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Recommended Citation
Samuel T. Gaines, Conduct of Attorneys: Group Practice and Representation, and Significant Developments in Ohio Disciplinary Matters, 16 W. Rsrv. L. Rev. 893 (1965)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol16/iss4/6

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Conduct of Attorneys: Group Practice and Representation, and Significant Developments in Ohio Disciplinary Matters

Samuel T. Gaines

Disciplinary Matters and impermissible conduct of attorneys by state standards viewed from the perspective of constitutionally protected rights under the First and Fourteenth Amendments to the United States Constitution occupied the stage front and center in the last two years. Making their presence known and soon perhaps to move boldly into the spotlight were group legal service plans spawned by societal pressures, both "Great" and otherwise, and the role of the attorney at law in the confrontation sometimes styled fair trial versus free press.1

I. DISCIPLINARY MATTERS

A. Disbarment Orders

Before January 1, 1957, the date on which Rule XXVII of the Ohio Supreme Court became effective, a disbarred attorney could apply for reinstatement.2 However, Rule XXVII3 does not provide for reinstatement once an order of disbarment is made. Such an

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1. Limitations of space prevent as exhaustive a consideration of some of the matters here dealt with as is deserved. Each of several, alone, could well be the subject of a lead article. For similar reasons the decisions and developments which are here dealt with are confined to such as are concerned with direct lawyer conduct. Outside this orbit, for instance, is so interesting and engrossing a case as Gideon v. Wainwright, 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1942), and holding that the fourteenth amendment requires states to provide lawyers for indigent defendants. Lewis, Gideon's Trumpet 188-89 (1964). So, too, is Escobedo v. Illinois, 378 U.S. 478 (1964), holding the constitutional right of lawyer consultation exists whenever the interrogatory process shifts from investigatory to accusatory. Similarly of great interest is congressional action providing for payment of lawyers and for investigatory services in federal court assignments of counsel.


order is now "absolutely final." The question remained as to whether one disbarred before January 1, 1957, is governed by the statutory procedure then in effect and never repealed by the General Assembly, or by the provisions of Rule XXVII. The Ohio Supreme Court, in an opinion which emphasizes its exclusive domain in "all matters relating to discipline and reinstatement," considered a statute in this area as an "aid to" but not "a limitation on" the power of the court. It held its present procedures retroactive, but with commendable fairness considered an order of disbarment prior to January 1, 1957, as equivalent to an order of only indefinite suspension under Rule XXVII. This interpretation allows for the filing of a petition for reinstatement, but it points up the devastating consequence of an order of disbarment under the present rule.

In the years 1963 and 1964, the Ohio Supreme Court entered two orders of disbarment in contested matters. In one case, it was alleged that respondent had solicited professional employment, attempted to collect fees in excess of those agreed upon, offered money in an attempt to influence a police officer to drop a case, offered a lay claim agent a split of fees for referrals of cases and for payment of an unfounded claim, and offered money to a person to inflict bodily injury or death upon a female person respondent claimed was "bugging him." Upon oral argument in the supreme court, it was suggested, for the first time, by counsel for respondent that the latter was mentally ill. To this all but one member of the court turned a deaf ear. The dissenting judge, observing that the respondent had been and continued to be confined in a psychiatric security ward upon a probate court commitment, would have paid heed to the mental illness claim and suspended the respondent only indefinitely.

5. Id. at 562, 191 N.E.2d at 169; accord, Mahoning Bar Ass'n v. Franko, 168 Ohio St. 17, 151 N.E.2d 17 (1958); Cleveland Bar Ass'n v. Pleasant, 167 Ohio St. 325, 148 N.E.2d 493 (1958); In re McBride, 164 Ohio St. 419, 132 N.E.2d 113 (1956).
7. OHIO SUP. CT. R. XVIII(21): "No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner."
9. Id. at 286, 194 N.E.2d at 432.
10. Id. at 288, 194 N.E.2d at 433 (dissent) noting OHIO SUP. CT. R. XXVIII(1), now OHIO SUP. CT. R. XIX(1), 176 Ohio St. lxiii (1964), as amended without change, stating that "These rules of professional conduct shall be binding upon all
Thus, the question still remains as to whether a plea of mental illness, supported by adequate proof and presented at the out of the board's hearing, might have won more of the members of the court to the view of the dissenting opinion.

In the other case where disbarment was ordered, the respondent admitted depositing in his own account and using for his own purposes a check for $17,582.19 which he had received for his client. The Board of Commissioners on Grievances and Discipline concluded that "respondent was guilty of embezzling... and that [he] lacks understanding of the ethics of the profession and the duties of a lawyer to his clients and to the public." Respondent's claim was that his client had loaned him the money. The court found this defense to be belated and impossible to believe. The court concluded that the respondent's misappropriation of the money of his client and his issuance of checks dishonored by reason of insufficient funds violated Canon 11, which is directed to improprieties in dealing with trust property; and that the "totality of his conduct" violated Canon 29, which makes it the duty of an attorney "to uphold the honor and to maintain the dignity of the profession..." Apparently, the court was unable to find any mitigating circumstances.

B. Indefinite Suspensions

Indefinite suspension from the practice of law was the discipline meted out for a wide variety of derelictions of professional obligations in the past two years. In one case, the respondent perpetrated a bomb hoax on a civil aircraft for which he was convicted and sentenced to a correctional institution. Commingling or misuse of a client's funds, or both, was the misconduct common to several cases.

members admitted to practice law in the State of Ohio, and the willful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XVIII of the Rules of Practice." (Emphasis added.)

12. Id. at 279, 199 N.E.2d at 578.
13. Id. at 280, 199 N.E.2d at 578.
14. "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him." Canon 11, § (2), in 176 Ohio St. lxv (1964).
16. Canon 29 requires that an attorney "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." 176 Ohio St. lxii (1964).
Commingling in one instance was accompanied by inferred use and delayed distribution of a client's share of a settlement, and this misconduct was coupled with the mishandling of an estate in which respondent misstated inventory and schedule of debts, failed to account for receipts and expenditures as required by statute, and failed to heed the court's requests and orders.18 In another case, there was both commingling of estate funds and conversion thereof to respondent's own use, together with the issuance of checks dishonored for insufficient funds.19 In still another case there was an improper handling of professional financial accounts and here indefinite suspension was imposed, even though the Board of Commissioners on Grievances and Discipline had recommended only a public reprimand.20 In a case involving failure to file income tax returns, the court by-passed the more severe penalty of disbarment and imposed the penalty of indefinite suspension. The court candidly admitted that it avoided a finding that such a crime involved moral turpitude,21 considered a violation of Canon 2922 which calls upon an attorney at all times to uphold the honor of the profession, and Canon 3223 which makes it incumbent upon an attorney to observe statute law, all of which amounts to misconduct as defined by subdivision (5) (a) of Rule XVIII.24 Indefinite suspension was also imposed in cases involving: conviction of the crime of obtaining money under false pretenses;25 conviction of the crime of impeding the administration of justice by burning records relevant to a federal grand jury inquiry.26

Two other instances where the court imposed this penalty involved the division of fees between a lawyer and lay workmen's compensation consultants or investigators after the court had held

19. Columbus Bar Ass'n v. Fodor, 175 Ohio St. 21, 190 N.E.2d 920 (1963).
21. Cleveland Bar Ass'n v. Bilinski, 177 Ohio St. 43, 201 N.E.2d 878 (1964). But see Dayton Bar Ass'n v. Prear, 175 Ohio St. 543, 548, 196 N.E.2d 773, 777 (1964) (dissenting opinion) where Judge Gibson states that failure to file income tax returns is not base or vile or depraved so as to constitute moral turpitude.
22. See note 16 supra.
23. Canon 32 requires that an attorney "must also observe and advise his client to observe the statute law. . . ."
24. "Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude." OHIO SUP. CT. R. XVIII(5) (a), 176 Ohio St. liii (1964).
25. Clermont County Bar Ass'n v. Ellis, 175 Ohio St. 538, 196 N.E.2d 769 (1964).
that the rendition of services in the preparation and presentation of claims for compensation arising under the Workmen's Compensation Laws of Ohio for a fee constitutes the practice of law,\textsuperscript{27} notwithstanding statutory permission for lay participation in such activities,\textsuperscript{28} and an arrangement with a New York law firm representing the Transport Workers Union whereby officers thereof would publicize respondent's availability to represent union members in FELA cases, and would bring such members to his office to employ respondent as such counsel. The arrangement further provided that respondent would remit 25 per cent of his fee to said firm, even though the client did not know or see the latter firm and the respondent had very little more contact with it.\textsuperscript{29} In a case involving the lending of money to clients where it was obvious that the only reasonable source of the client's ability to repay would be the proceeds received by the client on trial or settlement of his claim, the court concluded that such conduct amounted to a purchase by the attorney of an interest in the subject matter of the litigation he was conducting.\textsuperscript{30} In so holding, the court found inapplicable previous decisions to the contrary\textsuperscript{31} which had been pronounced before the court had adopted by rule the Canons of Professional Ethics. In the same case, the courts held improper the fact that respondent had employed a railroad employee as an accident investigator, and some of the accidents were ones in which his regular employer was involved. The respondent had been previously found guilty of unprofessional conduct in the solicitation of professional employment, and the court deemed him to be unprofessional in his attitude of not paying the costs of that litigation until more than five years had elapsed and the instant proceedings had been instituted.\textsuperscript{32}

In the case of \textit{Columbus Bar Ass'n v. Dargusch},\textsuperscript{33} respondent was chairman of the board of a corporation, his law firm was the

\begin{footnotesize}
\textsuperscript{27} In re Brown, Weiss & Wohl, 175 Ohio St. 149, 192 N.E.2d 54 (1963).
\textsuperscript{30} Canon 10 reads: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."
\textsuperscript{31} Roberts v. Montgomery, 115 Ohio St. 502, 154 N.E. 740 (1920); Scheinesohn v. Lemon, 84 Ohio St. 424, 95 N.E. 913 (1911); Reece v. Kyle, 49 Ohio St. 475, 31 N.E. 747 (1892).
\textsuperscript{32} Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396, \textit{cert. denied}, 379 U.S. 931 (1964).
\textsuperscript{33} 177 Ohio St. 95, 202 N.E.2d 625 (1964).
\end{footnotesize}
corporation's general counsel on a retainer fee basis, and he occupied the position of trustee of each of three living trusts owning 90 per cent of the corporation's stock. The court found that respondent had committed the following improprieties. He had caused the corporation to pay his personal club dues and bills, travel and entertainment expenses and liquor bills, all of which were unrelated to the business of the corporation and of which at least one of the beneficiaries of the trusts was not informed. He had arranged a loan of $70,000 to the corporation from one of the trusts, for which the corporation had paid the trust a finder's fee of $2,500. In addition, respondent's law firm received $900 from the trust in legal fees for work in connection therewith, although it is generally acknowledged that the borrower, not the lender, pays legal fees arising in such circumstances. At the same time, respondent's law firm was general counsel for the borrower, all of which the beneficiary of one of the trusts was unaware of. The respondent had also voted the stock of the three trusts in favor of a certain resolution which provided continued salary payments to his heirs and widow in the event of his decease. This resolution amounted to a distinct benefit to his heirs and widow, but a detriment to the corporation and to the beneficiaries of the three trusts. The court held that such action had been taken without express consent of the beneficiaries after a full disclosure of the facts and thus the respondent was in violation of Canon 6 (representing conflicting interests),

34. Canon 6. "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." 176 Ohio St. lxvi (1964).

35. Canon 29.

36. "A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure." 176 Ohio St. lxxv (1964).

C. Public Reprimands

Public reprimands were deemed appropriate in the following instances: (1) where a judge who had participated in court proceedings while intoxicated had reformed, had fulfilled the obligations of his office, had been attentive to his duties, and had refrained
from the use or consumption of alcoholic beverages;\(^{37}\) (2) where a lack of diligence not amounting to unethical conduct was combined with mishandling of a client's monies;\(^{38}\) (3) failure of respondent to remit collections resulting in conversion of some part thereof to respondent's own use where respondent admitted he was careless, and the court, observing that this was his first act of misconduct, pointed out that he now appreciated the seriousness of the position in which he had placed himself;\(^{39}\) (4) representation of both drivers involved in an automobile accident;\(^{40}\) (5) improper handling of an estate and divorce case;\(^{41}\) and (6) improper handling of certain financial matters where full restitution was made.\(^{42}\)

D. Dismissal

In Butler County Bar Ass'n v. Finkelman,\(^{43}\) an attorney, who represented clients in matters before a zoning commission and opposed application for variances or changes in zoning, had initiated referendum proceedings as to an ordinance granting variances and had appealed to the court under the Administrative Procedure Act.\(^{44}\) While the appeals were pending and the referendum petition was being circulated, he wrote a letter to members of the city council criticizing the zoning ordinances of the city and made suggestions regarding the setting up of a proper zoning procedure, offering his services gratis to help create proper zoning machinery. A copy of this letter was ultimately sent to the editor of a local newspaper. The local bar association charged the attorney with misconduct in that, allegedly motivated by ill feelings between himself and opposing counsel, he had offered the city his services as an attorney without pay knowing the city had an attorney, and had secured newspaper publicity and indirect advertising by sending letters to a newspaper for use in connection with the referendum and court actions. The court found the evidence insufficient to justify disciplinary action. This was the only case in which the court so found.

\(^{37}\) Stark County Bar Ass'n v. Weber, 175 Ohio St. 13, 190 N.E.2d 918 (1963).
\(^{38}\) Trumbull County Bar Ass'n v. Ivanchak, 175 Ohio St. 561, 197 N.E.2d 193 (1964).
\(^{39}\) Cleveland Bar Ass'n v. Robinson, 175 Ohio St. 536, 196 N.E.2d 784 (1964). The Board had recommended that respondent be indefinitely suspended.
\(^{40}\) Columbiana Bar Ass'n v. Aronson, 37 OHIO BAR 80 (1964).
\(^{41}\) Cleveland Bar Ass'n v. Yancey, 37 OHIO BAR 4 (1965).
\(^{42}\) Cleveland Bar Ass'n v. O'Malley, 37 OHIO BAR 4 (1964).
\(^{43}\) 176 Ohio St. 309, 199 N.E.2d 589 (1964).
\(^{44}\) OHIO REV. CODE § 119.01.
The power to end a person's right to earn his livelihood in a profession and to attain that which he has devoted many years of study and work is an awesome possession. And a court's obligation "to apply the standards of professional and ethical conduct uniformly, without regard to length of practice or to the positions a respondent may hold in his community"45 is oft an extremely trying task. To protect the public and the administration of justice and then to make punishment fit the misconduct of which a wayward practitioner has been guilty calls for perceptivity of a high order. The imposition of punishment, generally, is difficult. It is certainly so in this area.

II. IMPERMISSIBLE CONDUCT OF ATTORNEYS-AT-LAW BY STATE STANDARDS VIEWED FROM THE PERSPECTIVE OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

A. NAACP v. Button

The NAACP and the Educational Defense Fund, an affiliate, encourage, assist, and finance legal proceedings against segregation and for the attainment of civil rights. They furnish and pay their staff lawyers to represent litigants in such proceedings.

The states, however, have the power to regulate unethical conduct of attorneys. Thus, in the State of Virginia, a statute forbids the solicitation of legal business and defines a "runner" or "capper," embraced among those whose activities are so prohibited, to include "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."46

In the Button case, the Virginia Supreme Court of Appeals held that the activities of the NAACP fell within such statutory prohibitions, and amounted to the fomenting of legal business in violation of Canon 3547 (intervening lay organization's employment of lawyers to render legal services to its members in respect to their personal

45. Columbus Bar Ass'n v. Dargusch, 177 Ohio St. 95, 99, 202 N.E.2d 625, 628 (1964).
affairs)\(^{48}\) and Canon 47 (unauthorized law practice)\(^{49}\) of the American Bar Association Code of Professional Ethics which had previously been adopted by that court. The United States Supreme Court, however, reversed.\(^{50}\) The majority opinion, written by Mr. Justice Brennan, held the activities of the NAACP, its affiliates, and their legal staffs to be "modes of expression and association protected by the First and Fourteenth Amendments. . . ."\(^{51}\) The Court found the language in the decree below which purported to allow the NAACP to acquaint persons with what it believed to be their legal rights, to advise them to assert such rights of suit and to assist them in such suits by contributions of money, provided such suits "have not been solicited (and) . . . channeled to . . . attorneys"\(^{52}\) in violation of the aforesaid statute to be highly suspect.\(^{53}\) The Court was also of the opinion that because of vagueness and overbreadth, the statute lent itself to selective enforcement against unpopular causes and could become a weapon of oppression, however even-handed its terms.\(^{54}\) Because in the area of first amendment freedoms the threat of sanctions may "deter their exercise almost as potently as the actual application of sanctions,"\(^{55}\) lawyers, thought the Court, would hesitate to join in what the language in the decree purported to allow for fear of disciplinary action.

Conceding validity to Virginia's interest in regulating traditionally illegal practices of barratry, and maintenance and champert, the Court could find no evidence in the record before it of any malice or purely private pecuniary gain, a characteristic upon which com-

\(^{48}\) The professional services of a lawyer should not be controlled or exploited by any law 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. 171 Va. xxxii (1938).

\(^{49}\) "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." 171 Va. xxxv (1938).


\(^{51}\) Id. at 428-29.


\(^{54}\) Id. at 435, 436.

\(^{55}\) Id. at 433.
mon law antipathy to such practices was based, nor any evidence of NAACP interference in the actual conduct of litigation, neglect or harassment of clients, nor any conflict in objectives between the NAACP and its members. The Court declared that the state had "failed to advance any substantial regulatory interest, in the form of substantive evils"\textsuperscript{58} flowing from NAACP activities. Accordingly, the Court held that the prohibitions imposed were unjustified. Mr. Justice White agreed that the state statute was unconstitutional insofar as it forbade, by threatened criminal action, advising that particular attorneys be employed. However, he would have held the statute constitutional insofar as it forbade "management and dictation of tactics, strategy and conduct of litigation . . . by a lay agency such as the NAACP."\textsuperscript{57}

Mr. Justice Harlan, joined by Mr. Justice Clark and Mr. Justice Stewart did not agree. In their dissenting opinion, they recognized the first amendment right to advocate, to associate in order effectively to advocate, and to litigate in order to gain fundamental rights. But the problem in each case the opinion recites is "to weigh the legitimate interest of the State against the effect of the regulation [by the State] on individual rights."\textsuperscript{58}

Accordingly, the dissenting justices would have tipped the scales in favor of the state regulatory action in that the area of attempted regulation in \textit{Button} is one in which the states have traditionally exercised power. There was also found to exist some evidence of what might be regarded as impermissible conduct by the standard of state accepted interpretations of the language of the Canons of Professional Ethics.

The minority pointed to the undoubted right of the state to exercise power in regulating the practice of law. Noted in particular was NAACP activity with respect to the prayer in pleadings, the selection of plaintiffs and suit sites, and the timing of suits. Also observed as incompatible with the normal attorney-client relationship was the occasional omission of the name of any authorized counsel in the forms signed by prospective litigants, as well as the addition of co-counsel whether or not the forms contained such specific authorization. Ergo, concludes the minority, the legitimate interest of the state outweighed the incidental restrictive effect of its regulation on the exercise of first amendment freedoms.

\textsuperscript{56} \textit{Id.} at 444.
\textsuperscript{57} \textit{Id.} at 447.
\textsuperscript{58} \textit{Id.} at 453.
The state based its case in *Button* on claimed violations of Canons 35 and 47 which seek to prevent the interposition of a lay intermediary between the lawyer and his client to the end that the attorney-client relationship remains free from any possible dilution of the lawyer's devotion to his client. Both canons were promulgated to protect the public and prevent any disservice to the public interest; and this no one seriously contests. However, the wisdom and soundness of a strict interpretation of these particular canons, which would give rise to the suspicion that they were not being employed to further the public interest, has long been challenged by respectable authority. The minority opinion in *Button* took cognizance of this challenge, but refused to consider such a view on the ground that any such consideration "raises questions of social policy which have not been delegated to this Court for decision." But does not the minority here lose touch with logic? If we are to "weigh" state regulatory action against the restrictive effect of such action on first amendment freedoms, just as the minority itself phrases the problem, must we not for purposes of comparison use scales by which the weight to be attributed to such action may be determined? What better scales than those of reason may be so used?

In the circumstances of this case, the interest of every person seeking to enjoy the rights and privileges of first class citizenship — and there ought to be none other in the normal relations of our citizenry to our society — is identical with the interest of the public in the enjoyment of first amendment freedoms exercised in pursuit of such rights and privileges. A lawyer's devotion to his client seeking to obtain such rights and privileges cannot, therefore, in a prag-

59. See note 48 *supra*.
60. See note 49 *supra*.
61. DRINKER, LEGAL ETHICS 67 n.54 (1953). Commenting on a holding by the Unauthorized Practice Committee of the American Bar Association that a lawyer may not accept a retainer from a corporation or an association to advise or represent its stockholders or members in connection with their personal affairs, Drinker writes: "There would seem to be doubt as to the soundness of this conclusion. Such service by doctors is extensively furnished without question and is furnished with increasing frequency by labor unions and other organizations. It would seem to be one of the efficient developments of modern life which it is both unwise and futile to oppose. The public, it is believed, regards such opposition as in the interest of the lawyers and not, as claimed, in the public interest. 'The duty of this court is not to protect the bar from competition, but to protect the public from being advised or represented in legal matters by incompetent and unreliable persons.' Hulse v. Criger, 247 S.W.2d 855 (1952). See also Noone in 22 A.B.A.J. 609, 612 (1936)." See also DRINKER, *op. cit. supra*, at 161-67.
63. *Id.* at 461.
matic sense, be diluted by the fact that the lawyer is paid by a segment of the public attempting to exercise such freedoms in assisting the client's pursuit of such rights. State regulatory action tending to inhibit such exercise of first amendment freedoms by invoking the canons mentioned, when weighed upon such scales of reason, will be shown to be invoking the mere form and not the real substance of such canons.

The absence of "substantive evils" deriving from NAACP activities in the *Button* case is thoroughly consonant with the fact that they are in the public interest. It would be a paradox to permit the canons to be employed to suppress such activities. But it may not be amiss to recognize that the enjoyment of the rights and privileges of equal citizenship by all persons may not be palatable to some whose long entrenched postures make it difficult for them to accept the implementation of such rights and privileges. This recognition, however, cannot justify the use of standards, intended to serve the public interest, as a means to insulate an artery hardened status quo against the surgery which would allow the exercise of constitutionally protected freedoms to pump a refreshing blood supply through the body politic thereby giving it meaningful health. The majority view keeps pace with a tempo of constitutional interpretation which will serve our society well in a world engulfed in a titanic struggle for the minds of men.

B. *Brotherhood of Railroad Trainmen v. Virginia*

On April 20, 1964, the United States Supreme Court decided *Brotherhood of R.R. Trainmen v. Virginia.* This case reached the Court on writ of certiorari to the Supreme Court of Appeals of Virginia to review an order affirming a decree of injunction rendered by the Chancery Court of the City of Richmond, Virginia. The Virginia court had found that Brotherhood activities constituted solicitation of legal business and unauthorized practice of law. This had resulted in the channeling of substantially all Federal Employer Liability Act claims of Brotherhood members to lawyers chosen by its department of legal counsel.

The Brotherhood admitted that it had advised injured members and their dependents to obtain legal advice before making settlement of their claims and that it recommended particular attorneys to handle such claims. As a result, cases were channeled to particular lawyers approved by the Brotherhood. The Brotherhood contended

64. 377 U.S. 1 (1964).
that the injunction below against these activities violated the first and fourteenth amendments. The Supreme Court granted certiorari to consider the constitutional question raised in the light of the Button case.

In an opinion written by Mr. Justice Black the Court agreed with the Brotherhood contention, and reviewed the role which it had played in the evolution of the Federal Employers Liability Act, the ends and purposes of Congress in its enactment, and the difficulties attendant upon its implementation. The Court stated that the first amendment's protection of the right of workers to assist and advise each other includes inseparably the right "personally or through a special department of their Brotherhood to advise concerning the need for legal assistance and, most importantly, what lawyer a member could confidently rely on." On the other hand, the Court recognized the State's right to regulate the practice of law within its borders; but in exercising this right the State may not ignore constitutionally secured rights of individuals. With respect to the Brotherhood's activities, the Court detected no commercialization of the legal profession, no threat to the moral and ethical fabric of the administration of justice and no ambulance chasing. "Laymen," said the Court, "cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries... 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. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." Thus, the Court could find no substantive evils flowing from the Brotherhood's activities as would demonstrate "any appreciable public interest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers." The associa-

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65. Id. at 6.
67. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964). "If these words express a constitutional principle, it is difficult to believe that the right to associate for the protection of individual rights is limited to matters affected by federal laws." PAULSEN, EQUAL JUSTICE FOR THE POOR MAN, PUBLIC AFFAIRS PAMPHLET No. 367, p. 20 (1964).
68. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964). The Court, by footnote 9, takes cognizance of provisions in the decree below which enjoined the Brotherhood from "sharing counsel fees" with recommended lawyers and countenancing
tional rights of Brotherhood members were held entitled to the same constitutional protection as were those of NAACP members in the *Button* case. The Court struck down the decree below to the extent that it "infringes on such rights" or forbids "these activities" and added: "And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." The case was remanded for proceedings not inconsistent with the Court's opinion.

To Mr. Justice Clark, with whom Mr. Justice Harlan joined in dissent, the majority view did relegate the practice of law to the "level of a commercial enterprise." The dissent distinguished *Button* on the grounds that: (1) the claimed privilege there was a "form of political expression" designed to secure "constitutionally protected civil rights," whereas in *Brotherhood* the objective sought was the "settlement of damage claims;" and (2) in *Button*, "no substantive evil would result from the activity there permitted . . . whereas the past history of the union [the Brotherhood of Railroad Trainmen] indicates the contrary." The dissent looked with disdain upon the relationship of the Brotherhood to its recommended counsel and its other activities. In the minority's view, the whole case involved only the regulation of the profession of law, a power belonging to the state.

On January 15, 1965, the Chancery Court of the City of Richmond rendered its opinion upon remand. It interpreted the Supreme Court opinion as requiring it to hold that:

Any part of the decree of this court which forbade the members, through the Brotherhood, from advising injured members to obtain legal services and from recommending specific lawyers violates their constitutional rights under the First and Fourteenth Amendments and is null and void, and the decree should be accordingly modified and amended; and any lawyers accepting fee sharing by investigators, provided at its own expense, and pointing out that the Brotherhood denies engaging in such practices since 1959, observes "Since the Brotherhood is not objecting to the other provisions of the decree except insofar as they might later be construed as barring the Brotherhood from helping injured workers or their families by recommending that they not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood, it is only to that extent that we pass upon the validity of the other provisions."  

69. Id. at 8.  
70. Id. at 9.  
71. Id. at 10.  
72. Ibid.
employment pursuant to such recommendations are similarly pro-
tected by these amendments.\textsuperscript{73}

In its final decree, the chancery court restated in detail the injunctive
provisions of the original decree, then added a paragraph which re-
cited that nothing contained in the decree "shall be construed to in-
fringe upon or restrict the constitutional rights of the defendant to
advise persons: to obtain legal advice" before making a settlement
and "to recommend a specific lawyer or lawyers to give such advice
or handle such claims," \textit{provided, however, that "the circumstances
of such advice and recommendation shall not constitute or amount
to the solicitation of legal employment" for any lawyer.} The term
"solicit," adds the decree, "\textit{shall refer to the same terms as employed
or intended by the common law, the statutes of this state and Canons
of Legal Ethics of the American Bar Association adopted in this
state.}\textsuperscript{74}

Whether the Brotherhood will assert that the language of limita-
tion in the "provided however" clause renders this most recent de-
cree vulnerable to a charge of vagueness and uncertainty remains to
be seen. However, it is plain that constitutionally protected con-
duct, in the context of the Supreme Court's opinion in \textit{Brotherhood},
was held irreconcilable with the Virginia statutes as then construed
by the Virginia courts. And certainly it is not easy to reconcile such
constitutionally protected rights with some interpretations of the
word "solicit" made in the application of the Canons of Professional
Ethics of the American Bar Association.\textsuperscript{75} The Chancery Court, jus-
tifying its conclusion that its former decree need be revised in only
two respects, quotes the Brotherhood's own recital of the vital ques-
tion presented for review in its petition for certiorari:

\begin{quote}
Whether the Brotherhood of Railroad Trainmen and its members
have the right to make known to its members generally, and to
injured members and their survivors in particular, first, the ad-
visability of obtaining legal advice before making settlement of
their claims, and second, the names of attorneys, who, in its and
their opinion, have the capacity to handle such claims successfully,
and whether this right is protected by the First and Fourteenth
Amendments to the Constitution of the United States?\textsuperscript{76}
\end{quote}

\textsuperscript{75.} "Prior to \textit{Brotherhood}, it was generally thought that plans of this type were un-
lawful. They appeared to violate the canons against solicitation. . . ." Powell, \textit{The
A conclusion could indeed be drawn that the Supreme Court's opinion in *Brotherhood* did actually hold only that the right of the Brotherhood to advise its members not to settle without first consulting counsel and the right to recommend certain attorneys at law were constitutionally protected and immune to any restraints which would have the effect of barring their exercise. But the question remaining is: after *Brotherhood* — what? In *Button*, where the NAACP itself furnished and paid the lawyer, the Court went to some lengths to point out that there was absent any motivation of private pecuniary gain. In *Brotherhood*, where the petitioner advised its members not to settle without consulting a lawyer and recommended certain lawyers whom it selected as capable and honest, the Court found justified the exercise of associational rights "to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have."

It is true that in *Button* the Court was concerned with modes of political expression; but may it not also be appropriately observed that the exercise of the constitutionally protected right of political expression in the absence of meaningful access to an equal opportunity to gain and enjoy economic advantages would have an empty and a hollow ring? Political expression and economic advantages must be very close neighbors. Therefore, might not the Supreme Court find constitutional protection for a plan whereby the Brotherhood, for instance, would furnish and pay counsel to serve its members as in *Button*? The answer may depend in part upon the kind of record presented to the Court. However, in light of the language in *Button* and in *Brotherhood*, one would expect more than a modicum of receptivity on the part of the Court to the position that such an arrangement would be constitutionally protected.

### III. Group Legal Service Plans

It is and has been commonplace for attorneys to provide gratuitous legal aid to indigent persons. Legal aid societies, public defender associations, lawyer referral programs, and neighborhood

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77. *Brotherhood of R.R. Trainmen* v. Virginia, 377 U.S. 1, 3 (1964). In *Brotherhood*, the majority observed that in Great Britain many unions do provide paid counsel to members in personal lawsuits, a practice which the Court acknowledged was similar to that upheld in *Button*.

78. The NAACP itself has fostered and financed litigation in which the immediate objective was the economic benefit of members of the Negro race. See, e.g. Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627 (1965) (use of Negroes on governmental construction projects); Local 1, Independent Metal Workers Union (Hughes Tool Co.), 147 N.L.R.B. 166 (1964) (discrimination in representation by unions by giving better jobs to Caucasians.)
legal service projects have all furnished, and continue to furnish, ways and means of meeting demands for advice and guidance in areas where the average layman moves with great trepidation and grave fear.\textsuperscript{79} Whatever the causes, be they the complexities of the law itself, which at times can certainly be frightening, or the imagined or real costliness of legal advice, the belief is widespread that all too many people do not receive needed legal advice.\textsuperscript{80} Thus, group legal service plans, intended to encourage the public to seek desirable, sound, and advantageous legal advice by offering such services at a most reasonable cost, have become the object of serious concern and attention. In the eyes of the present national administration, pledged to its “Great Society,” this area of activity is deemed quite important. Quite recently, the Department of Health, Education and Welfare sponsored a Conference on the Extension of Legal Services to the Poor. It was made clear that the department, without undue delay, will be active in promoting ways and means of providing legal services to low income groups on some sort of a group service basis.\textsuperscript{81} In addition, the Director of the Office of Economic Opportunity, who is charged with conducting the “war

\textsuperscript{79} “There are now some 246 legal aid offices and 136 volunteer legal aid committees. These agencies reported last year some half million new cases handled. [Lawyer referral] . . . is in effect in some 200 local bar associations. More than 60,000 cases were referred to lawyers in 1963. . . .” Powell, The President’s Page, 51 A.B.A.J. 3, 20 (1965).

\textsuperscript{80} See address by Abrahams, National Conference of Bar Presidents, Summary of the Proceedings of the New York Meeting, Aug. 9, 1964, p. 59; see also Powell, supra note 79, at 3.

\textsuperscript{81} Held in Washington, D. C. November 12-14, 1964:

Address by U.S. Attorney General Katzenbach, 9 A.B.A. News No. 13, Dec. 15, 1964, p. 2; see also Powell, supra note 79, at 3, quoting address by R. Sargent Shriver, Director of OEO, outlining government plans for “supermarkets” of social service including “legal assistance” and suggesting that advice and assistance might be rendered by lay “aides” in situations where heretofore “we have assumed (such service) could only be (rendered) by professionals.”

At the Midyear Meeting of the American Bar Association, February, 1965, the House of Delegates unanimously approved a resolution directing officers and committees to: “Cooperate with the Office of Economic Opportunity and other appropriate groups in the development and implementation of programs for expanding availability of legal services to indigents and persons of low income [and] . . . to utilize to the maximum extent deemed feasible the experience and facilities of the organized bar, such as
against poverty," spoke in November 1964 of legal assistance as one of the elements in the services to be made available by the "war." Thus, it is plain that the thinking of the administration transcends just legal service to the indigent. 82

The State Bar of California has responded with a commendable awareness of the problem. Its Committee on Group Legal Services determined after a lengthy study that: "there is a substantial need to find better ways for clients to obtain lawyers who have experience in the fields of laws which are involved in their particular problems. . . ." 83 Accordingly, the committee made specific proposals for "legitimizing" group legal service plans under some measure of bar control and guidance. The committee recommended that there be determined specifically the kinds of permissible legal group service plans and appropriate restrictions which should be made applicable thereto.

A substantial part of the report was also devoted to another approach which the Committee deemed worthy of presentation. This approach would create an administrative agency with authority to approve any group legal service plan which complied with general criteria set forth in appropriate rule or statute. The theory of this approach is that it is too early in our experience in this field to become less than flexible. This would seem to be an appealing view. The administrative agency members could be selected with bar participation. Criteria for allowance or disallowance of any proposed plan, and subsequent review of the plan's operations could be provided.

The Button and Brotherhood cases each present a specie of group activity, an integral part of which is concerned with the performance of legal service. These cases did not spawn the concept of group legal service plans. The constitutional perspective upon which these

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82. "The term 'the poor,' moreover, is being used in a broader sense than indigency. The focus of the Washington conference was on the '20 per cent of our population' in the lowest income brackets." Powell, supra note 79, at 3.
83. See A.B.A. COORDINATION SERVICE RELEASE, State Bar of California, State Bar Committee on Group Legal Services, p. 1 (undated). Release of report not to be deemed approval but as invitation for comment by Bar members.
cases were decided, however, may point to a direction to which advocates of such plans may turn if their efforts are met by inelastic and intransigent opposition of entrenched precepts and obstinately immobile positions.\(^8\)

A Committee of the American Bar Association has already been created to study revision of the canons. The California State Bar Report suggests that some revision of the canons to permit implementation of its recommendations is in order; however, it will doubtless engender spirited controversy.\(^8\) In sum, the situation would seem to call for the profession to have an open mind and a will to resolve this development in the public interest and in the furtherance of the administration of justice under our adversary system.\(^8\)

IV. FAIR TRIAL VERSUS FREE PRESS

The impropriety of lawyer participation in communications media publicity related to litigation and its attendant potential interference with a fair trial has been generally recognized as the import of Canon 20, and just as generally more "honour'd in the breach than the observance."\(^8\) The advent of electronic media has heightened immeasurably the potential of denial of fair trial by an impartial jury. Communications media coverage, particularly of criminal

\(^8\) There is a growing awareness . . . that a denial or limitation of . . . legal rights . . . may cause or aggravate numerous social ills. More and more we are coming to recognize the necessity of an interdisciplinary approach which seeks the causes and cures of legal and social problems simultaneously or at least concurrently.

The tendency is increasing in our civilization to couch such problems in legal terms and to seek solutions through the litigating process in an adversary setting.

"We would delude ourselves if we concluded that our problem was what should the Bar do about group legal service plans and neighborhood centers . . . .

We submit that the question to be faced is: How can adequate legal services be made available to the public on a basis which the public will accept?

The lesson to be learned from *Button, Brotherhood and the War on Poverty* is that the public has begun to seek its own answers to that question.


The American Bar Association Committee on the Unauthorized Practice of the Law expressed its opposition to the California Report's recommendation re group legal services together with appropriate changes in the Canons. 10 A.B.A. News No. 2, Feb. 15, 1965, p. 1.

"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement." 176 Ohio St. lxx (1964).

matters, has now become highly repetitive, intense, and extensive. Courts are being confronted time and again with claims that the publicity attendant upon a given trial has prevented a fair trial by an impartial jury. It was such a claim which prompted the Supreme Court of New Jersey to take the occasion to pronounce its views on the conduct of lawyers, including prosecutors, with respect to publicity potentially prejudicial to a fair trial. It stated:

We interpret these canons, particularly Canon 20, to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is "open and shut" against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests. Such statements have the capacity to interfere with a fair trial and cannot be countenanced.

The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible.

The court also noted Canon 5 which deals with the duty of a prosecutor to promote justice.

It is obvious that lawyers provide the communications media with a fertile source of information. And such media have not hesitated to tell the bar that before it points a finger of scorn and blame at the media for prejudicial publicity, it should clean up its own house. The media have a point in this respect. Ought not every

88. For a good many years, the lawyers and the news media have been battling each other with great vehemence and vigor. The news media champion "The public's Right to Know." This presented problems enough when only the press was involved. It became far more difficult with the advent of radio, as those who lived through the Hall-Mills and the Hauptmann cases in the 1920's and the 1930's will recall. The excesses experienced there were, indeed, the specific background for Canon 35 of the Canons of Judicial Ethics of the American Bar Association. Finally, with the advent of television, the problem has become even more intense. Address by Dean Griswold, Law-Laymen Program, Section of Judicial Administration of A.B.A., August, 1964.

91. Id. at 389, 204 A.2d at 852 (1964) But cf. Opinion 199 A.B.A. Committee on Professional Ethics and Grievances, paraphrased in DRINKER, op. cit. supra note 61, at 70.
92. "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."
effort be made vigorously and energetically to enforce Canon 20 if the interpretation of this canon by the New Jersey Supreme Court is accepted? And, if perchance the canon which was adopted in 1908 needs revision and new teeth, should not whatever dental work it needs be performed at the earliest possible moment? If the bar is to protect fair trial by an impartial jury against a publicity barrage inimical to such constitutional right, it should indeed be invulnerable to the charge that it has condoned the part its members play in the very publicity it condemns.

The mike-draped neck and clicking camera with their promise of a prompt showing before millions of eyes and ears is a tidbit of surpassing temptation. There can be little doubt, however, that its potential for prejudicial impact on impartiality under our adversary system of justice is substantial. Lawyers, particularly, should be required to subordinate such allure to obviously overriding considerations of fair trial and justice, considerations which ought to be the essence of Canon 20. As the effort to resolve the confrontation of so-called fair trial versus free press becomes more advanced, more effective enforcement of Canon 20 must come to pass. Unless this be done the hypocrisy implicit in avoidance of its plain import will plague the profession.

V. OTHER SIGNIFICANT DEVELOPMENTS

Several other recent decisions have left a significant impact on Ohio law respecting conduct of attorneys. In one case a railroad, with knowledge that its employee had retained a lawyer on a contingent fee contract to represent him in a Federal Employers’ Liability Act claim, nevertheless settled the case directly with such employee. In an action by the employee’s attorney to recover the amount to which his contingent fee arrangement entitled him, the railroad contended that the contract between the plaintiff’s attorney and the employee was void. The argument was that the attorney, in addition to being counsel for plaintiff, was legal counsel for the Brotherhood of Railroad Trainmen, and that the employee had entered into the contract with the lawyer only by reason of the activities and recommendation of a B.R.T. representative. Therefore, the railroad concluded that the contract was void as it violated Canons 35 and 47 which prohibit such activity. However, the dis-

94. See amendment adopted by the New York State Bar Association on January 25, 1957.
district court found the contract to have been entered into voluntarily; it expressed the view that the question thus raised by the defendant, if it believed it to have merit, should have been presented as a disciplinary matter to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

In another important case, the Ohio Supreme Court reasserted its position that the Ohio Constitution gives it the inherent power to "regulate, control and define the practice of law," and held that the rendering of advice and services in the preparation and presentation of claims under the Workmen's Compensation Laws of Ohio for a fee constitutes the practice of law. Non-lawyers, therefore, may not hold themselves out as qualified to render such advice and services, despite statutory provision for representation before the Industrial Commission by "attorneys, agents, or representatives." These statutes were enacted pursuant to authority in the Ohio Constitution reposing in the General Assembly the power to pass laws establishing a state fund and a board empowered to determine rights of claimants to participate therein.

The supreme court also, during the year past, invoked its infrequently required power of contempt in cases involving discipline to impose jail sentences and a fine where the respondent, previously disciplined, failed to appear to answer new charges of misconduct in relation to his activities.

VI. CONCLUSION

American society is witnessing change, in varying degrees, on many fronts. The legal profession is no exception. A strong case could always be made for bar association recognition of the need for an elasticity in viewpoint and thought compatible with the public interest. It is especially so now. So long as society remains flexible and makes an effort to meet the evolving needs of our citizenry, so too must the legal profession, as an integral part of that society, remain alert to prevent a public image that professional standards are selfishly motivated and selfishly implemented for individual benefit.

The decisions and developments in the years 1963 and 1964 demonstrate amply that more than lip service will be paid to constitutional guarantees. This movement doubtless will continue.