Montana Law Review

Volume 26
Issue 1 *Fall 1964*

Article 8

July 1964

Ryan and Berg v. Brotherhood of Railroad Trainmen, 396 P.2d 113 (Mont. 1964)

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protection is granted. The license to publish, however, does not become absolute because this discussion is within the favored sphere. Freedom of speech and the right to defame will then be tempered to the extent a balance is achieved between public and private interests.

It is submitted that because the elements and methods of analysis which form the basis of the constitutional approach to privilege are substantially the same as those used by the tort approach, the privileges required by the Constitution should correspond to those which have been developed through tort law. The instant case, by extending the freedoms guaranteed by the first amendment, has created a new foundation upon which an extensive body of privileges may be built.[39]

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LEGAL AID PLANS OF LABOR UNIONS ARE AN EXERCISE OF FIRST AMENDMENT RIGHTS AND DO NOT CONFLICT WITH LEGAL ETHICS.—The defendant labor union operated a Legal Aid Department whereby union representatives and investigators advised injured union members to retain a particular attorney. The representatives and investigators occasionally carried blank contracts of employment and photos of settlement checks from previous lawsuits to persuade injured members to engage the attorney. The attorney's contingent fee was set by the union and from it the attorney paid for the investigative services performed by the union.[1] The Montana Bar Association charged the union and several nonresident attorneys with a conspiracy to engage in the unauthorized practice of law in Montana. The trial court enjoined defendant union from fee fixing, practicing law and soliciting claims. Defendant lawyers and their agents were enjoined from soliciting. Plaintiff alleged in part that the decree rendered in the trial court was inadequate because it allowed defendant union to continue investigating claims and recommending law-

[39]November 23, 1964, the Supreme Court handed down a sequel to the instant case. Garrison v. Louisiana, 33 U.S.L. WEEK 4019 (1964). Appellant, the District Attorney of Orleans Parish allegedly defamed eight judges of the criminal district court of the parish. He was convicted of criminal defamation. The court overturned the Louisiana decision, applying the same standard to criminal libel prosecutions as applied to civil action in the instant case. It said "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison v. State of Louisiana, supra* at 4022.

In the *Garrison* case the Court recognized for the first time that deliberate falsehood may be used as an effective political tool. However, this issue was passed over summarily as the Court indicated that their limitation of the right to comment by "actual malice" would take care of any such problems. See notes 12 and 20, *supra.*

[1]The court did not state the facts in the instant case but said they were essentially the same as in Hildebrand v. State Bar of California, 36 Cal.2d 504, 225 P.2d 508 (1950); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952); *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958). The statement of facts here is composed from facts common to those three cases. The activities of the union as described will hereinafter be referred to as the "plan."

yers. On appeal to the Montana Supreme Court, *held,* dismissed. The United States Supreme Court recently approved similar activities of the union and its Legal Aid Department.[2] In view of that decision, the decree of the district court unduly limited the union's activities in this area. *Ryan and Berg v. Brotherhood of Railroad Trainmen,* 396 P.2d 113 (Mont. 1964).[3]

The first amendment to the United States Constitution guarantees freedom of speech and assembly. A state may not limit these rights without showing a "substantial regulatory interest"[4] or a "clear and present danger"[5] to public welfare. In *BRT v. Virginia,*[6] the Supreme Court held that a substantial regulatory interest was not present to justify the limitations imposed by the state on the activities described in the instant case. The Court reasoned that first amendment freedoms included the freedom of union members to discuss their rights under the Federal Employer's Liability Act. A corollary of this right was the power to select spokesmen to give advice about legal assistance and direct prospective litigants to counsel. The Court said:

> Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not "ambulance chasing." The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any solicitation of business.[7]

The Court found, in effect, that the plan did not conflict with Canons 27 and 28 of the American Bar Association prohibiting solicitation.[8]

[2]Brotherhood of Railroad Trainmen v. Virginia State Bar, 84 S.Ct. 1113 (1964), hereinafter referred to as *BRT v. Virginia.*

[3]Plaintiff's petition for rehearing, on the grounds that the instant case is distinguishable on its facts from that decided by the United States Supreme Court, is now pending.

[4]NAACP v. Button, 371 U.S. 415, 444 (1963).

[5]Thomas v. Collins, 323 U.S. 516, 531 (1944).

[6]*Supra* note 2.

[7]*BRT v. Virginia, supra* note 2, at 1117. This language may be compared to that of the Tennessee Supreme Court which summarized *Doughty v. Grills, supra* note 1, as follows: "There was an original bill for an injunction brought by the officials of the State Bar Association against ambulance chasers corraling legal claims against the railroads through representatives of a union." Moore v. Mitchell, 205 Tenn. 591, 329 S.W.2d 821, 822 (1959).

[8]The canons of ethics are accepted standards of conduct for the Bar and are widely followed, although they do not have the force of statute unless adopted as such. *In re* Cohen, 261 Mass. 484, 159 N.E. 495, 55 A.L.R. 1309 (1928); McCracken, *Report on Observance by the Bar of Stated Professional Standards,* 37 VA. L. REV. 399 (1951). ABA, CANONS OF PROF. ETHICS, Canon 27 provides in part: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." Canon 28 in part: "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so." Solicitation is also prohibited by statute. See, REVISED CODES OF MONTANA, 1947, §§ 93-2108 and 94-35-209.

It ignored the conflict between the plan and Canon 35 forbidding the presence of a lay intermediary between attorney and client.[9]

In 1930, the Brotherhood adopted a legal aid plan which sought to secure adequate recoveries for its injured members.[10] Under this plan, the United States was divided into sixteen regions, following either geographic or railroad lines. A law firm in each region was selected by the Brotherhood to handle claims as they arose.[11] This plan was subject to sporadic litigation after 1930, and underwent a number of changes under judicial pressure.[12] It took its present form in 1959 pursuant to a decree of the Illinois Supreme Court.[13] The Illinois court stated that the plan did not violate the prohibition against solicitation if union activity were limited to:

1. Maintaining an investigative staff, employed and paid by the Legal Aid Department of the union;

2. Conducting investigations so that their results were of maximum value to members in prosecuting claims;

3. Forwarding information from the investigations to injured members; and,

4. Supplying names of attorneys capable, in its opinion, of handling claims successfully.[14]

However, the court forbade the union from the following:

1. Allowing its employees to carry blank contracts for employment of regional counsel and photos of settlement checks;

[9]Canon 35 provides in part:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer . . . . Charitable societies rendering aid to the indigent 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.
>
> This canon has not been observed as closely as the others. McCracken, *supra* note 8, and has been criticized as archaic, Weihofen, *Practice of Law by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119 (1934).

[10]The railroads were often successful in gaining "cheap settlements" of claims. *BRT v. Virginia, supra* note 2, at 1115.

[11]Montana was in the region assigned to a Minneapolis firm.

[12]See, for example, *In re* O'Neill, 5 F.Supp. 465 (E.D.N.Y. 1933).

[13]*In re Brotherhood of Railroad Trainmen, supra* note 1. The plan in Montana differed considerably from the form approved in Illinois because the Montana case was brought in 1958. The Brotherhood later conformed its national program to the requirements of the Illinois decree. Hecker, *Hulse v. Brotherhood of Railroad Trainmen . . . Corrected Abuse?* 28 U.P. NEWS 136 (1962).

[14]The Illinois court approved these elements of the plan because it felt that the Brotherhood had a legitimate interest in investigating physical injuries sustained by its members. The court did not explain the nature of this interest, but implicit in its opinion is acceptance of the Brotherhood's argument that the hazardous nature of railroading and the faculty of railroad agents to force settlement of claims on union members for small sums made a legal aid plan adviseable.

2. Having any financial connection with counsel; and,

3. Fixing fees for counsel's employment.

Moreover, regional counsel were forbidden from paying any gratuity to "tipsters" and investigators for procuring cases. The Illinois court thus condemned those activities most blatantly violative of the traditional professional prohibitions against solicitation and the presence of a lay intermediary.

Solicitation has long been prohibited because of its tendency to commercialize the profession.[15] The presence of a lay intermediary has been prohibited because of the likelihood of conflicts between the duties owed the client and those owed the intermediary.[16] These prohibitions are not founded upon fears of solicitation nor upon the presence of a lay intermediary as such, but on the consequences which may follow. Because of these traditional considerations, courts previously condemned the Brotherhood's[17] and similar plans.[18] Nonetheless, such programs occasionally received court and Bar approval.[19] Though they may have differed in form, the plans did not differ in principle. The courts rejecting as well as those accepting plans have generally attempted to categorize them on the pragmatic ground of whether they would frustrate the policy considerations underlying the prohibitions of solicitation and the presence of a lay intermediary.[20]

In 1963, the United States Supreme Court rendered its decision in

[15]Barton v. State Bar California, 209 Cal. 677, 289 Pac. 818 (1930); DRINKER, LEGAL ETHICS 211 (1953).

[16]*Informative Opinion of the Committee on Unauthorized Practice,* 36 A.B.A.J. 677 (1950).

[17]Atchison, Topeka & Santa Fe Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956) (dictum); State v. Lush, 170 Neb. 376, 103 N.W.2d 136 (1960); Hulse v. Brotherhood of Railroad Trainmen, 340 S.W.2d 404 (Mo. 1960); *Doughty v. Grills, supra* note 1; *Hildebrand v. State Bar of California, supra* note 1.

[18]See, *e.g.,* Rhode Island Bar Ass'n. v. Automobile Service Ass'n., 55 R.I. 122, 179 Atl. 139, 100 A.L.R. 226 (1935), where defendant auto club employed an attorney to give free legal advice to its members; People *ex rel* Courtney v. Ass'n. of Real Estate Taxpayers of Illinois, 354 Ill. 102, 187 N.E. 823 (1933), where defendant association obtained low cost legal aid in real estate tax suits involving its members; People *ex rel* Chicago Bar Ass'n. v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935), where defendant club employed attorneys to give free legal advice to its members; People *ex rel* Lawyers Institute of San Diego v. Merchant's Protective Corp., 189 Cal. 1531, 209 Pac. 363 (1922), where defendant corporation employed attorneys to advise members on new laws.

[19]See, *e.g.,* Gunnels v. Atlanta Bar Ass'n., 191 Ga. 366, 12 S.E.2d 602, 132 A.L.R. 1165 (1940), where lawyers advertised free legal advice to victims of usury; AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 209 (1957), where a lawyer was retained by a corporation which solicited insurance claims; *Id.* 341, where a manufacturer's association retained a lawyer to advise members on new developments in the law. See also Canon 35, *supra* note 9.

[20]A plan for legal aid to the indigent, for example, is socially desirable in promoting equality. Moreover, as it is not particularly lucrative, it does not lead to a competitive scramble for cases. On the other hand, a plan for the prosecution of personal injury suits is likely to be so profitable to attorneys that they compete for cases. Commercialization of the profession may result.

NAACP v. Button.[21] The case involved a legal aid plan for the litigation of school integration problems. The NAACP solicited cases and acted as a lay intermediary between the lawyer and the individual in whose name the suit was brought. The Court, however, found this practice unobjectionable. It did not contravene the policy considerations outlined above. But, more important, it was a form of political expression and thus protected by the first amendment.

With the application of the Constitution, the Court implied that categorization of plans into those which threatened to commercialize the profession and those which did not was no longer an adequate criterion. The implication became explicit when the Court approved the Brotherhood's plan in *BRT v. Virginia.*[22] In that case the Court ignored the possibility of distinguishing the plan on the ground that it served private ends rather than political objectives as did the plan involved in the NAACP decision.[23]

When it approved the Brotherhood's plan, the Court limited the prohibition of Canon 35 to cases of clear conflicts of interests. The Brotherhood did not interfere in the actual disposition of the claim.[24] As it was interested only in obtaining competent counsel for its members and as its pecuniary interest in operating the Legal Aid Department was probably *de minimis,*[25] there was no conflict between the Brotherhood and its injured members. Rather, the union's reward for its services was in inducement to membership and in gains in morale among workers. Neither of these inducements present any conflict of interest between the union and injured claimants.

Regional investigators, the lay intermediaries physically present between lawyer and client, performed the necessary function of investigation. Even when "investigation" was only a euphemism for solicitation, it was done for the attorney, not for the Brotherhood. Thus, although the Brotherhood plan, like that of the NAACP, contravened Canon 35, it did not violate the policy on which the canon was based.

It is submitted that a more serious objection can be made to the Brotherhood's plan on the grounds of solicitation. In *Hildebrand v. State Bar of California,* it was said:

> There is little question from the record but that petitioners knew exactly how their professional employment by injured rail-

[21] *Supra* note 4. The NAACP activities were prohibited by VA. CODE ANN. §§ 54-74, 54-78 and 54-79 (Supp. 1956). There was some evidence that the statutes were aimed at NAACP activities and not those of other groups. *Supra* note 4, at 445 (Douglas, J., concurring).

[22] *Supra* note 2.

[23] "No guaranteed civil right is involved. Here, the question involves solely the regulation of the profession, a power long recognized as belonging peculiarly to the State." *BRT v. Virginia, supra* note 2, at 1119 (Clarke, J., dissenting).

[24] *Hulse v. Brotherhood of Railroad Trainmen, supra* note 13.

[25] *Ibid.*

> road men was being solicited for them through the Brotherhood's activities, and they were willing to perform the desired legal services at a substantially reduced contingent fee rate in the belief that the volume of business to be directed to them through such solicitation would warrant such financial consideration.[26]

To this argument, the United States Supreme Court replied that it was not a vice for one union member to advise another to engage a particular lawyer. Stated in that language the argument of the Court is not subject to criticism. However, such a view is an oversimplification of the Brotherhood's practices. The evidence presented against the Brotherhood's plan, as well as findings made by state courts, illustrate that the solicitation was much more extensive than mere offers of advice.[27]

If the plan is operated in accordance with the decree of the Illinois Supreme Court,[28] solicitation will not be extensive. It may be questioned, however, whether the decree is in fact being followed. Moreover, the line between solicitation and investigation as conducted by the Brotherhood may be a fine one, for even if the decree is being followed, approved attorneys are still being recommended by the Brotherhood, they still receive notice of claims and presumably advertise in union publications.[29] To that degree, solicitation is inherent in the plan. Without the ability to recommend counsel, the Brotherhood could only maintain a lay department to investigate accidents and advise members whether they should sue. This would, however, destroy a primary purpose of the plan, to provide qualified counsel. The union could provide the names of attorneys qualified and experienced in personal injury suits. But what peculiar ability enables the union to select from scores of attorneys who fit this description a handful whom it deems competent? The union's practice of recommending but one law firm to an injured member is in fact, if not in theory, solicitation. Moreover, it is a type of solicitation which tends to commercialize the profession. In the past it led to fee-splitting and kickbacks. In the future, it could lead to recurrence of these practices and worse. Lawyers might eventually bid for business, the ultimate stage of commercialization.

Solicitation in the plan may be rationalized on another ground. In *Ryan v. Pennsylvania R. R.*, the court said:

> Intemperate and unwarranted argument cannot obscure a record which clearly shows that the purpose of the Brotherhood is a worthy one, planned to prevent possible frauds upon its members and to aid them in the assertion of their legal rights, and that as a result of that purpose of the plan, Meadows, in the in-

[26]225 P.2d at 511.
[27]*Doughty v. Grills, supra* note 1; *State v. Lush, supra* note 16.
[28]*In re Brotherhood of Railroad Trainmen, supra* note 1.
[29]*BRT v. Virginia, supra* note 2, at 1119 (Clarke, J., dissenting).

> stant case, obtained the legal services of a very able and experienced lawyer and at a stipulated fee far below that usually fixed in similar cases.[30]

The premise of this argument is that the policy against solicitation is overridden by the policy of securing fair settlement of claims. It is an appealing argument, but is subject to the criticism above. However, on the basis of such an argument, at least one state has exempted labor unions from the general statute prohibiting solicitation by "runners."[31]

The Brotherhood's plan has also been analogized to the retention by liability insurers of attorneys to handle claims against their customers.[32] This attempt to justify the Brotherhood's solicitation is weaker than the others. The insurer is the real party in interest as its money will be paid if the judgment is adverse. Moreover, the insurer attempts to settle claims and resorts to litigation in relatively few cases. The Brotherhood, on the other hand, is not a real party in interest, nor does it have the power to settle claims.

The effect of the Montana Supreme Court's decision in the instant case is to grant constitutional protection to legal aid plans where such plans do not cause a conflict in an attorney's loyalties. This does not indicate a complete break with tradition as courts have not indiscriminately condemned such plans in the past. Nonetheless, the decision is significant for it may encourage the proliferation of such plans. It is submitted, however, that the Montana Supreme Court should carefully scrutinize any plans that may come before it to exclude elements of unauthorized practice. In so doing, the plans should be limited to investigation and recommendation of attorneys. If so limited, legal aid plans can increase the quantity and quality of legal services rendered. Such plans are clearly subject to abuse, particularly solicitation, and courts and Bar alike must regulate their operation.

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UNINSURED MOTORIST POLICY—PROCEDURAL PROBLEMS ARISING FROM INTERVENTION OF INSURER IN ACTION BY INSURED AGAINST UNINSURED MOTORIST.—Plaintiff purchased a car insurance policy in which one clause stipulated the insured would be protected from legal damages caused by an accident with an uninsured motorist. A "no judgment" clause specified the insurance company would not be liable if the insured, without the consent of the company, sued an uninsured motorist to determine the damages. After an accident with an uninsured motorist the insurer refused to pay plaintiff for an injury. Subsequently the plaintiff brought

[30]268 Ill. App. 364 (1932).
[31]PA. STAT. ANN. tit. 12, § 1612 (1950).
[32]*Hildebrand v. State Bar of California, supra* note 1, at 521 (Traynor, J., dissenting).