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Constitutional Law - Legal Ethics - State Proscription of Solicitation Limited by Constitution

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market, therefore, the elimination of a potential competitor may affect competition as adversely as the elimination of actual competition, and it is thus desirable to consider lessening of potential as well as actual competition in section 7 cases.

The opportunity to give economic justification may be of more significance to a defendant in a joint venture than in a merger case. In a merger the only rehabilitating economic justification is the failing company doctrine;[30] but a joint venture, otherwise illegal, may have been justifiably motivated by a need for the gathering of necessary risk capital or for pooling of risks inherent in significant industrial innovation.[31] While the Court in *Penn-Olin* generally equates the merger with the joint venture, among the suggested criteria to be viewed on remand is "the reasons and necessities for its existence."[32] This suggests that the Court recognized that the exceptions accorded the joint ventures under section 7 may be broader than the single merger exception. If such is the case, the Court has achieved a desirable balance: those ventures most likely to result in anticompetitive effects may be effectively enjoined, while preserving those that serve an economic purpose.

Thus, *Penn-Olin* appears to establish a two step process for determining the validity of a joint venture under section 7. First the Government must prove that absent the joint venture each parent would have been an actual or potential competitor. Having shown this, if the venture corporation represents a substantial market share of the market it has entered — the single factor examined in present merger analysis — the burden shifts to the defendants to give an economic justification or to show lack of adverse effect on competition. If, however, the venture does not represent a substantial market share, the burden of proof may remain with the Government and the Court will employ the multifactor test.

Constitutional Law—Legal Ethics—State Proscription of Solicitation Limited by Constitution

The Brotherhood of Railroad Trainmen, through its department of legal counsel, advises its injured members or the families

30. See International Shoe Co. v. FTC, 280 U.S. 291, 299–303 (1930). See also United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 n.46 (1963); Hall & Philips, *supra* note 15, at 216; Note, 14 STAN. L. REV. 777, 796 (1962).

31. See Boyle, *supra* note 9, at 304–07; Dixon, *supra* note 28, at 399; Hale, *supra* note 9, at 928–29.

32. 378 U.S. at 177.

of those killed on the job not to settle their claims without first seeing a lawyer and recommends that they contact the regional lawyer approved by the Union.[1] At the behest of the state bar association, the Supreme Court of Appeals of Virginia[2] enjoined the Brotherhood from engaging in these activities[3] as contrary to statutes regulating solicitation and the practice of law within the State.[4] The United States Supreme Court struck down the injunction,[5] *holding* that the enjoined activity is protected under the first and fourteenth amendments.[6] *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, *rehearing denied*, 377 U.S. 960 (1964).

1. Under the union's plan, the United States is divided into 16 regions. A lawyer or firm with a reputation of honesty and skill in representing plaintiffs in railroad personal injury litigation is selected by the union's department of legal counsel in each region on the advice of lawyers and judges. This selection is subject to the approval of the union's president who also has the power to discharge the attorneys. After an accident, the secretary of the local lodge contacts the injured worker or his survivors and recommends their contacting the one approved regional lawyer. At the union's expense, a staff of investigators is maintained to gather evidence for use by the injured worker should a trial become necessary. It is admitted by the Brotherhood that the result of this plan is the channeling of almost all legal employment by its members to the particular approved lawyer. Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 4–5, 11 (1964).

2. Unreported decision of Va. Sup. Ct. App., June 12, 1962, affirming an injunction granted by the Chancery Court of the City of Richmond, Virginia.

3. Specifically, the Virginia court enjoined the Brotherhood

> . . . from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers . . . .

Quoted in 377 U.S. at 4. Furthermore, the decree enjoined the union from sharing counsel fees with recommended lawyers and from encouraging the sharing of fees by its regional investigators. *Id.* at 5 n.9.

4. Only persons who have obtained a license may practice law in Virginia. VA. CODE ANN. § 54–42 (1950). VA. CODE ANN. § 54–83.1 (1950) provides that an injunction may be sought to restrain permanently an individual or any person, firm, partnership or association acting for him, from soliciting legal employment.

5. The Brotherhood did not contest those parts of the injunction relating to fee-sharing but rather denied that it has engaged in such practices. The Court assumed that no such fee-sharing existed — the strongest case for the union — and passed only on the other provisions of the injunction. 377 U.S. at 5 n.9.

6. *Id.* at 8.

The first amendment[7] protects freedom of speech and assembly against governmental encroachment.[8] By construction, constitutional protection is extended to the right of association as a necessary cognate to free speech and assembly.[9] Thus, workers have a constitutional right to associate by joining a labor union.[10] Freedom of speech is not limited to abstract discussion but extends to the vigorous advocacy of ideas.[11] However, these first amendment freedoms are not absolute but are subject to federal or state restriction in the public interest.[12] Conflict over the extent of constitutional protection has been resolved by a balancing of the individual's rights[13] with the interests which the state is trying to protect.[14]

Traditionally, states have controlled the practice of law within

7. "Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people peaceably to assemble . . . ." U.S. CONST. amend. I.

8. Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960); Thomas v. Collins, 323 U.S. 516, 530 (1945); Grosjean v. American Press Co., 297 U.S. 233 (1936). The fourteenth amendment protects these rights against state violation. See NAACP v. Alabama, 357 U.S. 449, 460 (1958); Thomhill v. Alabama, 310 U.S. 88, 95 (1940); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Stromberg v. California, 283 U.S. 359, 368 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

9. De Jonge v. Oregon, *supra* note 8. See also Bates v. City of Little Rock, *supra* note 8; NAACP v. Alabama, *supra* note 8; Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963); Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74.

10. Thomas v. Collins, 323 U.S. 516 (1945); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *cf.* Note, *Constitutional Right to Membership in a Labor Union—5th and 14th Amendments*, 8 J. PUB. L. 580 (1959). Similarly, freedom of association includes the right to join a political party. See Sweezy v. New Hampshire, *supra* note 9, at 249.

11. See, *e.g.*, Sweezy v. New Hampshire, *supra* note 9, at 250–51. See also Fellman, *supra* note 9, at 104–08.

12. Barenblatt v. United States, 360 U.S. 109 (1959); American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950); Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

13. Organizations engaged in activities claimed to be constitutionally protected may assert the corresponding rights of their individual members as well as asserting these constitutional rights on their own behalf. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); Bates v. City of Little Rock, 361 U.S. 516, 523 n.9 (1960); NAACP v. Alabama, 357 U.S. 449, 458 (1958). Specifically, unions may assert their members' rights since "there is a direct community of interest between it and its members. . . ." Brotherhood of Stationary Eng'rs v. St. Louis, 212 S.W.2d 454, 458 (Mo. App. 1948).

14. Wilkinson v. United States, 365 U.S. 399, 414 (1961); Barenblatt v. United States, 360 U.S. 109, 134 (1959); Dennis v. United States, 341 U.S. 494, 542 (1951); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

their borders[15] by regulating entrance into the profession and setting standards of conduct.[16] This regulation seeks to promote the profession's high quality and dignity.[17] Canons of legal ethics prohibit, among numerous other practices,[18] solicitation[19] and advertising[20] to obtain legal business. Such commercial methods of competing for clients have been deemed unbecoming to the profession as well as enhancing the possibility of fraudulent claims, overcharging of fees, and overburdening the courts with unfounded litigation.[21] A form of indirect solicitation occurs when

15. This regulation necessarily belongs to the states. Schware v. Board of Bar Examiners, 353 U.S. 232, 248 (1957) (concurring opinion).

16. To some extent the legal profession itself, the state legislatures, and finally the state courts exercise control over who may become a member of the profession. See *In re* McDonald, 204 Minn. 61, 282 N.W. 677 (1938). In Minnesota, for example, standards for admission to the bar, include good moral character (R.2), the passing of a written examination (R.3), and possession of defined educational qualifications (R.5). *Rules of the Supreme Court for Admission to the Bar*, 27A MINN. STAT. ANN. 47 (1958). It is considered that an organization, unable to qualify as an officer of the court and not admitted to the bar, cannot practice law itself, Divine v. Watanga Hospital, 137 F. Supp. 628 (M.D.N.C. 1956), nor can it do so indirectly by employing lawyers to practice for it, *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910). If an organization does so, it is engaged in an unauthorized practice of law. See, *e.g.*, MINN. STAT. § 481.02 (1961). Both the organization, In the Matter of Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936), and the individual attorney, *In re* Otterness, 181 Minn. 254, 232 N.W. 318 (1930), are liable to court sanctions. As to the required standard of conduct for lawyers see notes 18–20 *infra*.

17. See, *e.g.*, Steer & Adair v. Land Title Guar. & Trust Co., 65 Ohio L. Abs. 33, 113 N.E.2d 763 (C.P. 1953); Comment, 25 U. CHI. L. REV. 674, 681–82 (1958); Note, 72 YALE L.J. 1613, 1630 (1963).

18. Most states have adopted the American Bar Association's Canons of Professional Ethics which forbid, *inter alia*, the following: stirring up of litigation either directly or through agents (Canon 28), fee-splitting (Canon 34), letting himself be controlled or exploited by lay intermediaries (Canon 35), or aiding the unauthorized practice of law (Canon 47). In Virginia, for example, see *Rules for Integration of the Bar*, 171 Va. xviii (1938).

19. This prohibition is based partly on the common-law offenses of champerty (a division of proceeds of litigation between the owner of the litigating claim and a party supporting or enforcing the litigation), Chester H. Roth Co. v. Esquire, Inc., 85 F. Supp. 848 (D.C.N.Y. 1949), and barratry (the offense of frequently stirring up quarrels and suits), Churchwell v. State, 195 Ga. 22, 25, 22 S.E.2d 824, 826 (1942). Today the ban is expressed in most states by statutes following ABA Canons 27 and 28 which condemn solicitation by lawyers or their agents. 63 COLUM. L. REV. 1502, 1504 (1963).

20. ABA Canon 27 specifically prohibits direct or indirect advertising. This is closely related to solicitation since the purpose of advertising is to gain professional employment.

21. See DRINKER, LEGAL ETHICS 64, 212 (1953); Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935); Note, *Legal Ethics — Ambulance*

an organization contacts one of its members who is in need of legal service and refers him to a lawyer selected by the organization.[22] Because the organization functions between the lawyer and client in their traditional relationship, it is referred to as a lay intermediary.[23] With rare exception,[24] states have proscribed the law-related activities of such organizations[25] and have found the lawyer to be in violation of the Canons of Legal Ethics.[26] Only infrequently has it been asserted that the Constitution limits state regulation of the legal profession.

In *NAACP v. Button*,[27] the Supreme Court for the first time

Chasing, 30 N.Y.U.L. REV. 182 (1955); Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U.L. REV. 895 (1953); 63 COLUM. L. REV. 1502, 1504–05 (1963). For a critical analysis of these reasons see Comment, 25 U. CHI. L. REV. 674 (1958).

22. See, *e.g.*, Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); *In re*: Petition of the Comm. on Rule 28 of the Cleveland Bar Ass'n, 15 Ohio L. Abs. 106 (Ct. App. 1933).

23. See note 43 *infra*.

24. The ABA approved the law-related activities of the American Liberty League — offering free legal service to the needy who felt their constitutional rights had been violated by the New Deal Legislation — because of the far reaching social problem otherwise unsolved. See ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, OPINION 148 (1935). Legal aid clinics are condoned. ABA Canon 35, note 26 *infra*. Also, a few lower courts have to some extent approved the practices of non-profit lay intermediaries. *E.g.*, *In re* Ades, 6 F. Supp. 467 (D.C.D. Md. 1934); Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 12 S.E.2d 602 (1940).

25. Most often the organization is attacked for solicitation or for engaging in the unauthorized practice of law. See People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); In the Matter of Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936); Clark, *The Effect of the Unauthorized Practice of Law Upon the Ethics of the Legal Profession*, 5 LAW & CONTEMP. PROB. 97, 99 (1938).

26. ABA CANONS OF PROFESSIONAL AND JUDICIAL ETHICS, Canon 35, at 32 (1947) provides that:

> 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 this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

27. 371 U.S. 415 (1963).

limited state regulation of the law related activities of a lay intermediary when it sanctioned the NAACP's practice of encouraging maintenance of civil rights litigation by its members and employing lawyers for their use.[28] The Court extended the first amendment rights of the NAACP and its members to include action to secure their constitutionally guaranteed civil rights and struck down the Virginia statute[29] proscribing these practices.[30] It stressed that the solicitation of litigation was undertaken, not to resolve private differences, but to achieve the federal policy of equal rights for Negroes — that the resultant litigation was a constitutionally protected "form of political expression."[31] The Court recognized Virginia's interest in regulating legal ethics but did not find sufficient evidence of substantive evils to justify its exercise in *Button*.[32] However, the Court failed to establish any definite guidelines of protection to be afforded other lay intermediaries.[33]

Unexpectedly,[34] on the strength of *Button*,[35] the Court in *R.R.*

28. See 63 COLUM. L. REV. 1502 (1963); *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 122 (1963); Note, 72 YALE L.J. 1613 (1963); *cf.* Konigsberg v. State Bar, 366 U.S. 36, 49–51 (1961), which held that the State's interest in regulating the legal profession and who shall be permitted to practice outweighs any deterrent effect on freedom of speech and association; and McCloskey v. Tobin, 252 U.S. 107 (1920), in which a state statute forbidding solicitation was upheld, as not violating rights guaranteed by the fourteenth amendment. See also *In re* Anastaplo, 366 U.S. 82, 89 (1961).

29. In 1956, in an effort to curb the effectiveness of the NAACP in civil rights litigation, Virginia enacted legislation, specifically Chapter 33, which broadened the definition of "runner" or "capper" to include the Association's legal program. 371 U.S. at 423–24; Note, 72 YALE L.J. 1613, 1619–22 (1963).

30. 371 U.S. at 428–29, 437.

31. *Id.* at 429.

32. Conducting litigation to enforce constitutional rights does not contain malicious intent, a necessary element of the common-law offense of stirring up litigation. *Id.* at 439–40. Also, there was no showing of a conflict of interest between the NAACP and its members. *Id.* at 443. Furthermore, no monetary or other private gains were involved since lawsuits attacking racial discrimination are not popular nor profitable. *Ibid.*

33. *Id.* at 442.

34. The Ohio Court, construing *Button*, held it did not apply to a case in which a lawyer had agreed to act as local counsel in the handling of claims for union members under the Federal Employers' Liability Act (FELA). Columbus Bar Ass'n v. Potts, 175 Ohio St. 101, 191 N.E.2d 728 (1963). The opinion distinguished *Button*, holding that litigation for private gain, containing greater possibility of abuse, is not entitled to the same protection accorded civil rights litigation. See also, on the expected scope of *Button*, 63 COLUM. L. REV. 1502 (1963); *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 122 (1963); Note, 72 YALE L.J. 1613 (1963).

35. The dissent in the instant case distinguished *NAACP v. Button* on the grounds that the union's practices are directed at "personal injury litiga-

Trainmen felt compelled to protect the activities of the Brotherhood.[36] It held that the first amendment gives workers the right to act together and advise one another regarding their rights under federal statute,[37] and that this constitutional guarantee includes the right of the members, through a special department, to advise each other concerning the need for legal advice and the choice of legal counsel.[38] Since "what Virginia has sought to halt is not a commercialization of the legal profession . . . [or] 'ambulance chasing,' . . . [because] the railroad workers . . . obviously are not engaged in the practice of law, [and because neither] they [n]or the lawyers whom they select [are] parties to any solicitation of business,"[39] the Court found no substantive evil to justify restriction of constitutional rights in the name of regulation of the legal profession.[40] More strongly, the Court casts doubt on the existence of any substantive evil that would justify even slight restriction of the Brotherhood's members' constitutional protection to "preserve and enforce rights granted them under federal law."[41]

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tion [which] is not a form of political expression. . . . Here, the question involves solely the regulation of the profession, a power long recognized as belonging peculiarly to the State." 377 U.S. at 10. Compare note 31 *supra* and accompanying text.

36. As stated in notes 3–5 *supra* and accompanying text, Virginia enjoined the Brotherhood from engaging in solicitation and related activities. The president of the ABA suggests that existing canons be strictly enforced against individual attorneys participating in such activities, notwithstanding the instant decision. 30 A.B.A. UNAUTHORIZED PRACTICE NEWS 114–15 (1964). However, the Court in dictum seems to protect the lawyer along with the intermediary: ". . . and, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." 377 U.S. at 8.

37. The rights here involved are created by FELA, 35 Stat. 65 (1909), as amended, 45 U.S.C. §§ 51–60 (1958), and the Safety Appliance Act, 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1–43 (1958).

38. 377 U.S. at 6. Given *Button* and the cases cited therein, this conclusion is inescapable. Therefore, the remainder of this paper addresses itself to the other half of the instant decision, namely, that the State has failed to establish a countervailing regulatory interest.

39. 377 U.S. at 6–7.

40. After recognizing that "Virginia undoubtedly has broad powers to regulate the practice of law within its borders," the Court concludes that the "State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan." *Id.* at 6, 8.

41. The instant Court reversed without analysis the trial court's fact finding that the Brotherhood's plan did present a substantive evil. See note 40 *supra* and accompanying text. The Court continued:

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe *in any way* the right of individuals . . . to be fairly represented in lawsuits authorized by Congress to effectuate

It is widely recognized that certain activities[42] of lay intermediaries[43] are socially desirable.[44] Membership organizations, such as the Brotherhood and the NAACP, can cheaply and conveniently inform their hitherto ignorant members of legal rights, the availability of legal guidance, and the competence of specified lawyers.[45] Group legal activities are particularly desirable when, in addition to aiding individuals, they further some otherwise frustrated social goal. Thus, the instant majority found that combined action through the Brotherhood secures members'

> a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, . . . [citing Gideon v. Wainwright, 372 U.S. 355 (1963)] and for them to associate together to help one another to preserve and enforce rights granted them under federal laws *cannot* be condemned as a threat to legal ethics.

377 U.S. at 7 (Emphasis added.) Later, without mentioning opposing State regulatory interests, the Court declared that "since . . . [Virginia's] decree . . . infringes those rights, it cannot stand . . . ." *Id.* at 8.

42. The instant dissent sanctions certain activities of such an organization—*i.e.*, simply recommending a competent lawyer to its members. *Id.* at 12.

43. The following discussion of the advantages and dangers of lay intermediaries is general in scope with some emphasis on membership organizations such as the Brotherhood. A more critical analysis would examine the merits of each specific class of organization. It is suggested that the following categorization would be helpful in this pursuit: (a) a corporation such as a bank or trust company directly employing an attorney to render legal services to its customers for which they are charged, (b) a non-profit organization such as a union, an automobile association, a trade association or a private club which employs a lawyer or directs its members to a specific lawyer but which does not exist primarily for this purpose, (c) a group organized primarily for the purpose of employing a lawyer to serve the members without charge, the costs of his services being paid out of dues assessed against the members, (d) an employer employing an attorney to provide legal services to its employees as a fringe benefit, (e) several persons having a common interest, such as a small hunting club, employing a lawyer for a common fee. See DRINKER, LEGAL ETHICS 161–68 (1953); PIRSIG, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (1965).

44. Thus, the existing prohibition of all quasi-legal activities of such organizations has been broadly criticized. See, *e.g.*, Hildebrand v. State Bar, 36 Cal. 2d 504, 515, 521, 225 P.2d 508, 514, 518 (1950) (dissenting opinions of Carter, J., and Traynor, J.); Llewellyn, *The Bar's Troubles and Poultices—and Cures?*, 5 LAW & CONTEMP. PROB. 104, 127–28 (1938); 63 COLUM. L. REV. 1502, 1511 (1963). Recently, a committee of the California State Bar Association suggested radical changes in traditional ethical standards to permit membership organizations to render all legal services to their members at group expense. St. Paul Sunday Pioneer Press, Oct. 11, 1964, § 1, p. 4.

45. DRINKER, LEGAL ETHICS 166 (1953); Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973, 980–86 (1963); Weihofen, *"Practice of Law" by Non-pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119 (1934).

rights under federal legislation better than the individual action of members;[46] the NAACP similarly was found to secure its members' constitutional rights to equal protection.[47] Legal aid societies, the one generally approved type of lay intermediary, emphasize the necessity of group efforts to insure legal assistance for low income members of society.[48]

However, as the history of the Brotherhood's plan itself illustrates,[49] numerous undesirable practices have been found to accompany the activities of certain lay intermediary organizations.[50] The intermediary's posture between the lawyer and his client, traditionally in a direct relationship, divides the lawyer's loyalty between his client and the membership group or its leaders,[51] and worse still, lends itself to various types of fee splitting

46. Historically, employees were frustrated in securing their rights under the FELA and Safety Appliance Acts. Their inadequate legal representation permitted the railroad lawyers and claims adjusters to take advantage of them and frustrate the policy of the statutes to make recovery for injury easy. The instant majority reviews this history and concludes that the Brotherhood's legal activities have contributed to employees' recent success in obtaining their rights under the statute. 377 U.S. at 2–4. The dissent takes issue with this conclusion. *Id.* at 9.

47. See note 31 *supra* and accompanying text.

The Brotherhood's goal of securing compliance with the policy expressed by the FELA does not seem as socially compelling as the NAACP's action to secure equal civil rights for Negroes.

Nevertheless, both situations illustrate that encouragement of litigation is sometimes socially desirable and, in fact, that it is really only unfounded litigation which ought not be encouraged. See note 18 *supra.*

48. ABA Canon 35, quoted note 26 *supra,* for example, excludes legal aid societies for indigents from its ban of lay intermediaries. See also Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes,* 63 COLUM. L. REV. 973 (1963); Smith, *Legal Services Offices for Persons of Moderate Means,* 31 J. AM. JUD. SOC'Y 37 (1947).

49. The Brotherhood's plan often has been before the courts. Among the activities previously found to exist were official fee-splitting with the union, unofficial "kick-backs" to individual local officials who brought the injured member to the attorney, union-determined fees, and the employment of coercive tactics to secure business, including the showing of copies of previous settlement checks and favorable newspaper reports about the attorney to prospective clients. See, *e.g., In re* Brotherhood of R.R. Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); *In re* O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933.) The instant dissent is skeptical that the union has reformed, as assumed by the majority. 377 U.S. at 11.

50. See note 43 *supra.*

51. Obviously, effective legal service demands that the lawyer's entire effort be in the best interest of the client, and in the conflicting interest of no other person or organization. Such conflict may result from the division of allegiance inherent in the intervention of an intermediary. See, *e.g.,* Pioneer Title & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958); In the Matter of Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936).

whereby the attorney "kicks back" a part of his fee to the lay organization which supplies him with business.[52] This kind of financial dependence strengthens the lawyer's allegiance to the organization,[53] necessarily weakening his regard for his client; the organization becomes in effect the soliciting agent of the lawyer.[54] The arrangement also may coerce acceptance of the chosen lawyer by the member,[55] thus limiting his free choice of attorney. In addition, because the organization is not restricted by professional ethics, it may stir up unfounded claims and litigation.[56] Finally, fear exists that the activities of such organizations concentrate legal work in the hands of a few lawyers to the prejudice of the remainder of the bar.[57]

The plan before the Court in *R.R. Trainmen*, however, mini-

The direct, familiar relationship between lawyer and client is desirable as an end in itself because of the trust in and respect for the legal process that it engenders in laymen. Note, 72 HARV. L. REV. 1334, 1340 (1959). See also Canon 35, quoted *supra* note 26.

52. State *ex rel.* Lundin v. Merchants Protective Corp., 105 Wash. 12, 177 Pac. 694 (1919); Note, 72 HARV. L. REV. 1334, 1345 (1959); DRINKER, LEGAL ETHICS 167 n.38 (1953).

Until recently, such payments were made to the Brotherhood. Note 49 *supra*. Although the majority assumes this practice does not exist in the plan under its consideration, note 5 *supra*, the dissent insinuates its existence in the indirect form of the lawyers' paying for investigative services of the union's staff at the time of injury. 377 U.S. at 11; see note 1 *supra*.

53. The dissent stresses this allegiance by pointing out that the Brotherhood's regional lawyers are, in effect, controlled by the union's president who appoints and can fire them. *Ibid.* Since a significant part of the livelihood of the approved lawyers undoubtedly comes through the Brotherhood, allegiance to the group is very likely.

54. See note 22 *supra* and accompanying text.

55. The dissent in the instant case emphasizes that not only is the injured worker given the name of the approved lawyer and urged by the local union official to employ him but the injured member's name and address is also given to the approved counsel. 377 U.S. at 11. Contact of the member by union and lawyer makes coercion probable. In addition, considering that union literature and meetings frequently endorse and mention that this lawyer is the only one approved, it is unrealistic to assume that the individual member has much freedom of choice.

56. See note 18 *supra*. *But see* note 47 *supra*.

The Brotherhood's activities in the instant situation undoubtedly encouraged litigation to some extent by discouraging settlements which otherwise would have occurred. However, unless the resultant litigation was unfounded, the additional burden placed on the courts seems justified in view of the statutory policy favoring the worker.

57. DRINKER, LEGAL ETHICS 167 (1953); Note, 25 U. CHI. L. REV. 674, 681 (1958). On the other hand, reliable surveys indicate the existence of much untapped legal business, especially among people of moderate means. HURST, THE GROWTH OF AMERICAN LAW 325 (1950). To the extent that the activities of lay intermediaries, often directed at this class of people, draw out this

mizes these potential abuses. The objectives of the Brotherhood and its members very likely coincide. Because both desire adequate legal representation, the danger of conflicting interests from the lawyer's divided allegiance to the individual and the group is remote.[58] Furthermore, the absence of any financial ties between union and lawyer[59] ensures the lawyer's independence and preserves his primary allegiance to his client. The Brotherhood's plan, as construed by the majority, not only minimizes potential dangers,[60] but also furthers a strong federal policy.[61] Therefore, the conclusion that the State "has failed to show any appreciable public interest"[62] to justify restriction of constitutionality protected activity is reasonable.

Yet the possible suggestion that no state regulation will be permitted in the area must be rejected.[63] Great potential dangers exist which the states traditionally have regulated. Absent overriding need for group legal activities, such as the furtherance of an otherwise frustrated federal policy as found by the instant majority, the states must be left to determine for themselves their regulatory interest. Even when such need exists, the states must be allowed to regulate abuses if regulation does not interfere with pursuit of the frustrated federal policy. In the present situation, the State ought to be able to preclude all fee splitting and to limit coercion by requiring submission of a list of several qualified attorneys to the member.[64] On the other hand, *Button*

untapped business, they would increase gross legal revenue to the benefit of the entire profession. *But see* note 56 *supra* and text accompanying.

58. See Note, 72 HARV. L. REV. 1334, 1344 (1959). However, even in a membership organization the interests of the group and the individual member need not coincide. For instance, prosecution of a given claim may benefit the individual although the resultant legal precedent would be detrimental to the group. See generally Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 605–16 (1956).

59. *But see* note 52 *supra*.

60. As mentioned previously, the dissent is skeptical of the existence of the facts assumed by the majority. See notes 49 & 52 *supra*.

61. See notes 46 & 47 *supra* and accompanying text. Because *Button* and the instant case protect lay intermediaries engaged in furthering federal rights, it is possible that this will be a limit to application of the cases. However, the constitutional right to associate to achieve the group's goals seems equally applicable to all kinds of legal and social ends. On the other hand, opposing state regulatory interest would appear stronger when the state had determined that rights it created cannot be furthered at the expense of interference with the practice of law within its borders.

62. 377 U.S. at 8.

63. See note 41 *supra*.

64. See NAACP v. Button, 371 U.S. 415, 447–48 (1963) (White, J., dissenting); *In re* Brotherhood of R.R. Trainmen, 13 Ill. App. 2d 381, 150 N.E.2d 163 (1958).

and the *R. R. Trainmen* decision should cause recognition of the benefits available through lay intermediaries and encourage modification of traditional blanket opposition to their activities to the extent consistent with effective avoidance of abuse.

Courts: State Courts Cannot Restrain Federal Court In Personam Relitigation

Petitioners,[1] a group of Dallas citizens, brought suit in a Texas court to restrain the City of Dallas from building an additional runway for its municipal airport and from selling bonds to finance the construction. Under Texas law, the issuance of municipal bonds is automatically stopped when a suit challenging their validity is filed.[2] Summary judgment was given for the city; the Texas Court of Civil Appeals affirmed;[3] the Supreme Court of Texas denied review;[4] and the United States Supreme Court denied certiorari.[5] Petitioners filed another action in federal district court seeking similar relief and again stopped the issuance of the bonds. The Texas Court of Civil Appeals then enjoined petitioners from prosecuting their federal suit.[6] Peti-

1. Plaintiffs originally included 46 Dallas citizens, including their counsel, Donovan. Later, at the time of filing the action in the United States District Court for the Northern District of Texas, plaintiffs were 120 Dallas citizens, including 27 of the original claimants. Petitioners were the 87 of the 120 plaintiffs who were convicted of contempt. Donovan v. City of Dallas, 377 U.S. 408–10 (1964).

2. TEX. REV. CIV. STAT. art. 1269j–5, § 3 (Supp. 1956) authorizes municipal airport revenue bonds and provides in part as follows: "The Revenue Bonds . . . shall not be finally issued until approved by the Attorney General of Texas and registered by the Comptroller of Public Accounts of the State of Texas, and after such approval shall be incontestable." As explained by the Texas Supreme Court in its opinion in the instant case, the Attorney General does not approve issuance as long as the bond validity is under attack in pending litigation. City of Dallas v. Dixon, 365 S.W.2d 919, 925 (Tex. 1963).

3. Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. 1961).

4. TEXAS WRITS OF ERROR TABLE at 105.

5. Atkinson v. City of Dallas, 370 U.S. 939 (1962).

6. After petitioners filed the second suit in the federal district court, the city applied to the Texas Court of Civil Appeals for a writ of prohibition to bar petitioners from prosecuting their case in the federal court. The Texas court denied relief holding that it was without power to enjoin petitioners and that the defense of res judicata on which the city relied could be raised and adjudicated in the federal court. City of Dallas v. Brown, 362 S.W.2d 372 (Tex. Civ. App. 1962). The Texas Supreme Court reversed. City of Dallas v. Dixon, 365 S.W.2d 919 (Tex. 1963). The Texas Court of Civil Appeals subsequently enjoined petitioners from further prosecution in the