

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

Opinion #163 - 10/9/70 (10-70) Topic: Labor Union Group Legal
Services Plan.

Modified by 416

Digest: Lawyer may cooperate with
union's plan to furnish members
free legal services, only if
matters are reasonably related
to the members' relationship
with their employers.

Code*: EC 2-7
DR 2-103 (D) and
Former Canon 35.

QUESTION

Is it proper for a lawyer to participate in a plan for supplying
free legal services by a meat cutters' and butchers' union as des-
cribed in the following letter from the union to its members:

"Dear Member:

Enclosed you will find a "Legal Benefit Card." This card
upon approval from the Local Union will entitle you to free
legal service by selected competent attorneys.

In order to qualify for this benefit your dues, initiation
fees et cetera must be paid up-to-date.

This plan covers all phases of law, such as Workmen's
Compensation, Matrimonial, Landlord/Tenant, Negligence,
Criminal and Real Estate and will provide consultations,
preparations and review of documents as well as Court
appearances by an attorney acting on your behalf.

Fraternally yours,"

OPINION

The United States Supreme Court, in three cases, decided in recent
years, has brought into question the validity of the restraints
traditionally imposed by the Bar on the participation of a lawyer
in group legal service activities. CF. Former Canon 35. In N.A.A.C.P.
v. Button, 371 U.S. 415 (1963) the Court permitted the plaintiff
organization to supply free legal services in a civil rights case.
In Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State
Bar, 377 U.S. 1 (1964) it permitted the union to recommend lawyers to
its members in cases of injuries connected with their employment.
In United Mine Workers of America, District 12 v. Illinois State Bar
Association, 389 U.S. 217 (1967), the court sustained a plan under
which the union offered to furnish its members with legal assistance,
at the union's expense, in workmen's compensation cases. The holdings
were grounded upon the constitutional rights of free speech, assembly
and petition. These decisions were rendered at the very time that
the new Code of Professional Responsibility was being formulated and
the problem they posed is reflected in the Disciplinary Rules as
finally drafted.

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DR 2-103 (D) permits a lawyer to cooperate "in a dignified manner" with group legal service activities, but limits the groups with which the lawyer may cooperate to certain designated agencies, such as legal aid, public defenders, military assistance offices, bar association referrals, and to

"(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

- (a) The primary purposes of such organization do not include the rendition of legal services.
- (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
- (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
- (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter."

In considering specific cases under this Disciplinary Rule it is necessary to consider the following broad language in the Supreme Court's opinion in the Railroad Trainmen case (supra.):

"The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Broterhood to advise concerning the need for legal assistance--and, most importantly, what lawyer a member could confidentially rely on--is an inseparable part of this constitutionally guarantted right to assist and advise each other."

* * * * *

"A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congree to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. Gideon v. Wainright, 372 U.S. 335, 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

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courts cannot be so handicapped."

The following language of EC 2-7 is relevant:

"EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers."

The constitutional rights of assembly, free speech and petition are rights that may be exercised for a reasonable purpose. The rights are not unlimited. There is no right to assemble for the purpose of committing murder, tearing down City Hall or overthrowing the government. These rights have to be construed in the light of the purpose sought.

Every court opinion should be construed in the light of the facts before it. The broad language of the Supreme Court cited above should not be construed so broadly as to destroy the fundamental freedom inherent in the right of members of the public to have independent counsel whose loyalty is wholly to the client and not to an intermediary whose economic power permits it to control or strongly influence the judgement of the lawyer.

Labor unions, trade associations, stock exchanges and other concentrations of economic power, if permitted to supply free legal services to their members in every area of interest to their members, could conceivably control the economic life of large numbers of lawyers who could become puppets of their employers to whom they would owe primary allegiance rather than servants of their clients. It is doubtful that the Supreme Court, in spite of the breadth of the language it used in connection with the Railroad Trainmen's legal referral service, intended to abolish the right of states and the bar to preserve the public's right to the loyalty of independent counsel.

Accordingly, the draftsmen of the Code of Professional Responsibility, attempting to arrive at a balance between the rights of assembly, free speech and petition and the right to protection of the individual afforded by independent counsel, provided in DR 2-103 (D)(5)(b) that the providing of free legal services to members must be "incidental and reasonably related to the primary purposes of" the organization and limited the organizations entitled to provide such service to those having a public or non-profit aspect.

The question, therefore, is whether the supplying of free legal services to members of a labor union in criminal, domestic relations, real estate and other matters not related to the members' employment are "incidental and reasonably related to the primary purposes of" the union. It would be easy, of course, to say that any activity of a labor union is for the general welfare of its members and is therefore

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"incidental and reasonably related" to its purposes. But this principle, if applied without limitation to every kind of organization that the ingenuity of man could contrive would lead to great abuse and a serious danger of ultimate destruction of the individual's right to independent counsel.

It is therefore the opinion of this Committee that a labor union may at its expense supply attorneys to its members in any area related to their employment or their relations with their employers including workmen's compensation, industrial accidents, arbitration of labor grievances, health and accident claims arising from employment, seniority rights, company housing, etc. The union has expertise in these areas and can exercise an informed judgment in such selection. See EC 2-7. However, a meat cutters' and butchers' union, for example, has no particular competence to select matrimonial lawyers, real estate lawyers, probate counsel, etc. for its members. The selection of counsel to furnish services in these areas should be left to the members.

Legal referral systems exist within the legal profession specifically designed to furnish assistance to those seeking to obtain competent legal counsel. EC 2-15. Unions should also be allowed to assist their members in finding qualified counsel to handle matters not related to their employment provided they do so on an impartial basis and the members have an unrestricted ability to make realistic choice. Also, unions should have the right to provide their members with funds for employing counsel in such matters, provided the lawyer is freely selected and paid by the member and in his dealings with the member as counsel is wholly independent of the union.

It is the Committee's opinion that the plan of the meat cutters' and butchers' union for supplying free legal services to its members in areas having no connection with the union's primary function of representing its members in dealing with their employers, fails to meet the foregoing criteria and it would, therefore, be unethical for lawyers to participate in the plan.

DISSENTING OPINION

Following is the dissenting opinion of Mr. Sanford D. Levy and Professor Gray Thoron:

The United States Supreme Court, in three cases decided in recent years, has brought into question the validity of the restraints traditionally imposed by the Bar on the participation of a lawyer in group legal service activities. Cf. Former Canon 35. In N.A.A.C.P. v. Button, 371 U.S. 415 (1963) the Court permitted the plaintiff organization to supply free legal services in a civil rights case. In Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar, 377 U.S. 1 (1964) it permitted the union to recommend lawyers to its members in cases of injuries connected with their employment. In United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217 (1967), the Court sustained a plan under which the union offered to furnish its members with legal assistance, at the union's expense, in workmen's compensation cases. The holdings were grounded upon the constitutional rights of free speech, assembly and petition. These decisions were rendered at the very time that the new Code of Professional Responsibility was being formulated and the problem they posed is reflected in the Disciplinary Rules as finally drafted.

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DR 2-103 (D) permits a lawyer to cooperate "in a dignified manner" with group legal service activities, but limits the groups with which the lawyer may cooperate to certain designated agencies, such as legal aid, public defenders, military assistance offices, bar association referrals, and to

"(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

- (a) The primary purposes of such organization do not include the rendition of legal services.
- (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
- (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
- (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter."

The key words in Subdivision (5) are "but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities..." If those words mean that the determination of the eligibility of a non-profit organization to furnish its members with legal services must in each case await a judicial constitutional interpretation, then the burden of passing upon the ethical propriety of group legal service plans will have been shifted to the courts and the bar will have abdicated its responsibility to regulate its own professional conduct. Certainly the Code was never intended to deprive the profession of its right, or affect its duty, to pass upon the propriety of the conduct of its members, subject always, of course, to judicial determination where there is appeal to the court.

A careful analysis of the three cited opinions satisfies our Committee that controlling constitutional interpretation permits union members to associate together to help one another preserve and enforce rights granted them under law.

It is true that the proposed services offered by the inquiring union, including, for example, matrimonial and landlord and tenant matters, may appear to be far removed from the primary purposes of a union of meat cutters and butcher workmen, and it may be argued that the furnishing of legal services in such matters would be barred by paragraph (b) of Subdivision (5). Thus, reference has frequently been made to the fact that the legal services rendered in the above cited Supreme Court cases were entirely germane to the purposes of the organizations involved. That was the fact, but nowhere did the Court suggest that it was the sole controlling fact. Without discussing the legal principles involved, it is pertinent to note that in the Railroad Trainmen opinion the Supreme Court stated, at pages 6 and 7:

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"The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers 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--is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

* * * * *

"A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. Gideon v. Wainwright, 372 U.S. 335, 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."

As stated in EC 2-7:

"EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers."

It should be noted that paragraph (b) of Subdivision (5) merely stipulates that the "recommending" etc. of legal services be "incidental and reasonably related to the primary purposes of such organization." It does not require that the legal services themselves involve matters that are so related. Furthermore, it may well be that the union has a legitimate interest in all matters affecting the welfare of its members, be they housing, domestic relations, health, education or otherwise.

