Group Legal Services and the New Code of Professional Responsibility

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thereby be decreased. Moreover, since the legislative roots of Article 18 lie deep in private agency and trust law, it would be in keeping with that tradition for the legislature to declare contracts affected by conflicts of interest to be voidable rather than void. Notwithstanding the foregoing remarks, Article 18 appears to be a significant attempt to achieve uniform regulation of conflict of interests.

Finally, it should be noted that the ultimate problem in this area is that of trust, and it is difficult to disagree with the thoughts expressed by Dean Manning: "The best way to make a man trustworthy is to trust him. And the best way to attract men of dignity to public office is to treat them as men of dignity." 76

BERNARD M. BRODSKY

GROUP LEGAL SERVICES AND THE NEW CODE OF PROFESSIONAL RESPONDIBILITY

The unique monopoly granted the legal profession to render legal services imposes a duty on the profession to ensure that every person who is in need of such services has ready access to them at an affordable cost.1 While the profession has accepted the burden in regard to the indigent,2 it has become increasingly apparent that a large proportion of our population, somewhere between the poles of poverty and affluence, has been unable to obtain these needed services.3 This gap is attributable, at least in part, to the potential recipients' lack of awareness of legal services; more specifically, to the ignorance of the public as to the need and value of such services, the lack of knowledge as to where to find a lawyer and of any particular attorney's qualifications, and finally, fear of the law itself, especially its processes and delays.4 From the standpoint of the profession,


1. "The maxim 'privilege brings responsibility' can be expanded to read, 'exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it.'" Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar, 12 U.C.L.A.L. Rev. 438, 443 (1965).

2. This comment will be restricted to a discussion of the legal problems of the non-indigent, as to treat the problems of the poor would necessitate a detailed examination of current facilities designed to supply their needs. In addition, the problems of the indigent vary significantly from those of the non-indigent.

3. "The need for some device for making lawyers' services more readily available to the public is apparent from the fact that large numbers of persons of moderate means do not now obtain needed legal services—at least not from lawyers." Christensen, Lawyer Referral Services: An Alternative to Lay Group Legal Services?, 12 U.C.L.A.L. Rev. 341, 342 (1965).

4. Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 Colum. L. Rev. 973, 975 (1963).

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the gap has largely been created by the restrictions imposed upon lawyers in rendering services, especially "the standards . . . that condemn advertising by lawyers, the representation of conflicting interests, and lay intermediaries that impair the direct loyalty of the lawyer to his clients." In addition, the security of the profession under such standards has led to "inertia of the bar coupled with fear of change." The result has been inequality of legal representation, causing laymen to turn to non-lawyers for solution of their legal problems. Primarily, the recipients' efforts have been in arrangements now known popularly as group legal services, whereby members of the group are provided with legal assistance by the organization for their own individual needs. Such arrangements have stirred the ire of the organized Bar, but in light of recent Supreme Court decisions recognizing the constitutionality of such arrangements, the Bar has been required to re-evaluate its position. The product of this re-evaluation is the new Code of Professional Responsibility which has supplanted the Canons of Professional Ethics. Before turning to the Code, however, the judicial proceedings which preceded its adoption must first be reviewed.

I. Group Legal Services and the Supreme Court

In 1963, the United States Supreme Court decided NAACP v. Button. Since 1849, Virginia had outlawed "running" or "capping," and in 1959, the State attempted to regulate the NAACP's activities by including in the definition of a "runner" or "capper," "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability." As a result, certain activities of the NAACP fell within this expanded definition, and thus constituted the unauthorized practice of law. These activities included the NAACP's maintenance of a legal staff of fifteen lawyers, paid by the organization on a per diem basis to conduct litigation on racial issues. Whether or not an action was to be approved was determined by the NAACP Chairman with the concurrence of the President. Primarily con-

5. Id.
6. Id.
7. When speaking of group legal services, a distinction must be kept in mind. Organizations which provide such services for their members obviously engage attorneys, as will be discussed below. However, non-lawyer members of the group may provide limited services of a legalistic nature to the individuals, for example, bringing the attorney and client together. These latter individuals thus perform "non-lawyer" services.
8. Hereinafter referred to as the Code.
cerned with school desegregation cases, the NAACP would send one of its lawyers to advise potential litigants of the coming struggle, with forms for their signature authorizing the staff lawyers to act for them in the litigation. The litigation itself was in the control of the attorneys, with litigants free to withdraw at any time.

The NAACP brought an action to have the provision of the Virginia statute declared inapplicable to its activities, or, if applicable, as null and void on the grounds that it violated their first and fourteenth amendment rights to speech, petition and assembly. The Virginia Supreme Court of Appeals\textsuperscript{11} held that the NAACP's activities fell within the expanded definition of Chapter 33, and also violated Canons 35 and 47 of the *ABA Canons of Professional Ethics*.\textsuperscript{12} On certiorari, the United States Supreme Court reversed the highest state court's ruling, holding, "The activities of the NAACP, its affiliates and legal staff shown on this record 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 violative of Chapter 33 and the Canons of Professional Ethics."\textsuperscript{13}

The Court, asserting that "a state cannot foreclose the exercise of constitutional rights by mere labels,"\textsuperscript{14} went on to say: "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 government intrusion."\textsuperscript{15} The Court thus recognized the activities of the NAACP as involving "constitutionally guaranteed civil rights."\textsuperscript{16} The Court emphasized that the NAACP had amply shown that its activities fell within the constitutional protections, while the State "has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which

\begin{itemize}
\item 12. *ABA Canons of Professional Ethics* No. 35 provides in part:
  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. . . . He [the lawyer] should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.
  A lawyer may accept employment from any 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.
*ABA Canons of Professional Ethics* No. 47 provides that: "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."
\item 14. *Id.* at 429.
\item 15. *Id.*
\item 16. *Id.* at 442.
\end{itemize}
The Court then concluded that although the State has a valid interest in regulating professional conduct, only if that interest is compelling has the State the right to limit first amendment freedoms, "[f]or a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." The decision was not without dissent. Mr. Justice Harlan emphasized the following facts: the staff lawyers were selected by the NAACP and received compensation therefrom; they had to agree to abide by NAACP policies; directives to the lawyer had much to do with the form and substance of the litigation, and as to the type of plaintiffs to be sought; and the lawyers were retained by obtaining signatures on blank forms from the prospective litigants. "In short, as these [facts] and other materials on the record show, the form of pleading, the type of relief to be requested, and the proper timing of suits have to a considerable extent, if not entirely, been determined by . . . [the NAACP's directives]." Mr. Justice Harlan concluded that the NAACP's activities could be constitutionally regulated by the State.

The legal profession received Button with relative calm, as it was felt that the decision only extended protection to activities aimed at securing political rights. The profession was aroused from complacency the very next year, however, when the Court decided *Brotherhood of Railroad Trainmen v. Virginia*. Here, the Union maintained a Department of Legal Counsel, with an attorney appointed for each of its sixteen regions. The Brotherhood, which had been instrumental in obtaining passage of federal laws to protect railroad employees, had established the Department to ensure that members injured or killed and their families would receive the benefits to which they were entitled. Thus, when a worker was injured or killed, a member of the Brotherhood would visit him or his widow, and advise them of their legal rights, suggesting the counsel of that region as being competent to handle the claim. The Virginia Supreme Court granted an injunction against the Brotherhood, finding that such activities channeled most, if not all, of these claims to attorneys chosen by the Union. The Brotherhood insisted that such activities were constitutionally protected

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17. Id. at 444.
18. Id. at 439.
19. Id. at 448-50.
20. Id. at 450.
22. 377 U.S. 1 (1964) [hereinafter referred to as BRT].
23. Acts in which the Brotherhood was instrumental in obtaining passage were the Safety Appliance Act of 1893, and the Federal Employers Liability Act of 1908.
under the first and fourteenth amendment freedoms of speech, petition and assembly. The United States Supreme Court reversed the Virginia court and vacated the injunction holding, "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."26

In arriving at its decision, the Court cited both Button and Gideon v. Wainwright,26 asserting that "[t]he Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP."27 Although recognizing Virginia’s broad power to regulate the profession within its borders, the Court emphasized that in its efforts at regulation, constitutionally guaranteed rights must be observed.28 Justice Clark, writing the dissent with Justice Harlan concurring, in a caustic prologemenon, stated: "By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise."29 He saw a basic distinction between Button and the case at hand; namely, that Button was circumscribed to activities aimed at obtaining constitutionally protected civil rights, while BRT involved personal injury litigation, which is "a procedure for the settlement of damage claims."30 Activity such as this not being a form of political expression, it was subject to regulation by the State. Justice Clark concluded: "The potential for evil in the union’s system is enormous and ... will bring disrepute to the legal profession."31

After BRT, it was felt that the path was cleared for recognition of group legal services.32 That recognition came shortly thereafter, in United Mine Workers of America v. Illinois State Bar Association.33 An action was commenced by the Illinois State Bar Association seeking to enjoin the UMW from what it considered the unauthorized practice of law. The Union retained a counsel to whom it paid an annual salary; his role was...

26. 372 U.S. 335 (1963). The Supreme Court here upheld the right of indigents to counsel in criminal proceedings for non-capital as well as capital offenses.
28. Id. at 6. The Court further stated that the union members' right to advise one another was an integral part of their constitutionally-guaranteed right of mutual assistance, which did not constitute an unauthorized practice of law, and which the State could not prohibit. The Court then made mention of the British practice whereby unions retain counsel to represent their members in personal lawsuits, "a practice similar to that which we upheld in NAACP v. Button. . . ." Id. at 7.
29. Id. at 9.
30. Id. at 10.
31. Id. at 12 (emphasis added).
33. 389 U.S. 217 (1967) [hereinafter referred to as UMW].
to represent any members who wished his service in presenting workmen's compensation claims before the Illinois Industrial Commission. The attorney was not directed by the Union in any way in conducting his investigation or handling the claims. The Union merely provided members with forms which they were to fill out and send to the attorney, stating their claim. The attorney prepared the case from the file, made an estimate of its value and presented it to the defendant coal company. When an agreement was reached, the attorney would notify the client, and would advise him whether or not to accept. If the client did not accept, a hearing was held before the Illinois Industrial Commission. Normally, this would be the first time the attorney and client came into direct contact, although the Union member was aware that the attorney could be reached at certain times and places. On these facts, the Illinois Supreme Court found that the Union's activities constituted the unauthorized practice of law and granted a permanent injunction, rejecting petitioner's claim that this violated its constitutionally guaranteed rights under the first and fourteenth amendments. That court found that Button applied only in cases where political rights were involved, and that BRT was applicable only in those cases where lawyers were recommended to clients, but not to the actual hiring of counsel by the group. The United States Supreme Court reversed the Illinois court, and vacated the injunction, holding, "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 Supreme Court, contending that Illinois' interpretation of Button and BRT was too narrow, again emphasized the test as being one of balancing the State's interest in regulating the conduct of the profession against the constitutional guarantees under the first and fourteenth amendments. Before the State can restrict associational rights, the offending practice must be serious enough to actually endanger the profession's standards. Mr. Justice Harlan, alone dissenting, reiterated his argument in Button that litigation is more than mere speech; it is conduct, and as such is subject to reasonable regulation. Although he favored the balancing approach, he was of the opinion "that the majority has weighed the competing interests badly, according too much force to the claims of the Union and too little to those of the public interest at stake." He felt the same objectives could be obtained by alternative methods, such as Union recommendation of at-

36. Id. at 226.
37. Id. at 228.
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torneys considered competent to handle such cases, or through imposition of dues on Union members to maintain a collective fund to reimburse them if they became involved in litigation.\(^8\) He concluded by saying:

This decision, which again manifests the peculiar insensitivity to the need for seeking an appropriate constitutional balance between federal and state authority that in recent years has characterized so many of the Court's decisions under the Fourteenth Amendment, puts this Court more deeply than ever in the business of supervising the practice of law in the various States. From my standpoint, what is done today is unnecessary, undesirable, and constitutionally all wrong. In the absence of demonstrated arbitrary or discriminatory regulation, state courts and legislatures should be left to govern their own Bars, free from interference by this Court.\(^9\)

II. GROUP LEGAL SERVICES AND THE CODE OF PROFESSIONAL RESPONSIBILITY

The impact of these three decisions has been recognized by the authors of the new Code. In the Preface it is noted that: "Recent decisions of the Supreme Court of the United States have necessitated intensive studies of certain Canons."\(^40\) The Code's treatment of group legal services, however, is still rather restrictive. While asserting the right of every member of our society to counsel when needed,\(^41\) and recognizing that the solution of legal problems depends upon the recipient's recognition of their existence and importance, and necessarily, upon his ability to obtain legal services,\(^42\) there is still a refusal to approve group service plans except as already specifically determined by the Court. This unwillingness is manifest in Disciplinary Rule 2-103, entitled Recommendation of Professional Employment, sub-paragraph D-(5), which provides:

\[(D)\text{ A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal services activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:}

\[\ldots\]

\[(5)\text{ Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of such services requires the allowance of such legal service activities.}\]

38. Id. at 228-30.
39. Id. at 233-34 (emphasis added).
40. ABA CODE OF PROFESSIONAL RESPONSIBILITY at i.
41. Id., EC 1-1.
42. Id., EC 2-1.
43. Id., DR 2-103-D(5) (emphasis added).
Thus, the obvious question presents itself; in light of the "controlling constitutional interpretation" of Button, BRT and UMW, and the limitations of DR 2-103-D(5), what types of group legal services are permissible? To limit group legal services to those in defense of fundamental political rights of the type recognized in Button is a quite narrow interpretation. In contrast, the effect of BRT and UMW was to assert that "the enforcement of any legal rights, even purely personal civil injury claims, could be assisted by an organization."44 The possibility that this service could be rendered only by means of referral services, as recognized by BRT, was expanded in UMW to approval of "a plan under which an organization both employed and paid for an advocate."45 The Bar seems to indicate, however, that only those forms clearly established are to be recognized, and the Code imposes additional requirements to ensure that group legal service plans will not receive ready expansion. The Code provides that the primary purpose of the group must be other than the rendition of such services,46 although the offering of such services must be reasonably related to the organization's primary purpose.47 There is to be no financial benefit in rendering these services,48 and the beneficiary must be the client, not the group.49

The intent of such restrictions is obvious. The Bar will recognize plans such as those of the NAACP, Brotherhood, or Mine Workers, since they satisfy all these requirements. However, any attempt to establish groups for the sole purpose of providing legal services is forbidden, as is the rendition of any legal services if the primary purpose of the organization cannot be reasonably related to the offering of such services. Absent from the Code is a provision allowing for a balancing of public interests, for there are really two interests at stake: the public interest in a profession of high ethical standing, and the public interest in adequate legal services for all in need. These interests are not necessarily mutually exclusive, but disproportionate weight on one, as in the Code, will make attainment of the other quite difficult. The Code desires only that high professional standards be maintained. Such a restrictive view has been justified on the grounds that it prevents needless litigation, fraudulent claims, and undesirable competition between attorneys which could lead to deprofessionalization.60

The primary responsibility of the Bar, however, is to make legal services available to all who need them.61 As one author comments:

44. Steiner, supra note 21, at 619.
45. Id.
46. ABA Code of Professional Responsibility DR 2-103-D(5)-(a).
47. Id., DR 2-103-D(5)-(b).
48. Id., DR 2-103-D(5)-(c).
49. Id., DR 2-103-D(5)-(d).
50. See Schwartz, supra note 82, at 287.
51. See Cheatham, supra note 4, at 985.
The standards of lawyers are not ends in themselves, nor are they negative in their object. They are affirmative in their purpose and are means to the end of better performance of the lawyers' roles. They are no more immutable than any other laws or standards. If under changed conditions they come to block the purpose they are intended to serve, they should be modified or rejected. . . .

This may very well happen to the new Code, as it did to the old Canons. The Supreme Court has provided the test—only if a state can show a substantial evil endangering the profession's standards will it be permitted to restrict first and fourteenth amendment rights and the constitutionally guaranteed organizational freedom of members of the community to unite in order to secure legal services. Regarding any specific plan of group legal services, "the test of the organization's acceptability should be the benefit to the public in terms of price, effectiveness, and competence of the legal service." Undoubtedly, if the need for legal services remains unfulfilled, experimentation in new means to provide such services is inevitable. If there is any deviation from the restrictions imposed by the Code, the Bar has made it clear that it will challenge such extensions to force the question of whether any new group service plan will be allowable, since the Code states that these requirements are to have effect unless prohibited by the courts. The Court in all three cases speaks of the activities conducted as involving a fundamental right of association to obtain legal services. It seems that if there is such a right, then its exercise should not be unduly restricted by the stringently narrow confines of the Code.

The next logical step in the development of group plans might be the establishment of organizations with the sole purpose of obtaining legal services for their members. Such a plan would directly contravene the Code provisions, and would therefore be an unauthorized practice of law. Under the test developed by the Court, any such arrangement would have to exhibit substantial evils endangering professional standards to be enjoined. With the burden of proof resting on the state, it may not be easy to prove the actual harm demanded by the Court. Absent such proof, and in light of the Court's stand in the past, extension of the Court's imprimatur to recognize such groups is likely. If such arrangements are included under the protective aegis of the first and fourteenth amendments, then the Code may abridge fundamental rights of association.

This is not to say that all of the Code's prohibitions are undesirable. "[T]he standards that help to insure dependable service . . . must be maintained." Certainly the requirement that the organization not influence the

52. Id. at 979.
54. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103-D(5).
55. Cheatham, supra note 4, at 985.
lawyer-client relationship is important since this could very well lead to conflicts of interest between the needs of the client and those of the group. However, "[t]he mere possibility that the union-employer [or any other organization] may exert pressure on the attorney-employee and thereby induce the latter to divide his loyalties is not sufficient reason to invalidate a plan of group legal services that is clearly in the public interest." It is very likely that the interests of the group and its individual members will often coincide. If this is the case, then the fear of conflict of interest is largely unwarranted. It has been noted that many existing plans, including those of the NAACP and the Brotherhood of Railroad Trainmen, do exhibit a strict attorney-client relationship, thus avoiding possibilities of conflicting interests. In the event that a conflict does arise, the Bar and the courts are available to supervise, for "under a plan of group legal services . . . the attorney . . . is as subject to control and discipline by the courts as any other attorney would be."

Litigation may very well increase with greater use of these plans. The Bar has opposed the proliferation of lawsuits, but unquestionably a plaintiff with a meritorious claim deserves his day in court, regardless of the fact that our judicial apparatus is presently overloaded. The difficulty with the Bar's ethical rules is that they do not necessarily eliminate unmeritorious claims, but rather tend to eliminate unknowing claimants. In addition, there is potentially a preventive advantage in an arrangement whereby a group affords its members attorneys' services. If a person can consult readily with an attorney, as such plans provide, he may be spared the necessity of litigation at some later date. Litigation is often the costly result of a person's ignorance or mistakes when faced with a situation with possible legal complications. Legal advice in the early stages may make protracted and expensive court action to rectify such mistakes unnecessary. This would be an attractive feature of group legal services which could help eventually to reduce the workload of the courts.

A fear has been expressed as to possible adverse effects group legal services may have on the composition of the profession. The feeling is that it is the large firm which will benefit from group legal services since, being the most efficient, it could best handle the volume, and thus would attract the most business. Others feel that due to the nature of the profession, with the greater majority of lawyers practicing in small firms, there is a danger that "if large blocks of the public had their problems channeled to

57. See Zimroth, supra note 53, at 974.
58. Cady, supra note 56, at 423.
59. See Zimroth, supra note 53, at 979.
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group service lawyers, the competitive consequences might be devastating.”

To the contrary, there is an equally cogent argument that “this [group legal
services] is not going to be terribly profitable business because there are
going to be reduced fees and hourly charges involved, and... therefore, we
may find that this actually helps the smaller firms and the smaller practi-
tioners.” If there are no fortunes to be made in group legal services, then
the argument that they will lead to commercialization of the profession
seems groundless. Indeed, a large demand for services which at present are
not being supplied would lead one to assume that the profession as a whole
will benefit by group legal service plans.

A further advantage of group legal services is the potential for legal
education of the community which could lead to an increased awareness of
legal problems by the public at large. “There is no guarantee that in time
the members of the public will, by self-education, come to understand that
their problems can best be handled by a lawyer. Mechanisms such as group
legal services are one way of bringing these important facts home to them.”

The disturbing aspect of the Bar’s position is that its objection to
group legal services will certainly delay their development; the advantages
of such services might thereby be lost while the problems they are designed
to alleviate will continue unabated. One commentator succinctly expresses
the fundamental problem when he states: “a group of people organize to
provide cheaper or more efficient legal service for themselves or for others;
no one challenges the utility of the organization, only its legality; the
challenge may be successful because the organization has committed or will
commit an ethical sin.” The Bar’s worthy intentions seem, therefore, mis-
directed. In BRT, for example, the client determined the course of the
litigation. “The only kind of control exerted by the Brotherhood seemed
to benefit its members since it provided cheaper, more efficient service. Yet
the practice was outlawed, because ‘control’ was bad.” Reliance on many
traditional standards that are irrelevant to today’s situations will mean that
effective remedies will be undeservedly stymied.

Finally, even if the non-indigent realizes, as in the past, that he has a
legal problem, he is often faced with the difficult task of selecting an at-
torney competent to handle his particular problem. For the most part, he is
limited to “contacting a non-lawyer relative or friend, selecting a name from

61. Stolz, Insurance for Legal Services: A Preliminary Study of Feasibility, 35 U.
Chi. L. Rev. 417, 422 (1968).
62. Greenawalt, supra note 60, at 306.
63. Schwartz, supra note 32, at 287. Labor unions could be extremely effective
here, by establishing educational programs for their members. This would certainly be
one way of reaching a large segment of the population.
64. Zimroth, supra note 53, at 968 (emphasis added).
65. Id. at 975.
the Yellow Pages, walking through the district where lawyers tend to con
gregate or visiting one whose office is nearby, or calling lawyer reference
services in communities where they exist." It is obvious that only in the
last case has the potential client been given any assistance; in the other
instances he has a "hit-and-miss" chance of selecting an able attorney.
"Group legal service plans tend to reduce the element of chance with re-
spect to the competence of the attorney retained by the client." Therefore, group services can aid in reducing the fears of the client.

Education of the public to legal problems, cheaper and more efficient
services, some guarantee of counsel's competence—all these have been cited
as advantages of group legal services. They could go far toward solving the
problem of inadequate legal services. Whether or not they are the only, or
best means, remains to be seen.

III. ALTERNATIVES TO GROUP LEGAL SERVICES

One attempt at fulfilling the public's need for adequate rendition of
legal services which has had the approval and active support of the Bar is
lawyer referral service.

The legal profession has developed lawyer referral systems de-
dsigned to aid individuals who are able to pay fees but need assist-
ance in locating lawyers competent to handle their particular
problems. Use of a lawyer referral system enables a layman to avoid
an uninformed selection of a lawyer because such a system makes
possible the employment of competent lawyers who have indicated
an interest in the subject matter involved. Lawyers should support
the principle of lawyer referral systems.

It should be noted that the benefits attributed to group legal services are
the very ones thought so important in relation to lawyer referral services.
The basic premises upon which lawyer referral is founded are that both the
public and the profession benefit when legal problems are handled by those
trained in the law, and that the lawyer's monopoly in providing such
services imposes a duty to make these services readily available at prices
affordable by all.

The actual operation of such a system is relatively simple. The service
functions through a panel of lawyers, and most services make at least some

67. Id. at 290.
68. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-15.
69. Christensen, Lawyer Referral Service: An Alternative to Lay-Group Legal Serv-
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attempt to vouch for the competence of their participating practitioners.\textsuperscript{70} When a prospective client calls at the service office, an attorney will discuss his problem with him, and make an evaluation of the individual's situation. He will then arrange for an interview between the client and an attorney affiliated with the service. After the initial meeting with the attorney at the service office, the client and the designated lawyer are free to take any action they decide upon.\textsuperscript{73} Thus, the referral system is basically designed to function as a "middleman" to bring attorney and client together.

Some lawyers are of the opinion that "[t]he lawyer referral plan is an ideal approach to the problem because it is directed toward the very segment of the public that must be reached—those able to pay reasonable fees but reluctant to take their legal problems to lawyers."\textsuperscript{72} Essential to the success of any referral service is the active support of the local Bar, and "continuous and effective publicity."\textsuperscript{73} Unfortunately, it has been noted that the plan has not been adopted by many local Bars, and of those which have established such services, there are too few that give it active support.\textsuperscript{74} The importance of publicity is obvious. The very existence of lawyer referral is a testimonial to the ignorance of the public about legal problems and services. If the public were fully aware of these, what need would there be in having lawyer referral? On the other hand, if the public is unaware of the existence of a service such as lawyer referral, they are in no better position than if the concept had never arisen and been put into effect. Unquestionably, to allow individual lawyers to publicize would be undesirable and would lower the profession's esteem. However, if individual attorneys must be forbidden to publicize, then it is incumbent that the Bar assure adequate information as to the existence of lawyer referral. In light of the almost total reliance of the Bar on lawyer referral, this obligation assumes even greater importance.

A second alternative to lay group legal services which has been proposed is that of legal insurance. Professor Stolz, who has developed at least a

\textsuperscript{70} Christensen states that the lawyers who serve on the panel usually designate the "kinds of cases they will or will not accept from the referral services." Most lawyer referral services operate by allowing designation of areas for their participating attorneys, although some "have established special panels of lawyers to handle cases in specific fields of law." A few even "make some attempt to limit membership on special panels to lawyers who are actually qualified in those fields of law." \textit{Id.} at 347-48.


\textsuperscript{72} \textit{Id.} (emphasis added). The client is charged an initial fee, usually five dollars for the first half-hour he spends with the designated attorney. If further consultation is necessary, the attorney and client arrange between themselves for additional financing.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} Christensen is of the opinion that presently, lawyer referral is far too limited in scope. "The efficacy of the lawyer referral service as an alternative to lay-group legal services depends upon the extent to which these . . . deficiencies can be remedied." Christensen, \textit{supra} note 69, at 544.
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rudimentary plan, is of the opinion that "[a] legal insurance scheme could be designed with the chief goal of providing a convenient way to budget relatively modest, frequently encountered legal costs." Legal insurance itself is not a novel idea. The public has long had access to automobile and homeowner's liability insurance, and for most purposes, the coverage is adequate. However, the Stolz proposal would seek to extend the use of insurance to cover a greater variety of circumstances where liability may be imposed by law.

The Stolz plan has three major characteristics. First, there is the basic benefit. This is the price a client would have to pay for one hour's consultation per year with an attorney. Under the plan there would be no charge for the initial visit. The advantages supposedly which would derive from the basic benefit are rather extensive. Stolz believes that such a provision would be adequate to fully cover most people to the extent that they need legal assistance, would encourage use of lawyers when there is a question as to the existence of a legal problem since there would be no initial cost, would solve most landlord-tenant, will-drafting, real estate and consumer problems, and finally, would prevent needless litigation. The second major characteristic is that of exceptions to coverage, and there are many. There should be no coverage where insurance is already available, where claims are currently handled on a contingent fee basis, in matters involving probate, divorce, wage claims, and enforcement of support cases, and

75. Stolz, supra note 61, at 425.
76. Id. at 436. Stolz cautions not to draw too extensive an analogy to health insurance, for two reasons. First, it is likely that all persons will at some time or another need the services of a doctor, whereas, there is no substantial likelihood that an attorney's services will ever be required. Second, the major cost of health insurance reflects institutional rather than professional charges, i.e., the cost of hospital rooms, medicine, etc. The cost of legal services, on the other hand, is almost completely a reflection of the price of professional services. Id. at 423.
77. Id. at 455. This coverage, however, would not apply for consultation regarding tax returns.
78. Id. at 455-56.
79. Automobile and homeowner's insurance come under this exclusion, with the exception that if the claim exceeds the limits of the policy, or if the insured is subject to counterclaims, or if both parties are insured by the same insurer, there should be coverage. Id. at 456-57.
80. Excluded under this provision would be all claims for personal injury, workmen's compensation, or condemnation cases. Id. at 457-58.
81. Coverage in these areas would be limited to the basic benefit, but only in a very restricted sense. Stolz feels that most probate matters can be handled sufficiently within the time allotted under the basic benefit, and thus should not be given any expanded coverage. As for the other three areas, since there are public agencies established to handle these situations, the insured would be entitled only to counsel for the purpose of advising the client as to what agency can properly handle his problems. Id. at 457-59.

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in criminal cases. The third major characteristic is the provision of additional benefits beyond the basic benefit. This would be allowed by establishing a schedule providing additional coverage under certain circumstances. Thus, if the insured found himself a defendant in a civil suit he would be entitled to a minimum of an extra hour of consultation and a maximum of one day in court. If there is extended litigation, Stolz provides a "major trial benefit" which would entitle the insured to a maximum of ten days in court if he were a plaintiff, or some extent of co-insurance if he were a defendant.

On the advantages of such a plan, Professor Stolz states that "a legal insurance plan, unlike group legal services, could be organized to permit the client-insured to select his own lawyer, who would be compensated by benefits from the insurance policy." In addition, such a program would not involve the difficulties of administration encountered in group legal services, or the danger that a member of such a group will not receive adequate representation from the service's attorney. He does point to the fact, however, that group legal services have the advantages of economies of scale and designation of lawyers. As long as free choice of lawyer is maintained, no insurance plan would be able to compete financially with group legal services. He calls, therefore, for recognition of legal specialties, with the requirement that lawyers would be selected according to the areas in which they are deemed competent. "In this way, both economies of scale and client free choice could be achieved." Finally, he feels that by prepaying the cost of legal services through the insurance plan people would not be as fearful of consulting a lawyer.

There are certain difficulties which will be encountered in trying to devise and implement a plan of legal insurance. First, there is the problem of defining who is the recipient of such services. This is clearly defined in the case of medical insurance since the recipient is obviously the patient. The insured under a legal insurance policy need not be the beneficiary, and this leads also to the problem of deciding who can and who cannot be a beneficiary of such a policy. Secondly, the need for such insurance is unevenly distributed. As one's property holdings increase, the likelihood

82. Criminal liability would be excluded, because there are public agencies, such as the public defender, to handle these cases. Id. at 459-60.
83. Id. at 460. The extra consultation would also be available to the insured in the following situations: if he found himself to be a respondent in an administrative hearing, if he were arrested, or if he had his tax return audited.
84. Id. at 461.
85. Id. at 421-22.
86. Id. at 474-75.
87. Id. at 472.
88. Id. at 451.
89. Id. at 422.
that a person will become involved in litigation becomes greater. Thus, the poorer man may well end up paying a disproportionate share for the richer's legal claims and liabilities. Thirdly, the very concept of legal insurance is not easily defined. Necessarily, it would have to be determined what situations will or will not be covered and how much flexibility is to be allowed. Thus, problems in determining the benefit may arise. All these difficulties would have to be overcome before implementation of any such program.

IV. CONCLUSION

There is probably no one plan that would completely fulfill the presently unsatisfied need for legal services. The different approaches, however, are all aimed at the same problem—filling the gap between the need for and the actual provision of adequate legal services for the non-indigent. Therefore, the plans could complement one another, and thereby serve the needs of the greatest number of individuals. Our priorities, however, will determine initially which proposal will be employed. If one feels, for example, that the need for legal awareness and assurance of competency of counsel outweighs the desire to maintain a strict attorney-client relationship, one would tend to favor group legal service proposals. If the primary concern is with maintaining the direct contact between lawyer and client one might lean towards referral services or legal insurance. Each of these plans has beneficial characteristics which go towards eliminating at least part of the problem.

An overall program could be provided utilizing each of the plans to some extent. By implementing group legal services in such organizations as unions, automobile clubs, or other groups where the members share some common interest, a basis would be formed for providing legal services of all natures to the members. For those individuals who are not affiliated with any such group, an attempt could be made to service their needs by use of referral services or legal insurance. For those who are willing and able to pay, insurance could be best used to fulfill their needs. However, since the coverage of such a policy, at least in Stolz's proposal, is limited to some extent, lawyer referral would be available to serve those not covered by legal insurance because of inability to sustain the cost. A cooperative plan could be designed to prevent overlapping of legal services by providing that the recipient who belongs to an organization which conducts a legal service program would not be eligible for legal insurance or for use of referral systems. Those individuals who can afford to pay for legal insurance would be eligible for only this type of assistance. It would be necessary to establish the income level below which the cost of legal insurance is

90. Id. at 425.
prohibitive; once determined, any person whose income falls below this minimum would be a likely recipient of referral services.\footnote{The economic viability of group legal services is beyond the scope of this paper. However, this aspect presents some important questions which must be answered; for example, questions such as whether a group legal services plan would be economically attractive to lawyers and the public, and what the cost to each would be, need to be extensively studied.}

The benefits of such a scheme could be quite extensive. The recipients of any particular type of service could be much more easily identified. Once identified, the assessing of the individual needs of the clients and the provision of greater service of those needs would be greatly simplified. The scheme would also lend itself much more readily to policing activities in order to guard against abuses. Finally, if such a system were established, it would virtually eliminate the public's ignorance of the law and its processes.

On the other hand, the system would be undesirable in that it would limit the client's free choice of services which is present under existing arrangements. Also, it is discriminatory in the sense that the eligibility of an individual for any specific type of legal service is determined by factors contingent to his actual need, for example, whether the individual belongs to some organization which provides legal services, or whether his income is above or below a certain level. However, an extensive public relations program designed to educate the public as to the problems of insufficiency of legal services, and as to what each plan is designed to achieve, could eventually persuade the recipients to support such a comprehensive plan. In light of the fact that the legal profession exists primarily to serve the public, it seems that fulfillment of the public need should be the legal profession's primary objective.

Whether or not such a comprehensive plan would ever meet with the approval of the courts, the Bar, or the public at this time remains conjectural. One thing is certain—our present attempts to solve the problem of providing legal services have been inadequate. Much of the blame for this rests with the profession itself. The \textit{Code}, like its predecessor, emphasizes lawyer referral services almost to the total exclusion of any other approach. It has required the force of judicial decisions to make the Bar relax its prohibitive rules. If the Bar is going to continue to stress lawyer referral, then it has an obligation to insure that such a plan will do all that is needed.

The development of group legal services clearly reflects the profession's failure to forge lawyer referral into an effective tool. Therefore, it should not be surprising if the non-legal community continues to fend for itself, with greater provision for and further refinement of group legal services. The Bar's concern with maintaining the ethical standards of the profession is justifiable and worthy. Yet, the legal community must also fulfill its com-
mittment of service. The way to insure both is not by arbitrary discrimi-
nation against any specific plan. Rather, the Bar should adopt an attitude
of “watchfulness” whereby it would not automatically adjudge group legal
plans as unauthorized practice of law, but would allow their existence until
proven harmful. This, in effect, would be giving the test developed by the
Supreme Court official recognition in the Code. More importantly, it would
give the Bar a flexibility now unfortunately lacking. If the Bar really
wishes to be an effective guardian of ethical standards, it should work closely
in the development of such plans. It would be wise for the Bar to remember
that these plans have a powerful ally in the Supreme Court.

The present Code is altruistic in its formulation of the problem. How-
ever, the worthy intentions evidenced in the ethical considerations are
not borne out by the provisions of the disciplinary rules. In restricting
group legal service plans, the Bar must have a more substantial justification
for such an attitude than its contention that there is potential abuse inherent
in such plans. Even if there was general agreement on this premise, there
must still be provision for an adequate substitute by the profession. Dis-
ciplinary Rule 2-103-D, therefore, is an unrealistic and desirable rule.
The Bar's position should be carefully re-evaluated.

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NEW YORK ABORTION REFORM AND CONFLICTING MUNICIPAL
REGULATIONS: A QUESTION OF HOME RULE

I. INTRODUCTION

Abortion and its array of associated problems have been the focus of
intense controversy for at least the last decade. During the past three years,
certain states have passed “liberalized” abortion statutes, amending laws
which have been in existence since before the Civil War. The New York
State Abortion Law of 1828 served as the original model for other state
abortion statutes, and the law remained virtually unchanged until this
year. The constant legislative debate on abortion reform in New York has
been so unpredictable that the 1969 legislature rejected, by nine votes, an
abortion reform bill which would be considered restrictive as compared to

1. “Liberalization” of the abortion laws during the period of 1967-69, meant that
the states allowed abortions only if the woman would be in danger of death if the fetus
was not terminated. Colorado, North Carolina, and California enacted such statutes in
1967; Georgia and Maryland in 1968; and Arkansas, Kansas, Delaware, Oregon and New
abolished practically all restrictions on abortions. D. CALLAHAN, ABORTION LAW, CHOICE

2. See Means, The Law of New York Concerning Abortion and the Status of the