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Constitutional Law--Attorney and Client--Right to Counsel [*District 12, United Mineworkers of America v. Il-linois State Bar Association*, 389 US. 217 (1967)]

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CONSTITUTIONAL LAW — ATTORNEY AND CLIENT — RIGHT TO COUNSEL

District 12, United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217 (1967).

The significant question presented to the United States Supreme Court in *District 12, United Mine Workers of America v. Illinois State Bar Association*[1] was to what extent associations are constitutionally protected when engaging in group legal practice.[2] The Court, which believed that the Illinois State court interpretations of associational freedom were "too narrow,"[3] proceeded to weigh the competing interests[4] involved in favor of the union. The problem that still remains, however, is that when competing interests are significantly different, the Court must continually "balance" these interests to determine in whose favor the scales of justice should be tipped.

In order to gain the proper perspective for viewing the import of the *UMW* decision, it is imperative to first review the Court's two prior decisions in the field of group legal practice. The first, *NAACP v. Button*,[5] involved the State of Virginia's attempt to apply its amended barratry statutes[6] to the NAACP. It was the ex-

[1] 389 U.S. 217 (1967).

[2] "The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." Thomas v. Collins, 323 U.S. 516, 531 (1945). *But see* Justice Harlan's dissent in *UMW*, in which he reiterated the views he previously set forth in NAACP v. Button, 371 U.S. 415, 452-55 (1963) (dissenting opinion), by stating:

> the freedom of expression guaranteed against state interference by the Fourteenth Amendment includes the liberty of individuals not only to speak but also to unite to make their speech effective. The latter right encompasses the right to join together to obtain judicial redress. However, litigation is more than speech; it is conduct. And the States may reasonably regulate conduct even though it is related to expression. 389 U.S. at 226.

[3] 389 U.S. at 221.

[4] The Court's decision in the *UMW* case still leaves the question of what activities are constitutionally protected unanswered. This is due to the Court's use of a "balancing" approach rather than an "absolute" standard when interpreting first amendment cases. For a further discussion of this point, see Lathrop v. Donohue, 367 U.S. 820, 871-74 (1961) (dissenting opinion); Konigsberg v. State Bar, 366 U.S. 36, 60-71 (1961) (dissenting opinion).

[5] 371 U.S. 415 (1963).

[6] VA. CODE ANN. §§ 54-74, 54-78, 54-79 (1950), *as amended*, Va. Acts of Assembly 1956, ch. 32, at 33-35. It has been said of barratry that "[t]he offense does not consist in promoting either private suits or public prosecutions when the sole object is the attainment of public justice or private right, but in the prostitution of these remedies to mean and selfish purposes." 9 C.J.S. *Barratry* § 2, at 1547 (1938). *See also* Golden Commissary Corp. v. Shipley, 157 A.2d 810, 815 (D.C. Mun. Ct. App. 1960).

press purpose of the Virginia statute to make it legally impossible for the NAACP to provide and compensate *per diem* staff counsel in aiding Negro member and nonmember parties in civil rights cases. Virginia's highest court held the NAACP guilty of "fomenting and 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."[7] This, the court said, was a violation of chapter 33 of the *Virginia Code* as well as Canons 35 and 47 of the American Bar Association.[8] The Supreme Court, on the other hand, construed chapter 33 of the *Virginia Code* to violate the first and 14th amendments "by unduly inhibiting protected freedoms of expression and association."[9]

Justice Brennan, speaking for the majority, based his opinion on the freedoms of association and expression but failed to define what the consequences of fully exercising these rights might encompass. Many read the *Button* decision as allowing solicitation of legal business for lawyers only where it "was a form of 'political expression' to secure, through court action, constitutionally protected civil rights."[10] This ambiguous interpretation remained unclarified until the *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*[11] case held that constitutional protection was not solely limited to the "civil rights"[12] area.

The *Trainmen* case concerned a union plan to aid its members and their families in obtaining legal redress for employment-related accidents covered by the Federal Employers Liability Act.[13] A legal counsel staff was maintained by the Brotherhood to recommend to its members and their families the names of lawyers whom the union believed to be honest and competent. The Virginia State Bar charged that the union's activities specifically violated both the statutes relating to the unauthorized practice of law and Canons 28, 35, and 47 of the *ABA Canons of Professional Ethics.* These Can-

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[7] NAACP v. Harrison, 202 Va. 142, 155, 116 S.E.2d 55, 66 (1960), *rev'd sub nom.*, NAACP v. Button, 371 U.S. 415 (1963).

[8] ABA CANONS OF PROFESSIONAL ETHICS NO. 35 deals with soliciting clients, through the use of lay intermediaries and *id.* NO. 47 is concerned with assisting an association in its unauthorized practice of law.

[9] 371 U.S. at 437.

[10] Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 10 (1964), wherein Justice Clark, dissenting, distinguished the *Button* decision.

[11] 377 U.S. 1 (1964).

[12] *Id.* at 8.

[13] 45 U.S.C. §§ 51-60 (1964).

ons prohibited "stirring up of litigation, control or exploitation by a lay agency of professional services of a lawyer, and aiding the unauthorized practice of law."[14]

In holding that the Brotherhood's plan and activities were within the protected area of free speech and free association, the Court implicitly curtailed, by the use of constitutional immunity, the previously broad power of the bar or court to control the legal profession.[15] But the Court again failed to define the exact boundaries of constitutional protection for group legal services.[16] The Court also failed to define what specific limitations were to be placed upon the bar or court in implementing their conceded right to control the profession.[17] Thus, the questions left unanswered by these two decisions were how broad is the right of association and what countervailing State interests may justify the limitation of this right. Faced with this question, the Court used the *UMW* case to reiterate its "balancing approach" to the problem, which in essence will always leave the issue of explicit boundaries unresolved.

The Court's process for determining which of these competing interests will prevail, is to weigh the State's concern for high standards of legal ethics against the people's right of associational freedom.[18] By use of this "balancing approach," the Court held, in the *UMW* case, that the competing interests of the union outweighed those of the State. What the Court did, in effect, was to balance the degree of ethical sin committed under present canons of legal ethics in forming group legal services against the people's right of associational freedom and their right of legal redress of grievances.

In *UMW*, the State's argument for asserting its regulatory interest was based upon the *potential* for abuse inherent in the union's plan.[19] On this ground, the Illinois State Bar Association was ini-

[14] 377 U.S. at 6 n.10.

[15] Justice Black, writing the majority opinion in the *UMW* case, stated:

> That the States have broad power to regulate the practice of law is, of course, beyond question. . . . But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedom. 389 U.S. at 222.

Justice Harlan, in his dissent, said that States have a right to regulate "the potential for abuse." *Id.* at 230.

[16] *See* note 4 *supra.*

[17] *See* note 15 *supra.*

[18] 389 U.S. at 222.

[19] *Compare* the majority's emphasis on actual harm, *id.*, *with* Justice Harlan's emphasis on potential harm, *id.* at 232-33, where he stated:

> But the proper question is not whether this particular plan has in fact caused any harm. It is, instead, settled that in the absence of any dominant

tially successful in enjoining the plan,[20] the basis of which can be summarized as follows. The union employed an attorney on a salary basis to represent members and their dependents in connection with their claims for personal injury or death under the Illinois Workmen's Compensation Act.[21] The members were advised by the union that they could choose any attorney they wished and were in no way compelled to use the union-provided attorney. The terms of the attorney's employment specifically stated that his sole "obligations and relations will be to and with only the several persons" he represents.[22]

In litigating injured union members' claims, the attorney prepared his cases from the union's files and often had no personal contact with the injured members until hearings were held before the Illinois Industrial Commission. If a prehearing settlement was reached, the injured member could choose to accept the amount or to proceed to the hearing. The full amount of any settlement or award was paid entirely to the injured member, since the attorney's compensation was his union-paid annual salary.

The Illinois Supreme Court rejected the union's contention that its members had a right, protected by the first and 14th amendments, to join together and assist one another in the assertion of their legal rights by collectively hiring an attorney to handle their claims.[23] Illinois' highest court interpreted the United States Supreme Court's decision in *NAACP v. Button* to be concerned predominantly with litigation that could be characterized as a form of political expression.[24] The Illinois Supreme Court interpreted the

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opposing interest a State may enforce prophylactic measures reasonably calculated to ward off foreseeable abuses, and that the fact that a specific activity has not yet produced any desirable consequences will not exempt it from regulation.

See Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 222-25 (1949); Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 321-22 (1943).

[20] Illinois State Bar Ass'n v. District 12, UMW, 35 Ill. 2d 112, 219 N.E.2d 503 (1966), *rev'd*, 389 U.S. 217 (1967).

[21] ILL. REV. STAT. ch. 48, §§ 138-72 (1963).

[22] 389 U.S. at 220.

[23] 35 Ill. 2d at 112, 219 N.E.2d at 503. When applicable statutes have been absent, State courts have claimed that their power to supervise the bar derives from the common law. Using the common law as its power base, these courts have drawn and enforced standards of professional conduct closely related to the prohibitions found in the *American Bar Association's Canons of Professional Ethics. See, e.g., In re* Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936). *See generally* H. DRINKER, LEGAL ETHICS 26-30, 35-48 (1953).

[24] 389 U.S. at 221. The *Button* decision can be read to indicate that first amendment principles only protect those associations that seek to litigate issues of "public interest," since the Court dwelt for considerable length on how suits prompted and

Trainmen case as not extending to protect plans involving the explicit hiring of an attorney by unions for their members. Both of these interpretations were considered too "narrowly limited"[25] by Justice Black in his majority opinion in *UMW*.

In rejecting the Illinois court's interpretation of *Button* and *Trainmen*, the Court held that the States previously, practically unbridled usage of "prophylactic" rules of legal ethics[26] was no longer acceptable. The Court stated that it was "equally apparent that the broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedom."[27]

The *UMW* decision reflects the Court's awareness of the possible evils of group practice. Consequently, this decision was carefully worded to show that the Court recognized that group practice of law arrangements might sometimes be constitutionally restricted if there was a compelling State interest in regulating a particular plan.[28]

The Supreme Court, in *UMW*, discussed the dangers of baseless litigation and conflicting interests between the association and individual litigants as being far too speculative to justify the broad remedy invoked in the *Button* case.[29] In the same vein of reasoning, the *Trainmen* case is referred to in terms of the "theoretical imaginable divergence"[30] between the union's interest and that of the individual litigant-member. If such a split in interest occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interest of his client.[31] But the Court answered these problems in the *UMW* context by stating:

> In both cases, there was absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose in the context of a particular lawsuit; indeed in the present case the Illinois Supreme Court itself de-

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brought by the NAACP were ingrained with constitutional principles. *See* note 10 *supra* & accompanying text.

[25] 389 U.S. at 221.

[26] *See* note 15 *supra.*

[27] 389 U.S. at 222.

[28] *Id.*; *cf. id.* at 226 (dissenting opinion). *See also* 371 U.S. at 438.

[29] 389 U.S. at 223.

[30] *Id.* at 224.

[31] One of the stated purposes of the Brotherhood of Railroad Trainmen was to enforce the FELA so that members could receive compensation for their injuries. 377 U.S. at 3. This purpose coincided exactly with the members' interests and thus served to strengthen the Court's usage of the term "theoretically imaginable divergence."

scribed the possibilities of conflicting interests as, at most, "conceivabl[e]."[32]

The fears raised by the *Button*, *Trainmen*, and *UMW* cases are based on the belief that an organized group which provides legal services might interfere with the attorney-client relationship,[33] or somehow attempt to control the lawyer's activities in some method harmful to the client.[34] Or, even if the organization does not consciously do either of these things, there is the possibility that the mere existence of the organization will force the lawyer to divide his loyalties between the organization and his client.[35]

These fears are not baseless for there should be concern that a lawyer does perform in the most effective manner possible for his client. Although it is doubtful, an attorney might jeopardize his client's interests because of external pressures exerted by an association, and therefore some State regulation may be desirable. Con-

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[32] 389 U.S. at 224. The union and its attorney were charged with soliciting clients through the use of lay intermediaries and assisting an association in its unauthorized practice of law, which are violations of Canons 35 and 47, respectively. *See* note 8 *supra.*

Yet, the *UMW* case raises only a minimal amount of ethical violations. A more complete listing of ethical violations would include: *Maintenance*, which can be defined as a layman furnishing money to permit a lawyer to provide, in part, costs and expenses involved in carrying on litigation for a third party, Kane v. Sesac, Inc., 54 F. Supp. 853, 859 (S.D.N.Y. 1943). *See generally* Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48-57 (1935); *champerty*, which is a bargain to divide the proceeds of litigation between the owner of the liquidated claim and a party supporting or enforcing the litigation, Draper v. Zebec, 219 Ind. 362, 37 N.E.2d 952, 956 (1942); *barratry*, *see* note 6 *supra*; *solicitation, inciting litigation, channeling, advertising*, *see* ABA CANONS OF ETHICS NOS. 27, 28, 40, 43, 46; *unauthorized practice*, *see id.* NO. 47; *control of litigation*, *see id.*; Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n, 167 Va. 327, 329, 189 S.E. 153, 159 (1937); *lay intermediary*, *see* ABA CANONS OF PROFESSIONAL ETHICS NO. 35; *commercialization*, *see* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 8, at 71, 75 (1925); *corporate practice*, *see In re* Co-operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910); and *ambulance chasing*, *see In re* Cohn, 10 Ill. 2d 186, 190, 196 N.E.2d 301, 303 (1957); Doughty v. Grills, 37 Tenn. App. 63, 82, 260 S.W.2d 379, 387 (1952).

[33] The editors of the American Bar Association Journal voiced their displeasure with the *UMW* case because they believed the decision would destroy the close relationship between attorney and client. They grudgingly concluded, "[t]he decision is here for us to live with." *A New Dispensation*, 54 A.B.A.J. 264 (1968); *see* text accompanying notes 21-23 *supra*. *See also* People *ex rel.* Courtney v. Association of Real Estate Tax-Payers, 354 Ill. 102, 109, 187 N.E. 823, 826 (1933); *In re* Maclub of America, Inc., 295 Mass. 45, 49, 3 N.E.2d 272, 274 (1936).

[34] Justice Harlan made such a conflict of interest argument in his dissent in NAACP v. Button, 371 U.S. 415, 460-63 (1963). *See also* Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n, 167 Va. 327, 339, 189 S.E. 153, 159 (1937); ABA CANONS OF PROFESSIONAL ETHICS NO. 35.

[35] *See* Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, 72 HARV. L. REV. 1334, 1344-45 (1959). *See also In re* Co-operative Law Co., 198 N.Y. 479, 483-84, 92 N.E. 15, 16 (1910); *Information Opinion of the Committee on Unauthorized Practice of the Law*, 36 A.B.A.J. 677 (1950).

sequently, some rules of legal ethics are necessary and are based on truly sound policies that have relevance to present-day legal practice.[36] But it is equally important to note that when these rules of legal ethics are broadly, capriciously, arbitrarily, or indiscriminantly applied by bar associations, they prohibit as many beneficial practices as they do harmful ones. Conversely, it would be platitudinous to reject the rules of legal ethics by merely stating that times have changed.

Surely the holding in *UMW* is not a wholesale dismissal of the rules of legal ethics nor is it a usurpation of the State's power to rule and regulate its own bar. In his dissent Justice Harlan stated that "[i]n 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."[37] But this advice, if faithfully followed, would vitiate the reason for the Court's present sojourn into the land of group legal services, namely the "balancing" of the competing interests of the State against those of associational freedom to determine which interests will prevail.

The *UMW* case has reaffirmed the hope of those who nourish on the idea that the present rules of legal ethics will be changed to reflect the values of our contemporary legal profession. Those who have advocated change look upon present-day legal practice as being inappropriately guided by the rules of legal ethics promulgated by our ancestors.[38] For example, rules prohibiting champerty, maintenance, and barratry are some of the most frequently relied upon rules to outlaw group legal practice. In essence, the repeated use of these rules strikes at the heart of the group legal services purpose, that is, to help people prosecute claims they might not otherwise be able or inclined to prosecute themselves.

Yet, it is important to note that the attitude of our society has vastly changed from originally opposing speculation in litigation, as evidenced by the rules prohibiting champerty, maintenance, and barratry. For example, the practice of assigning choses in action

[36] For example, rules preventing maintenance, champerty, and barratry can be used to protect harassed litigants and to protect against vexatious and oppressive litigation. But in order to truly serve these functions, the rules must not simply provide wholesale prohibitions for such abuses, but should be reformulated in terms of the motive of the maintainer and the outcome of the litigation. In prohibiting such abuses, the courts must change their emphasis from the *act* of maintaining a suit to the *motive* or *effect* of bringing a suit.

[37] 389 U.S. at 234.

[38] The rules of legal ethics as they evolved from England and Colonial America were, for the most part, rules of etiquette aimed more at keeping the legal profession congenial than at benefitting the public. H. DRINKER, *supra* note 23, at 210-12.

would fit within the definition of champerty but assigning choses is now common practice.[39] Another example is contingent fee contracts which are also a violation of the laws of champerty, but which are increasingly being accepted by our society.[40]

The *Button*, *Trainmen*, and *UMW* decisions serve to further illustrate our contemporary society's changing attitudes towards group legal practice. When these cases are viewed together, it is quite clear that members of an association can now act as a unit to promote a particular interest of that group or the individuals comprising such a group. But it is in light of these recent changes in group legal practice that the *UMW* case most distinctly fails. The Court should have used *UMW* as a vehicle to permit a plan by which lawyers are provided to assist members of an association with *all* their legal problems.[41] Specifically, the Supreme Court has failed to use the *UMW* case to expressly denounce ABA Canon 35 which says:

> 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 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.*[42]

It must be presumed that the State bars are cognizant of the fact that their basic organizational forms of practice must change in response to society's long felt need for legal aid.[43] What the *UMW* case seems to imply is that these changes will be foisted upon the

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[39] Radin, *supra* note 32, at 48-57; Winfield, *Assignment of Choses in Action in Relation to Maintenance and Champerty*, 35 L.Q. REV. 143 (1919).

[40] J. COHEN, THE LAW: BUSINESS OR PROFESSION? 205-10 (1919); G. COSTIGAN, CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS 643-49 (2d ed. 1933); H. DRINKER, *supra* note 23, at 176.

[41] The Hotel Trades Council in New York City is a good example of group practice covering a wide range of rights. A union member can request advice on various matters including landlord-tenant law and income tax problems. Advisors, without formal legal training but with some general knowledge of the area of law upon which they advise, offer advice on certain types of legal questions. Legal matters on which the lay advisors feel inadequate to give advice are referred to the attorney employed by the union. *See* N.Y. Times, April 10, 1965, at 31, col. 2.

[42] ABA CANONS OF PROFESSIONAL ETHICS No. 35 (emphasis added).

[43] Thirty-five years ago Weihofen posed a question that the bars are still facing today; "Why is it that individuals may band together to provide themselves with cheaper insurance, cheaper groceries, higher wages, better prices, easier credit, low taxes, better health, — everything, except better or cheaper legal advice and aid?" Weihofen, *"Practice of Law" by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119, 128 (1933).

bars by the United States Supreme Court, rather than worked out by the State bars themselves.[44]

If the *UMW* case has failed to make new innovations in the area of group legal practice, it may nevertheless be considered successful by illustrating the dire need for change in this field.[45] In *UMW*, the Court has implied that the services of a lawyer should be equally available to associations[46] as well as to individuals. If professional limitations block this path, then the Court, upon "balancing" the competing interests of State and association, will, in most instances, find in favor of associational freedom. Ultimately, the Court may determine that group legal services provided for *all* the legal problems of an associational member contains sufficient merit to justify tipping its "balancing" scales in his direction. Unfortunately, the *UMW* case does not stand for this much desired interpretation.[47]

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[44] A good illustration of this problem is the experience of the American Medical Association. The AMA attempted, without success, to prevent the growth of group practice, causing great injury to itself and its members. *See* American Medical Ass'n v. United States, 317 U.S. 519 (1942).

[45] Thirty years ago it was said that "[t]he time has come to be bold in striking out along new paths of group effort which, if properly safeguarded, will not impair either the traditional independence of the lawyer or the dignity of the profession." *Special Committee on Economic Conditions of the Bar*, 63 A.B.A. REP. 390, 391-92 (1938).

[46] The groups that are being denied their legal existence satisfy "an unfulfilled public need for legal services," and at a lower cost. *Progress Report of the Committee on Group Legal Services*, 39 CAL. ST. B.J. 639, 652-59 (1964).

[47] An affirmative analysis of the need for group legal services can be found in Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 U.C.L.A.L. REV. 438 (1965).