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**Group Legal Services and the Right
of Association**

The United States Supreme Court has recently curtailed the reach of state statutes that prohibit solicitation of legal business. In

two unprecedented opinions the Court has held that the soliciting activities of lay organizations fall within the protection of the right of association.

*National Ass'n for the Advancement of Colored People v. Button*¹ grew out of Virginia's plan of massive resistance to school integration.² The state expanded its anti-solicitation statutes in 1956 to include group activities³ in an attempt to suppress an NAACP system which secured litigants through meetings conducted to explain the legal means for desegregation. It was common practice at such gatherings to distribute forms which authorized the NAACP or Defense Fund attorneys to represent the signers in subsequent civil rights litigation. The United States Supreme Court held that anti-solicitation statutes could not constitutionally be applied to prohibit these activities. In the context of NAACP objectives, association for the promotion of litigation was protected by the right of association, and Virginia had shown no valid reason for restraining the exercise of this first amendment freedom.⁴

A similar issue arose in *Brotherhood of R.R. Trainmen v.*

1. 371 U.S. 415 (1963).

2. 371 U.S. at 445-46 (Douglas, J., concurring). See note 35 *infra*.

3. VA. CODE ANN. §§ 54-74, 54-78, 54-79 (1958), as amended, Va. Acts Extra Sess. 1956 ch. 33. The prohibitions read in pertinent part (amendments in italics):

"§ 54-74 . . . (6) 'Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct,' as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of article 7 of this chapter.* . . .

"§ 54-78 . . . (1) A 'runner' or 'capper' is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability,* in the solicitation or procurement of business for such attorney at law *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.* . . .

"§ 54-79 . . . It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper *as defined in § 54-78* to solicit any business for an attorney at law *or such person, partnership, corporation, organization or association.* . . ."

4. 371 U.S. at 431, 444. See text accompanying notes 16, 17 & 35 *infra*. Mr. Justice Douglas concurred, noting that the Virginia statute apparently reflected a legislative purpose to penalize the NAACP. Mr. Justice White concurred in part but dissented from the apparent breadth of the majority opinion. Mr. Justice Harlan, joined by Justices Clark and Stewart, dissented on the ground that Virginia had a valid interest in imposing "reasonable regulations limiting the permissible form of litigation and the manner of legal representation within its borders." 371 U.S. at 455. He concluded that such regulation was undeniably a matter of legitimate concern to the state and its "possible impact on the rights of expression and association [was] . . . far too remote to cause any doubt as to [the statute's] . . . validity." *Ibid.*

Virginia ex rel. Virginia State Bar.⁵ The union maintained a legal aid program which divided the country into sixteen regions where attorneys or firms with a reputation for skill in personal injury litigation were selected upon the advice of local counsel and judges. After injury to a union worker, a Brotherhood representative would recommend that the claim not be settled before consultation with an approved regional attorney.⁶ The Virginia courts held that state anti-solicitation statutes proscribed this arrangement, and they 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 selected lawyers."⁷ The United States Supreme Court vacated this ruling, holding that the union's activities were protected from state interference by the first amendment.⁸

These cases underscore two notable trends in recent constitutional interpretation. First, the decisions point up the increasing emphasis placed by the Court on the necessity for competent attorneys in all stages of legal proceedings. This right to counsel has recently been expanded in a line of criminal cases.⁹ *Brotherhood* and *Button* may intimate analogous considerations in civil litigation. Viewed as an initial step within this development, the cases may simply stand for the proposition that lay organizations may develop and utilize the particular legal aid programs approved by the Court.¹⁰

It is apparent, however, that the decisions are of broader significance. The Court placed no discernible limitations on the exercise of the right to establish group legal services. Consequently, the cases raise implications for the bar which may require a change in the traditional approach to the practice of law. Typically, both attorneys and laymen have been forbidden to engage in the solicitation

5. 377 U.S. 1 (1964), *rehearing denied*, 377 U.S. 960 (1964).

6. *Id.* at 4.

7. *Ibid.*

8. *Id.* at 8. Mr. Justice Stewart took no part in the disposition of the case. Mr. Justice Clark, joined by Mr. Justice Harlan, dissented on the ground that "the potential for evil in the union's system is enormous" and, therefore, that it is a valid subject of state regulation. 377 U.S. at 12. He found the *Button* decision inapposite authority to support the majority opinion because *Brotherhood's* personal injury litigation was not a "form of political expression." *Id.* at 10. Compare text accompanying notes 18-23, 36 & 37 *infra*.

9. *E.g.*, *Escobedo v. Illinois*, 378 U.S. 478 (1964) (refusal to let defendant consult with counsel during interrogation violates due process); *Massiah v. United States*, 377 U.S. 201 (1964) (admission at trial of incriminating statements made after indictment and without benefit of counsel violates fifth and sixth amendments); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel made applicable to state prosecutions).

10. See Simpson, *Group Legal Services—The Case for Caution*, 12 U.C.L.A.L. REV. 327 (1965). But see Bodle, *Group Legal Services—The Case for BRT*, 12 U.C.L.A.L. REV. 306, 323 (1965).

of legal business and related activities.¹¹ Under the decisions in *Button* and *Brotherhood*, however, the exercise of legislative or judicial power to control the legal profession has been severely curtailed by the first amendment protection seemingly granted to group legal aid programs similar to those in the principal cases. Bar canons, rules of professional conduct, and state legislation must be re-evaluated and brought into conformity with allowable group legal aid programs.¹² It is clear that such programs fall within basic needs of our legal system, and the bar will no longer be permitted to ignore these needs.¹³

The *Button* and *Brotherhood* cases are also indicative of a second trend in recent constitutional interpretation. The decisions emphasize not only the broad sweep that has been granted to first amendment freedoms generally, but also the recent developments in the area of associational rights. This generalized right of association has developed only within the last decade as a cognate to freedom of assembly.¹⁴ In its first clear enunciation, the right was limited to the holding that every citizen should have the freedom to engage in political expression and association.¹⁵ This definition was subsequently expanded to include association for the advancement of beliefs and ideas.¹⁶

Button re-examines the scope to be afforded the right of association. While, arguably, the decision approves of association for

11. See, e.g., note 3 *supra*, notes 12 & 31 *infra*.

12. It appears that canons 28 ("stirring up litigation, directly or through agents"), 35 ("intermediaries") and 47 ("aiding the unauthorized practice of law") of the American Bar Association's Canons of Professional Ethics now require some re-writing. In addition, many state rules of professional conduct (e.g., CAL. BUS. & PROF. CODE § 6076) will need revision, as will state statutes similar to those of Virginia. This far-reaching development has naturally aroused a great amount of bar disapproval, as evidenced by the approximately forty state and four local bar associations which joined in the ABA petition for rehearing of the *Brotherhood* decision, 377 U.S. 960 (1964).

13. See *The Availability of Counsel and Group Legal Services—A Symposium*, 12 U.C.L.A.L. REV. 279, 280 (1965), where Professor Schwartz notes that: "What is strikingly significant about this array of discussions is that with only one dissent the contributors to the Symposium agree that [*Brotherhood*] . . . heralds a new era for the legal profession; that the change was a long time coming; and that there is now an opportunity, perhaps the first in history, for the Bar—free of the type of restrictions struck down in . . . [*Brotherhood*—to fulfill its primary function of providing legal services for those who are in need of them." Cf. MURPHY & PRITCHETT, COURTS, JUDGES, AND POLITICS 274-311 (1961).

14. *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (Black, J., concurring). One commentator views the right of association as not fully incorporated into the right of assembly. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 237 (1961). Another writer, on the other hand, argues that "associational rights, to the extent they exist, are not derived solely from the first amendment. Rather they are implied in the whole constitutional framework for the protection of individual liberty in a democratic society." Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 5 (1964).

15. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

16. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

the promotion of any litigation, the language of the opinion is much narrower. The Court was careful to point out that "for such a group, association for litigation may be the most effective form of political association."¹⁷ The import of the Court's reasoning thus could be interpreted as limiting protection to associational activities that facilitate goals basically political in character, a conclusion consonant with the traditional orderly group activity protected by the first amendment.

Brotherhood, on the other hand, appears to fall outside the limitations enunciated in earlier decisions. In this case the Court protected the union's activity on the grounds that the privilege of members to assist and advise each other was indispensable to implementation of rights granted by Congress under the Safety Appliance Act¹⁸ and the Federal Employers Liability Act.¹⁹ Assuming the right to associate was necessary to preserve the efficacy of these federal statutes,²⁰ it nevertheless seems that the result in the case might better have been rested on the basis of the supremacy clause²¹ instead of the first amendment. Defending the union's plan as necessary to preserve rights granted under federal laws is perhaps understandable, but to equate this protection with the reach of the first amendment freedom of association seems both unnecessary and unwise. The union's primary interest in its members' litigation was a desire to see that skillful attorneys were obtained so that recoveries might fully compensate injuries. The mere fact of association should not make this essentially economically-motivated activity meritorious of first amendment protection.²² By its decision in *Brotherhood*, the Court has unwisely extended protection of the right of association to what seems merely "a procedure for the settlement of damage claims."²³

17. 371 U.S. at 431.

18. 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-16, 26, 27 (1958).

19. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-59 (1958).

20. 377 U.S. at 5. See also *id.* at 7, where the Court refers to "the right of individuals and the public to be fairly represented in lawsuits *authorized by Congress to effectuate a basic public interest.*" (Emphasis added.) The legislative history of the FELA lends weight to the argument that one of its purposes was to facilitate litigation by union members. See 42 CONG. REC. 4435 (1908).

21. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, § 2. Commenting on the supremacy clause and the FELA, the Court has stated:

"[W]hen Congress, in the exertion of the power confided to it by the Constitution, adopted . . . [the FELA], it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [a state] . . . as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 57 (1912).

22. Compare *NAACP v. Button*, 371 U.S. 415, 429 (1963): "In the context of NAACP objectives, litigation is not a technique of resolving private differences." See note 24 *infra*.

23. 377 U.S. 1, 10 (Clark, J. dissenting).

It would have been preferable, and more harmonious with the fundamental nature of first amendment concepts, if protection of asserted rights of association were permitted only if the basic goal of such activities were the advocacy of beliefs or political ideas. This would preclude first amendment protection of activities pointed toward the creation of purely economic advantages.²⁴ The question in every case should be whether the activity concerns a basic promotion of expression or communication.²⁵

Lacking any such limitation at present, it must be assumed that the right of association now encompasses group legal aid plans. Even within this context, however, the principal cases are not clear as to the weight to be given a state's interest in the regulation of its legal profession. Freedom of association, as part of the first amendment, is applicable to the states by virtue of the fourteenth amendment.²⁶ But first amendment rights are not absolute; their exercise may be circumscribed in the presence of an overriding state interest.²⁷ Several tests have been employed by the Court to determine the degree of state interest necessary to justify abridgment of first

24. To extend the right of association as a first amendment protection to any activities could, carried to its logical limit, perhaps lead to an assertion of a right collusively to fix prices, etc. The *Brotherhood* decision suggests use by the Court of the first amendment as a substitute for substantive due process, including concomitant concepts of reasonableness of state regulation. In this context, it should be noted that if economic liberty were found to be the determinative factor justifying referral programs, some members of the Court would find no constitutional basis for attacking state regulations, having long refused to recognize substantive due process limitations in this area. See, e.g., *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Cf. Mr. Justice White's dissent in *Robinson v. California*, 370 U.S. 660, 685 (1962), where he objects to the majority's application of the cruel and unusual punishment prohibition to invalidate a state narcotics law, arguing that "if this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress." *Id.* at 689. In any case, at least two specific groups have heretofore been denied the right to utilize group legal services, and they will undoubtedly seek to relitigate the point in the light of *Brotherhood*. *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935) (auto club); *People ex rel. Courtney v. Ass'n of Real Estate Tax-payers*, 354 Ill. 102, 187 N.E. 823 (1933) (taxpayers association). See generally *The Availability of Counsel and Group Legal Services—A Symposium*, *supra* note 13.

25. A related analysis of first amendment protection problems has been enunciated by Professor Emerson, *supra* note 14. His method of examination would draw a distinction between "expression" and "action." The former would be entitled to complete protection and the latter protection subject to reasonable regulation. This analysis, of course, presupposes that the activity is initially within the scope of the first amendment and therefore his analysis differs from that in the present text, which would delimit protection at a more fundamental stage.

26. *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960).

27. E.g., *id.* at 524; *American Communications Ass'n v. Douds*, 339 U.S. 382, 394-95 (1950). But see Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865 (1960); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

amendment freedoms.²⁸ In the principal cases the Court balanced associational rights against the state's interest in regulating its legal profession, and in neither case was Virginia's concern held to be sufficient.

Ad hoc balancing tests have generally given some weight to state regulation of local problems.²⁹ The Virginia statutes at first glance appear representative of valid local interests. They conform to a history³⁰ of state regulation aimed at prohibiting the common-law offenses of champerty, barratry, and maintenance.³¹ When modern offshoots, advertising and solicitation, developed, the states reacted by prohibiting these activities through statutory or decisional means.³² The constitutionality of such interdictions has heretofore been sustained,³³ and states have usually been held to have a substantial interest in the regulation of their legal profession, even as against asserted first amendment rights.³⁴

Button's peculiar facts may have dictated the result which overcame the state interests involved. The Court emphasized the context in which the statutes had been enacted. They appeared to be specifically aimed at hampering NAACP activities and were recognized as part of Virginia's resistance to desegregation.³⁵ *Brotherhood* cannot be sustained on the same grounds. There the legislation was not directed against the union. Moreover, there was a long Brotherhood history of requiring approved attorneys to kick back part of their fees.³⁶ Virginia thus would appear to have had a valid interest in applying anti-solicitation statutes to this scheme, which seemingly presented a substantial danger that high standards of

28. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) ("clear and present danger" test); *Gitlow v. New York*, 268 U.S. 652 (1925) ("bad tendency" test); *American Communications Ass'n v. Douds*, *supra* note 27, at 400 ("balancing" test); *Barenblatt v. United States*, 360 U.S. 109, 141 (1959) (Black, J., dissenting) ("absolute" test).

29. For favorable comment on use of the "balancing" test, see Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75. For criticism, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963).

30. A state tradition of supervision lends weight to the validity of its regulation. *Barenblatt v. United States*, 360 U.S. 109, 127 (1959).

31. See 14 AM. JUR. 2d, *Champerty and Maintenance* § 1 (1964); *Inciting Litigation*, 3 RACE REL. L. REP. 1257, 1261-63 (1958). See generally 4 BLACKSTONE COMMENTARIES *134-36.

32. *In re McDonald*, 204 Minn. 61, 282 N.W. 677 (1933); Annot., 53 A.L.R. 279 (1928). See generally 63 COLUM. L. REV. 1502, 1504-07 (1963).

33. See, e.g., *McCloskey v. Tobin*, 252 U.S. 107 (1920); *Hildebrand v. State Bar*, 36 Cal. 2d 504, 225 P.2d 508 (1950); *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97 (1933).

34. See *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

35. For a brief examination of Virginia's "massive resistance" legislation, see Birkby & Murphy, *Interest Group Conflict in the Judicial Arena—The First Amendment and Group Access to the Courts*, 42 TEXAS L. REV. 1018, 1021-30 (1964).

36. 377 U.S. at 9 (Clark, J., dissenting). See *In re Brotherhood of R.R. Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958).

legal conduct might be compromised. Perhaps only the lack of a showing by Virginia of specific substantive evils flowing from the union's legal referral plan prevented subordination of first amendment rights.³⁷ If this assumption is correct, the implication is that in future cases it will be incumbent upon the states to demonstrate that particular types of associational conduct will result in specified evils that the state should be allowed to prohibit before a state policy prohibiting such association will receive approval by the Supreme Court.³⁸

37. This viewpoint is implicit, for example, in the holding of the Richmond, Virginia, Chancery Court upon remand of the *Brotherhood* case. The Virginia court held that the United States Supreme Court had not approved of "the commercialization of the legal profession and 'ambulance chasing' or any of the objectionable practices of the Brotherhood in this case." Thus, only that part of the decree which enjoined the Brotherhood from advising its members to consult with recommended attorneys was unconstitutional, in the view of the Virginia court. *Virginia State Bar v. Railroad Trainmen*, 33 U.S.L. WEEK 2387 (Richmond, Va. Chancery Ct., Jan. 15, 1965).

38. In *State Bar v. Brotherhood of R.R. Trainmen*, 374 Mich. 152, 132 N.W.2d 78 (1965), the Michigan Supreme Court reversed and remanded a Michigan circuit court injunction similar to the one granted by the Richmond Chancery Court in the Virginia *Brotherhood of Railroad Trainmen* action. The Michigan Supreme Court, however, remanded with permission for amendment of the Michigan State Bar's bill, apparently implying that a more specific injunction directed against particular Brotherhood practices would be constitutional.