be economic. The attorney selected by the group to represent its members in certain types of cases would be as-

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9 See, e.g., E. Koos, The Family and the Law (1949); Lawyer's Practice Manual, supra note 5; Clark & Corstvet, The Lawyer and the Public: An A.A.L.S. Survey, 47 Yale L.J. 1272 (1938); S.B.J., supra note 7.

10 Professor Karl Llewellyn of the Columbia University School of Law, in one of the earliest and best articles on the subject, argued that the widespread unauthorized practice of law is a symptom of the legal profession's failure to make its services available in critical areas. He urged “group action” to get the business done “in keeping with the age.” Llewellyn, The Bar's Troubles, and Poulitics—and Cures? 5 Law and Contemp. Prob. 104, 134 (1938).

11 Again, anyone familiar with the profession is aware of the growth of legal aid clinics, reference services, and public defender offices.

12 S.B.J., supra note 7, at 661.
sured of a continuing volume of business and would be able, in normal circumstances, to increase his efficiency and thereby reduce the unit cost of his services. Also, if the attorney were to be employed directly by the group or if an insurance arrangement similar to group medical insurance plans were to be employed, the cost of the services received by an individual would be borne by all the members of the group as one of the costs of membership. The security of the group itself and the common experiences of its members in seeking legal remedies would eliminate fear or unwillingness to submit oneself to legal processes. So too, group experience would generate individual awareness of common legal problems. The problem of selecting an attorney would be totally solved, since one of the benefits of group association is ready access to an attorney who is employed by, or who has a referral agreement with, the group.

III

If we can reasonably be assured that group arrangements can help satisfy the need for the services of an attorney, why have they not been employed to the extent necessary? The answer is that the organized bar has long refused to allow the development of group legal services despite the obvious benefit to society, and state courts have, for the most part, reinforced the position of the bar. But recent decisions of the United States Supreme Court have forced the bar to change its attitude.

In the early 1920's the Ethics Committee of the American Bar Association held that a lawyer may not accept employment in the legal department of an automobile club which offers legal aid to motorists in the form of advice on traffic laws and the defense of damage claims as an inducement to prospective members. Such an arrangement, it held, would constitute an unauthorized practice of the law. In Opinion 8 the Committee stated:

The essential dignity of the profession forbids a lawyer to solicit business or to exploit his professional services. It follows that he cannot properly enter into any relations with another to have done for him

— Id. at 667.

— Id. The American Bar Association has commenced a pilot project in prepaid legal cost insurance—the first such experiment to test the feasibility of legal services insurance comparable to private health care insurance now available to the public. 13 A.B. News, Nov. 1968, at 1, col. 1.


— H. Drinker, Legal Ethics (1953).
that which he cannot properly do for himself.

It must therefore be held that the furnishing, selling or exploiting of the legal services of members of the Bar is derogatory to the dignity and self-respect of the profession, tends to lower the standards of professional character and conduct and thus lessens the usefulness of the profession to the public, and that a lawyer is guilty of misconduct, when he makes it possible, by thus allowing his services to be exploited or dealt in, for others to commercialize the profession and bring it into disrepute. 17

Unquestionably it is and always has been beneath professional dignity and detrimental to the public at large for an attorney to exploit or sell legal services in a commercial manner. But it does seem that the automobile club could have been permitted to mention in a dignified manner the availability of legal services. It could have adhered to strict bar regulations prohibiting the club from interfering with subsequent relations between the member and the attorney, and the bar itself could have instituted a licensing program to provide proper supervision of such a group service arrangement. Instead, the entire arrangement was prohibited, and as a result of Opinion 8, Canon 35 of the Code of Professional Ethics of the American Bar Association was developed. 18 That canon "does not specifically cover this but is directed rather at [preventing] services to members of associations." 19

Thus, at this early date the attitude of the organized bar toward group services became established and, it seems, rigor mortis set in. 20

Only once has the American Bar Association sanctioned arrange-

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17 Id. at 164.
18 Id. Canon 35 reads as follows:
The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries. 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 his employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

ABA CANONS OF PROFESSIONAL ETHICS No. 35.

19 DRINKER, supra note 16, at 164.

20 It has also been held that such practices violate Canon 47, condemning aid by a lawyer of the unauthorized practice of law. Id. at 165. Canon 47 reads as follows:
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.

ABA CANONS OF PROFESSIONAL ETHICS No. 47.
ments similar to the one condemned by Opinion 8. In that instance the attorneys were associated with the American Liberty League, an organization formed to oppose New Deal legislation. They offered free legal services to persons who believed that their constitutional rights had been infringed but who were unable to afford the cost of litigation. The Bar Association found that the economic and social issues involved were important enough to transcend the rules of professional ethics. It is not commendable that the Association refused to extend this rationale to a group legal service program designed to help any person with a legal problem.

Despite the initial attitude of the American Bar Association, the need for more adequate legal services persisted, and in the face of Canon 35, the bar had to seek some means of satisfying it other than group services. In 1937 the Association created a Special Committee on Legal Clinics to seek means of solving the problem. This committee reported in favor of a lawyer reference service. A subsequent committee went further by calling for the use of lawyer reference plans and some form of “low-cost legal service methods” to aid “persons who otherwise might not have the benefit of legal advice.” But instead of further investigating the recommendation for providing low-cost legal services, the Association turned away and until recently has concentrated on the lawyer reference plan.

Professor Elliott E. Cheatham sharply criticized this head-in-the-sand attitude and described another problem it generates.

While the bar associations have been reluctant to go beyond lawyer referral services, others have not been so hesitant. Laymen have pressed in where lawyers feared to venture. The same year, 1950, that the American Bar Association quietly channeled the work of its committee on low cost legal services into the one method of lawyer referral, three reports of the Association’s Committee on Unauthorized Practice of the Law showed the wide scope of unauthorized practice, especially in the form of group practice with lay intermediaries retaining lawyers and furnishing their services to clients. The outcry by lawyers has continued and so has the unauthorized practice of law, but what else could be expected if lawyers do not make readily accessible the legal services needed? (emphasis added).

21 ABA CANONS OF PROFESSIONAL ETHICS, OPINIONS, No. 148 (1935).
22 Id.
25 CHEATHAM, supra note 7, at 978.
Not surprisingly, the attitude of the organized bar in California originally paralleled that of the American Bar Association. In 1958 the President of the State Bar of California appointed a Committee on Group Legal Services to examine the problem. In its final report that committee set forth several examples of group practice then in widespread existence and concluded:

The Committee is of the opinion that the need of the public for competent legal advice at fees which they can afford can be met without changing the existing restrictions upon the practice of law and upon the conduct of attorneys. The Committee is of the opinion that those restrictions are in the public interest and should be maintained. The provision of competent legal services for persons not eligible for charity can be met either by their seeking lawyers of their own choice without outside help or by their use of the lawyer referral systems.

The Committee further recommended that the State Bar of California adopt Canon 35 of the American Bar Association’s Canons of Professional Ethics.

The comments of the next President of the State Bar on the Committee’s recommendations were devastating.

The core of the problem can be simply stated: 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? The answer which the Committee suggests is equally simple: No, he cannot; he must go to a lawyer of his own choice without outside help or he must select a lawyer from a list furnished by a Lawyer Reference Service maintained by a local bar association. In these days of collective security, old age pensions, unemployment insurance, employers’ associations, group insurance plans, group medical plans, labor unions, employee welfare funds, employee associations and insurance generally, I am by no means sure that the Committee’s answer is going to continue to satisfy the public indefinitely.

Nevertheless the conclusions and recommendations of the first committee were ratified by a new investigative committee appointed in 1959. Implicit in the latter committee’s findings was the conclusion

26 33 S.B.J., supra note 3.
27 34 S.B.J., supra note 3, at 343.
28 Id., at 344.
29 S.B.J., supra note 7, at 643-44.
30 Address by Burnham Enersen, President of State Bar of California, Dec., 1959, in 35 Cal. S.B.J. 11 (1960). The second committee was also known as the Committee on Group Legal Services.
that group services are in fact an evil which can and must be eliminated by strict application of the rule regulating professional conduct.\textsuperscript{31} This committee submitted a proposed Rule 20, quite similar to Canon 35, for addition to the Rules of Professional Conduct of the State Bar of California.\textsuperscript{32}

There are several theories upon which such disapproval of group legal services are based. A conflict of interest might arise to confront the attorney if the interests of the association should differ from those of its litigating member in a particular case.\textsuperscript{33} As noted in Opinion 8, the channeling of legal problems to attorneys by an association might be construed as an improper solicitation of business, a practice long condemned in connection with the legal profession. Then, too, the sanctity of the lawyer-client relationship might be jeopardized due to the interposition of a third party, the association, which might be in a position to control the litigation.

These possible abuses cannot be underestimated; professional standards are indeed necessary: On the other hand, fear of abuse cannot be allowed to prevent the development of proper programs designed to bring adequate legal services to all who need them in our society.\textsuperscript{34}

\textsuperscript{31} In light of all the evidence available that many persons go without needed legal services, the Committee's conclusion was remarkable:

The relationship between attorney and client shall remain inviolate. The ethics of the profession shall be maintained and all people shall be free to select attorneys of their choice. The Committee finds that there are adequate services available at a reasonable cost.


It is unbelievable that such a dogmatic assertion would be made. The conclusion is reminiscent of the A.B.A.'s old Opinion 8, rendered in 1925, but here it is forty-four years later. It also ignores the evidence. And whether the attorney-client relationship "shall remain inviolate," to use its god-like phrase, is not within this committee's power to say; that relationship most certainly will be violated, if not severed, if a positive attempt to bridge the gap between the need for and the availability of legal services is not made.

\textsuperscript{32} 35 CAL. S.B.J. 724 (1960).

\textsuperscript{33} This conflict arises frequently in litigation involving liability insurance policies. Theoretically the defense attorney represents the insured defendant. But does he really? Suppose an offer to settle within the limits of the defendant's policy is disapproved by the insurance company and therefore refused by the defense attorney; suppose further that a verdict is ultimately rendered which exceeds the policy limits, to the dismay of the insured defendant. Is that not a "conflict of interest" case of classical proportions? See, e.g., Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

\textsuperscript{34} For years the organized bar in California refused to allow lawyers to incorporate for fear of abuse of the attorney-client relationship and destruction of the traditional form of practice, but that opposition prevented lawyers from obtaining certain tax advantages enjoyed by other businesses. So in 1968 a bill [Cal. S.B. 53, Reg. Sess. (1968) (Moscone)] was introduced in the California Legislature, in spite of the bar's
It is easy to advocate a lawyer reference service as the solution to the problem—easy because this allows existing professional standards to stand inviolate as examples to the public of the sublime ethical principles of the profession. It is as though we in the temples of the law are telling those without that the regulation of our moral standards is more important than our obligation to provide them with the services that make the law more than a mere abstraction or an authoritarian tool to them.

We are in the position of saying that a man who cannot otherwise afford legal services should nevertheless be prevented from pooling his money with others in a formal association, seeking the advice of an attorney selected by the association, and paying that attorney with money contributed by other members of the group as a price of membership. Why can he not do that? He cannot because we, the organized bar, are afraid that our professional standards will be violated. But what has that individual done to corrupt us? Nothing. He has simply sought to secure for himself the services necessary to protect his legal rights—services which only we, the very ones who have now prevented him from securing them, can give. If he had a forum, he could point out that by preventing him from securing legal services in this manner, we are admitting, before the fact, that lawyers are dishonest, that they will not recognize and seek to free themselves from conflicts of interests, that they will exploit the association in an improper manner to secure business, and that they will allow the association to impinge upon their duty toward and relationship with their client. It would be much wiser for the profession to assert, quite truthfully, that the great majority of lawyers would not allow those things to happen in any situation and that professional regulations can certainly be devised which would deter such abuses irrespective of the means people use to seek legal help. Such an attitude would be far more realistic and appreciative of today's complexities and of the inherent ethics of our profession.

Fortunately, a change in attitude has begun to emerge. Paradoxically, the State Bar of California is in part responsible for the change. After hearings on proposed Rule 20; a rule designed by the second traditional opposition, on the premise that further delay was simply unfair to those who might benefit. As a result, the State Bar took another look at the matter, decided it should be involved if incorporation was to become a reality, and cooperated to develop a bill which would maintain professionalism and yet allow for better economic treatment to those affected. The measure was ultimately enacted and signed into law. Cal. Stats. —, ch. 1375 (Reg. Sess. 1968).
State Bar committee to completely eliminate group legal services, the Board of Governors appointed a third committee to continue the study of group legal services and to make recommendations prior to the adoption of any new rule of professional conduct. Perhaps the Board sensed that the reports of the first two committees were somewhat anachronistic. The report of the third committee, which we shall call the Enersen Report, is one of the most exhaustive and enlightened statements on the group legal service concept. Some of its more significant conclusions are:

1. [T]here is an unfilled need for legal services of such a substantial degree as to cause serious concern.

2. [T]here is a present substantial public demand for group-type legal services.

3. [I]t is in the public interest that the State Bar of California meet the need which this demand for group-type legal services reflects. The Rules of Professional Conduct of the State Bar should be amended accordingly.

Based on these conclusions, the Enersen Report contained the following basic recommendations, among others:

1. Associations or groups may actively attempt to channel legal problems of their members to certain designated attorneys.

2. Attorneys may enter arrangements with such associations setting forth the terms of employment and the association may pay the attorney fee.

3. These arrangements need not be limited to nonprofit associations.

4. The legal services provided need not be limited to problems of "common interest" to the group. Such a limitation ignores the bas-

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35 S.B.J., supra note 31.
36 S.B.J., supra note 7. The chairman was Burnham Enersen of San Francisco.
37 This committee's "interim report" to the Board of Governors reflected an attitude which was suggestive of the open-minded approach it would take:

The review of these developments led the Committee to a somewhat uneasy feeling that perhaps society may be moving ahead of the legal profession in searching for and experimenting with ways and means of dealing with these problems. It was also felt that trends may be developing which can have substantial impact upon the practice of law and upon the economic welfare of the members of the legal profession. At the same time it was agreed that no proper solution of these problems could be predicated upon consideration of the personal interests of lawyers alone, but rather that in any proper solution the public interest must receive paramount consideration.

Id. at 648-49.
38 Id. at 722.
39 Id.
40 Id. at 723. This recommendation is in direct opposition to those of the first two State Bar committees to study the problem.
ic consideration underlying these recommendations: the need of the public for legal services.\(^{41}\)

Finally, if the recommendations were to be adopted, the Report urged that certain restrictions on group legal service plans likewise be adopted and vigorously enforced to avoid the abuses feared in earlier reports.\(^{42}\)

Shortly thereafter, the American Bar Association appointed its latest Special Committee on Availability of Legal Services to consider once again the extent of the public’s unfulfilled need for legal services and to evaluate existing and new methods for fulfilling that need, specifically including group legal service programs.\(^{43}\) This committee made a proposed policy statement to the Association’s House of Delegates at its 1968 meeting that group legal service arrangements, with adequate safeguards, would be in the public interest. "‘We have concluded,’” the committee reported, “‘that the proper question is not, is there a need for group legal service arrangements, but rather why should not we, the legal profession, make our services available on this basis if the public wants it that way?’”\(^{44}\) (emphasis added). In short, the Committee placed the interest of the public ahead of any internal policing problems the profession might have. Recently the Association’s Committee on the Unauthorized Practice of Law, which had a long history of opposition to such arrangements, concurred in the Legal Service Committee’s policy statement favoring group legal services.\(^{45}\)

The American Bar Association has yet to formally adopt a policy statement favoring group legal services. In fact, continuing investigation of the proposal has served to harden the opposition of certain bar groups who are against any change along this line. The majority of bar representatives testifying at further hearings by the Special Committee on the Availability of Legal Services in Chicago, on October 25 and 26, 1968, expressed the view that advocates of group legal services have not demonstrated that a real need exists for such programs. The Illinois State Bar Association said that if groups were permitted to organize and employ lawyers, "‘the days of the private practitioner . . . will be numbered. No greater threat has yet been proposed to the

\(^{41}\) Id. at 724-26.

\(^{42}\) Id. at 723-24.


\(^{45}\) A.B.A. Standing Comm. on Unauthorized Practice of the Law, Annual Report, 34 UNAUTHORIZED PRACTICE NEWS 76 (Summer 1968).
independence and integrity of the bar. 46 This clearly reveals the real reason many oppose the expansion of group legal services. The concern with professional ethics has been a convenient rationalization for opposition, but the sole practitioner who opposes expansion does so because he sees it as a threat to his existence. In other words, self-preservation, whether or not in the public interest, is dominant.

One eminent writer, Henry S. Drinker, had this to say about the attitude:

The real argument against their [group legal services] 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. 47

It is difficult to criticize opposition based on an apparent threat to one's livelihood. Indeed, it is easier to criticize those lawyers who favor group legal services because they will be in a position to benefit most from such arrangements. Nevertheless, the writers believe that the profession must make such services available if there is any need whatever for group legal services. We are quite certain that the American Bar Association will ultimately reach the same conclusion and endorse group legal services.

IV

Until recently, consideration of the concept of group legal services concerned the advisability of modifying professional standards to allow such arrangements. The underlying assumption was that the State controlled the issue through its power to regulate professional conduct. This assumption was implicit in various state cases dealing with the issue.

The key California case was Hildebrand v. State Bar, 48 which involved the question whether certain attorneys had violated the Rules of Professional Conduct by entering into an agreement with a union, the Brotherhood of Railroad Trainmen, to furnish legal services to its members. The State Bar charged that the attorneys had violated rules prohibiting the solicitation of employment 49 and the acceptance of professional employment incident to the activities of another unlicensed person or of "any association . . . that for compensation controls, di-

46 A.B. News, supra note 44.
47 DRINKER, supra note 16, at 167.
49 Id. at 505, 225 P.2d at 509.
rects or influences such employment."\(^{50}\)

The Brotherhood's legal services plan is the oldest and best known of all the legal aid programs established by labor organizations in the United States.\(^{61}\) It was determined in 1930 that in claims against the railroads, the employees "were getting absolutely no legal advice and were relying entirely upon the railroads' furnishing them with information as to their rights, with the result that settlements were being made which were . . . unconscionable."\(^{52}\) Under the plan, the Union established a legal aid department to provide investigative and professional services to those members involved in claims against the railroads. The charges were to be less than the usual contingent fee in similar cases.\(^{53}\) That department designated regional counsel in each area of the country, and Union members were urged to employ them. Contracts were executed directly between counsel and claimant. In most cases they provided for a twenty-five per cent contingent fee, a small percentage of which was to be paid to the Union to offset the expenses incurred in operating the legal aid department.

Petitioners in *Hildebrand* were regional counsel. They knew, in the court's words, 

... how their professional employment ... was being solicited for them through the Brotherhood's activities, and they were willing to perform the desired legal services at a substantially reduced contingent fee rate in the belief that the volume of business to be directed to them through such solicitation would warrant such financial consideration.\(^{54}\)

The court therefore expressed the view that the petitioners' participation in the scheme "cannot be condoned as consistent with the ethical proprieties exacted of the members of the bar in this state."\(^{55}\) The court simply considered the Union's arrangement with the attorneys in light of the literal language of the rules of conduct, and found conflict. It did not mention the railroads' history of scandalous treatment of those employees who were injured in the course of employment and refused to settle on the railroads' terms.\(^{56}\) It should have realized that

\(^{50}\) *Id.* at 510, 225 P.2d at 512.


\(^{54}\) *Id.* at 509, 225 P.2d at 511.

\(^{55}\) *Id.* at 514, 225 P.2d at 514.

\(^{56}\) Bodle, *supra* note 51, at 309. This article contains a good review of the course of conduct followed by the railroads. Consider the following excerpt from an investigative report prepared by the Railroad Retirement Board at the request of the Senate Committee on Interstate and Foreign Commerce:

We further take judicial notice of respondent's exhibit, ... a report of the Rail-
this was a case where adequate legal services were drastically needed and could be obtained only by some sort of group arrangement. This was not a situation in which to make rules of conduct applicable on a technical basis in the absence of clear proof of a conflict of interest detrimental to the employer or employee.

In a dissenting opinion, Justice Roger Traynor (now Chief Justice) found no violation of rules of ethics if properly applied. His premise was:

[T]he primary duty of the legal profession [is] to serve the public, [and] 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. After examining each of the rules allegedly violated and giving examples of the practices they were meant to proscribe, he found the arrangement in question to be ethical and proper:

In the present case, however, it is not contended that the Brotherhood is engaged in the practice of law, and there is no evidence of evils that the Rules of Professional Conduct are intended to guard against. The Brotherhood's plan in no way lowers the dignity of the profession. It does not lead the railroad employees to incompetent counsel. There is no conflict in the interest of the Brotherhood and its members, and therefore no danger that the attorneys recommended by the Brotherhood will be faced with conflicting allegiances. There is no interference with the direct attorney-client relationship; the members are free to retain or reject the attorneys recommended by the Brotherhood and they deal directly with the attorneys themselves.

Justice Traynor's remarks are refreshing in their emphasis on the fact that professional rules must be designed with the interest of the public foremost in mind. To the extent that they thwart efforts to provide needed legal services, the public is not served. Incidentally, Justice Traynor's opinion, along with a similar one by Justice Carter, foreshadowed the United States Supreme Court decisions to come a decade and a half later.

road Retirement Board to the Senate Committee on Interstate Commerce, which we believe bears directly on this proceeding. That report shows a general course of conduct and a highly antagonistic attitude of the railroads toward all employees who retain counsel to defend their rights; that in Federal employers' liability cases settled without counsel, 97% of the employees returned to work for the railroad; while if suit was filed, from 80% to 96% of such employees lost their jobs.

57 36 Cal. 2d 504, 522, 225 P.2d 508, 519 (1950).

58 Id. at 527, 225 P.2d at 522.
Similar proceedings have been filed in several other state courts and in the federal courts. The outcome has usually been similar to that in *Hildebrand*, although some courts have found the arrangement to be ethical and approved it. Running through all these cases is the central assumption that the State has an inherent right to regulate the practice of law and does so through the rules of professional conduct established by its organized bar association. As in *Hildebrand*, the courts have simply sought to determine whether the practice in question is prohibited by those rules. With the exception of the opinions by Justices Traynor and Carter, there is no hint in the cases of the type of limitation on the states' power which was eventually developed in three recent United States Supreme Court decisions. It is these decisions which have forced bar associations to reconsider opposition to group legal services.

The issue reached the Supreme Court from an unexpected source in *NAACP v. Button*. That case involved the Virginia State Conference of the NAACP, composed of eighty-nine chapters, which maintained a paid legal staff of attorneys to assist its members in actions based on racial discrimination. Cases were obtained upon application from members which often followed chapter meetings where staff attorneys explained the legal steps necessary to bring about the end of various types of discrimination. Thus, cases were actively solicited as a practical matter. The Conference completely financed those cases in which the litigant retained NAACP staff counsel to represent him. Often the attorney assigned to the case was one with whom the individual previously had no contact. In fact, "the prospective litigant retain[ed] not so much a particular attorney as the 'firm' of NAACP and Defense Fund lawyers . . . ."

Virginia's highest court had held that the practice violated not only Canon 35 and 47 of the ABA but also chapter 33 of the state's

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61 Id. at 421-22.
62 Prior to 1956 no attempt was made to prohibit these activities of the NAACP, which had been carried on for many years. But in that year Chapter 33 was added to the Virginia Code to amend the definition of "runner" or "capper" (those engaged in illegal solicitation) to include an agent for an organization which retains a lawyer in connection with an action in which it is not a party and in which it has no real interest. For the pertinent amendments see Va. Code, §§ 54-74, 54-78, 54-79 (1950), as amended, Acts of 1956, Ex. Sess., ch. 33 (Repl. Vol. 1958). It is probably not illogical to assume
code, which forbids the solicitation of legal business by a "runner" or "capper." The court stated that the NAACP was guilty of "soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control."

The United States Supreme Court reversed, holding that the activities of the NAACP and legal staff are "modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business." To the contention that "solicitation" is a practice wholly outside the area of First Amendment freedoms, the Court replied that "a State cannot foreclose the exercise of constitutional rights by mere labels" and "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." The NAACP's ends are lawful—the equality of treatment by all governments for all members of the Negro community in the country—and litigation is a desirable means of achieving those ends. Such litigation is, in fact, "a form of political expression" well within the scope of the First Amendment.

As the Court interpreted Virginia's law forbidding solicitation, a person who informed another that his legal rights had been infringed and referred him to a particular attorney was guilty of a crime, as was any attorney who acted as counsel knowing the circumstances of the referral. But by forbidding NAACP members to advise prospective litigants to seek counsel in this manner, Virginia was choking off the most effective means of expression for this minority group, which was more likely to achieve success in the courts than at the polls.

The Court impliedly conceded that group legal service arrangements might be constitutionally restricted if there were an overriding and compelling state interest in restriction. However, after weighing the in-

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63 DRINKER, supra note 16; Canon 35, supra note 18; Canon 47, supra note 20.
66 Id. at 429.
67 Id.
68 Id.
69 Id. at 438.
terest of the State in controlling the legal profession against the limitations imposed upon the NAACP’s activities, it held that the State had failed to demonstrate “any substantial regulatory interest in the form of substantive evils flowing from petitioner’s activities, which can justify the broad prohibitions which it has imposed.”

The traditional evils which the statute in question and the rules of professional conduct were meant to prevent did not result from the NAACP’s arrangement.

It would be convenient to read the Button decision as applying only to group service arrangements involving forms of political expression, and just such an interpretation has often been made. But the decision in the next important case, Brotherhood of R.R. Trainmen v. Virginia State Bar, indicated that the Court intended a broader scope. Much as the State Bar of California had done in Hildebrand, the Virginia State Bar had successfully sought through the state courts to enjoin the activities of the Brotherhood in providing legal aid to its members, on the ground that its plan involved the stirring up of litigation and amounted to the unauthorized practice of law. The Union had admitted that it advised its members to obtain legal advice before settling personal injury claims arising from their employment, that it customarily recommended particular attorneys, and that in fact the plan did result in the channeling of employment to those attorneys so recommended. In reversing the Virginia court’s decree enjoining such practices, the Supreme Court relied upon Button and concluded that First Amendment protections shielded the plan:

[T]he First Amendment’s guarantees of free speech, petition, and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers’ Liability Act, statutory rights which would be vain and futile

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70 Id. at 444.
71 However valid may be Virginia’s interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious.
74 36 Cal. 2d 504, 255 P.2d 508 (1950).
if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.\textsuperscript{75}

The majority rejected the argument of Justice Clark, who was joined in dissent by Justice Harlan, that the decision “overthrows state regulation of the legal profession and relegates the practice of law to a commercial enterprise.”\textsuperscript{76} Justice Clark further argued, to no avail, that \textit{Button} was not applicable.

Personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims. No guaranteed civil right is involved. Here, the question involves solely the regulation of the profession, a power long recognized as belonging particularly to the state.\textsuperscript{77}

As in \textit{Button}, the Court indicated that the State could still invoke its regulatory powers in a proper case to prohibit practices which in fact provoke abuse and debase the legal profession. This was implicit in its answer to the argument that the Brotherhood's practices amounted to an unethical scheme of solicitation in which the Brotherhood and the attorney accepting referrals were involved. In examining the charge, the Court said that “what Virginia has sought to halt here is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not ‘ambulance chasing.’”\textsuperscript{78} And the 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.”\textsuperscript{79}

Aside from the ambiguous reference to “ambulance chasing,” however, the Court did not explicitly say what sort of arrangement \textit{would} constitute unauthorized practice or solicitation. It appears that the limits will be delineated on a case-by-case basis as group practice

\textsuperscript{75} 377 U.S. 1, 5-6 (1963).
\textsuperscript{76} Id. at 9.
\textsuperscript{77} Id. at 10.
\textsuperscript{78} Id. at 6.
\textsuperscript{79} Id. at 6-7.
plans become more popular and as bar associations respond with regulatory efforts. The Court will no doubt continue to employ the "balancing" technique used in the Button and BRT cases. Such methods have been subject to criticism on the ground that by simply weighing all possible interests in each individual case, the Court will not be able to structure positive doctrines to guide future decisions. But such criticism seems shortsighted. It would be an impossible task for a court at this time to visualize all or even most of the variations group practice may be expected to take and then to announce a rule which is sufficiently broad to encompass all those variations yet concise enough to constitute a practicable guideline. Thus far the three principal cases to come before the Supreme Court have involved group practice arrangements within that speculative limit beyond which lie the unethical evils which cannot be tolerated. Truly definitive guidelines will appear only when a decision is rendered which finds a particular arrangement to be outside the scope of the First Amendment and therefore subject to prohibition by the State under its regulatory powers.

The decision in the United Mine Workers v. Illinois State Bar Ass'n is the most recent in this area, but in that case, too, the Court sanctioned a group service plan previously found by Illinois courts to constitute unauthorized practice. As did BRT, that case involved a union program that had been in successful operation for decades. The Mine Workers Union had established a legal department in 1913 to enable its members to obtain benefits made possible by the enactment of the Illinois Workmen's Compensation Statute. That action was prompted by the discovery of abuses wherein "the interests of the members were being juggled and even when not, they were required to pay forty or fifty per cent of the amounts recovered in damage suits, for attorney fees." The Union employed an attorney on a salary basis to represent workers with claims for personal injuries arising from their employment. The terms of the attorney's employment explicitly provided that he would receive no interference from Union officials and that he would have obligations to and relations with only the persons he represented. Union members were allowed to seek other counsel and, in fact, were often advised to do so. The attorney received no part of any settlement or award, his sole compensation being the salary paid by the Union. In an action filed by the Illinois

81 389 U.S. 217 (1967).
82 Id. at 219.
State Bar, however, the trial court found that the employment of an attorney in this manner constituted unauthorized practice. Among other things, the court permanently enjoined the Union from employing attorneys to represent its members.

On appeal, the Illinois Supreme Court rejected the contention that the injunction violated the workers’ First Amendment rights as set forth in *Button* and *BRT*. It attempted to distinguish *BRT* by noting that the decision in that case “protected plans under which workers were advised to consult specific attorneys, but did not extend to protect plans involving an explicit hiring of such attorneys by the Union.”

The court viewed the *Button* case “as concerned chiefly with litigation that can be characterized as a form of political expression.” But the United States Supreme Court, Justice Black writing the opinion, made it clear that such simple distinctions were false:

> We do not think that our decisions in *Trainmen* and *Button* can be so narrowly limited. We hold that the freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

The Court had long held that government is not free to prohibit even indirectly the free exercise of First Amendment freedoms. Laws which affect the exercise of such rights cannot be sustained merely because they are meant to deal with some evil otherwise within the States’ legislative competence. Hence, regulation of the practice of law, which is within the States’ power, cannot be allowed to unjustifiably impair the value of associational freedoms. Those principles, invoked in *Button* and *BRT*, were held to apply here as well. The dangers of a conflict of interests in the United Mine Workers’ arrangement were found to be, at the very most, “conceivable.” The decree at issue “thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State’s interest in high standards of legal ethics.”

Certainly this decision will once and for all lay to rest the conten-
tions that *Button* can be distinguished because it involved "political expression" and *BRT* because the Union merely referred members to attorneys. Such things as the involvement of political rights or the mode of operation (whether a mere reference to, or actual employment of, a lawyer) are incidental. Taken alone they do not justify prohibition of the exercise of associational rights as found in the group legal service arrangements involved in these cases. There must be something more. Rather than mere speculation or inferences based on something which is "conceivable," there must be substantial evidence of practices which justify the invocation of a State's regulatory power. What these evil practices will constitute has not been decided. One can guess, for example, that proof of direct interference in the litigation by a non-attorney officer of an association would call for regulatory action, as would specific proof of some sort of conflict of interest necessarily resulting from a group service arrangement. But in none of the cases discussed was any concrete evidence of that nature offered.

V

It happened that each of the group practice arrangements thus far reviewed by the Supreme Court was established by groups of persons with common interests. This is not strange, nor is it an outstanding feature distinguishing these cases, since any persons found within a particular social group are bound to have common interests. It also happened that legal services were sought by those groups for reasons common to the purpose for which the members had formed a group, i.e., vindication of political rights or redress of personal injury suffered as a result of one's employment. It has therefore been suggested that the decisions may be read as approving group services only when "limited to matters related to the common principal purposes" for which the group was formed.90 It may be assumed that such a limitation would

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90 The Board of Governors of the State Bar of California has devised a "Proposed Rule 20" to be added to the Rules of Professional Conduct. In pertinent part it reads as follows:

The participation of a member of the State Bar in a plan for the provision of legal services to the individual members of a group or organization, as herein defined, either on a salary basis or otherwise, is not in violation of these Rules of Professional Conduct if the member's participation conforms to the said plan and if the terms of such plan

(1) are contained in a writing duly authenticated by an authorized representative of the group or organization and filed with the State Bar and set forth the nature and extent of the legal services to be made available under such plan,

(2) contain adequate provisions which will

(a) limit such legal services to matters related to the common principal
mean, for example, that the attorney selected by a labor union would be prohibited from representing a worker in a divorce case or a personal injury case unrelated to his employment. We submit, however, that a policy limitation of that nature is the result of an unwarranted reading of the United States Supreme Court cases. Furthermore, it is unworkable and unwise. The facts in the three cases support such a limitation, but the principles enunciated do not.

Nowhere in the decisions can language be found which justifies the conclusion that group service arrangements will be prohibited unless they provide solely for the rendering of services related to the purpose for which the group was formed. If that had been the simple rule laid down in *Button* or *BRT*, then surely the Illinois court would have recognized it in rendering the initial decision in *UMW*, and the United States Supreme Court would have expanded upon it in its *UMW* decision. Such a theory was never considered.

Suppose that the only common purpose of a particular group is that of securing and financing legal services for its members. In that case would the proposed limitation really be any limitation at all? It would not seem so, for any type of legal service would be related to the common principal purpose for which the group was formed. Without further explanation, then, we are left with a proposed restriction which can only confuse the issue. It has the appearance of a limitation, but as we read it, it allows the ultimate form of group legal services. Surely that is not intended, but considerable clarification is needed.

As a practical matter, how will an attorney serving under a group plan know what kinds of cases he can take in that capacity if the proposed limitation were to be adopted? What would the attorney give his client as the reason for his inability to handle his divorce case?

purposes for which such group or organization was formed and provide personal and adequate legal representation for such matters . . . .


It has not yet been determined whether the proposed rule will be adopted. In any event the following statement by the current President of the State Bar, Samuel O. Pruitt, is most commendable and encouraging:

In my opinion, there is substantial evidence before the Board of a pressing need for an affirmative recognition that group plans are permissible, and indeed should be encouraged to develop in line with standards designed to serve the best interests of the public; that it is in the public interest that such plans should be regulated in some way, or that at least some guidance be given, so as to preserve those ethical and fiduciary characteristics that are the hallmark of a learned profession and distinguish us from commercial tradesmen; and that the failure to come to grips with this challenge by devising the best solutions within our capacities—and to do so soon—is to be derelict in our responsibilities to the public and to ourselves.

Pruitt, President’s Message, 43 CAL. S.B.J. 853, 857 (1968).
He would probably say that the rules of conduct laid down by his bar association will not allow him to take the case because of a possible conflict of interest. But a curious and no doubt confused client would then be told that if the attorney could take the case, he would never allow such a conflict to come about. The client, who in most cases would have paid for legal services in the form of union dues or the like, would then be forced to retain yet another attorney on an individual basis in what appears, at least to the client, to be part of the same dispute. If the profession is truly concerned about its public image, it will not allow that kind of situation to develop.

VI

We have attempted to show, as concisely as possible, the fluctuations in thought and action regarding group legal services. From 1926, when the regressive Opinion 8 was rendered, to 1963, when the decision in *NAACP v. Button* came down, there was always the possibility that group service arrangements could be disapproved and prohibited at any time. But *Button* and its descendant decisions made it clear that bar associations cannot prevent group practice where there is a mere possibility that a conflict of interests might result. Since basic constitutional rights are involved, a high degree of proof of circumstances which justify application of the States' power to regulate the profession will be required before particular practice arrangements may be prohibited.

Although group legal services were of concern to the organized bar for many years prior to *Button*, that decision precipitated new efforts which are favorable to the broadened use of group services. It is most desirable that this trend continue to the point where legal services are available in some manner to all those who need them. When the lawyer becomes a readily accessible member of the community, able and willing to help anyone in need of his skills, the profession can cease worrying about its image, at least among persons at lower economic and cultural levels. The inaccessibility of lawyers to persons in those categories has caused a freakish sort of awe, but it has also generated in them a frightening amount of distrust. Unsophisticated persons naturally tend to distrust and dislike those with whom they are not in ready contact. It is not illogical to conclude that the profession's overriding concern for its ethical principles has, in this instance at least, caused a lessening of respect for lawyers and the law. We submit, then, that a continued relaxation of our overextended and
unjustified fear of group legal services on ethical grounds will result in a better public image for lawyers.

Recent events have shown that the underprivileged and the aggrieved in our society will not allow their reasonable demands to go unanswered. Fortunately our courts, if not our legislatures, have for the most part responded in a positive manner to diminish the threat of widespread revolt and concomitant repression. But the courts are just one segment of the legal apparatus and they cannot work alone. Lawyers, too, must become more intimately involved in this social struggle, increasing their willingness to represent any and all persons with reasonable demands before any appropriate forum. A broadening of the use and availability of group legal services will help to make the necessary degree of involvement possible.