Canon 2 - The Bright and Dark Face of the Legal Profession

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I. INTRODUCTION

Can our profession make Equal Justice Under Law a reality? Is the command of Canon 2 of the Code of Professional Responsibility to make legal service available to all who need that service a lofty expression or a realistic goal?

The focus of this article is on the disciplinary rules which, though intended to implement Canon 2, in fact foreclose lawyers from ethically participating in plans designed to extend legal services to many Americans who otherwise would go without a lawyer.

Given self interest as a common characteristic, there is always present in any member of a profession a tension between his own interest and the higher goals of that profession. One cannot speak of the legal profession in monolithic terms. Even to refer to attitudes of the organized bar is misleading and to some extent meaningless. The bar consists of a great variety of individual lawyers and this is likewise true of bar associations. The degree of tension between self interest and professional goals will vary substantially, depending as it does on a number of factors: status (whether a...
lawyer is an employee or an entrepreneur, a solo practitioner, a
member of a small firm or an establishment law firm, a law teacher,
house or institutional counsel), economic security, education, social
standing, and ideological bent. Thus, a lawyer's view of legal ethics
will depend largely upon his position in the spectrum of the legal
community.

One can assume that a partner in a well-established corporate
law firm, financially and socially secure, will have a view of such
subjects as ambulance chasing, specialization, unauthorized prac-
tice of the law, and group legal services, somewhat different from
that of a solo practitioner in an ethnic community of a large city.
The fact that the latter's views are conditioned by his marginal
position is understandable.

The Code is the product of members of the profession, invariably
a leadership group. The extent to which this group is representa-
tive of the total membership depends on a number of factors, in-
cluding the structure of the national and local organizations and
the type of professional willing to invest time and energy to achieve
status within the organization.

Only an empirical study of some dimension will tell us just how
representative of the total membership is the Special Committee
on Ethical Standards, the draftsmen of the Code, the Section on
General Practice, the Board of Governors or the House of Delegates.
One can conclude from the Code, more fully elaborated later, that
it represents a compromise viewpoint of a highly diversified bar.
The Code reflects both the bright and dark face of the profession.

One need not agree with George Bernard Shaw's pronouncement
that "all professions are conspiracies against the laity"1 and still
recognize that self-regulation by a profession with public service
obligations is a perilous undertaking.

The 1908 Code not only reflected a blissful unawareness of the
inherent conflict between self-interest and professional obligation
but was also silent on the duty to make legal service available. The
preamble emphasized efficiency, integrity and impartiality in the
administration of the courts. Its charge was simple:

The future of the Republic, to a great extent, depends upon our
maintenance of justice pure and unsullied. It cannot be so main-

1. G.B. SHAW, PREFACE TO A DOCTOR'S DILEMMA.
tained unless the conduct and motives of our professions are such as to merit the approval of all just men. 2

The Code adopted in 1969 reflects a substantial growth in maturity, especially in its recognition of the public service role of the profession. Its preamble rhetoric is a call for leadership:

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system . . . Within the framework of these principles a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing responsibilities of society. 3

Thus, Canon 2 implements our concern for increasing the availability of legal services: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." 4 Without doubt this Canon is the most significant innovation of the Code.

We are all consumers of justice or injustice. However, whether what we consume is good or ill depends in substantial part on whether legal services are available to us. Legal services, except for the poor, are sold like any other commodity—for a price. And it is that price which rations legal services and in turn justice. The delivery of legal services is controlled by the legal profession, and the profession claims that only lawyers may render such services. It is the thesis of this article that the legal profession has, on the whole, effectively maintained this monopoly and that a significant sector of the bar is now attempting, despite the goal of Canon 2, to preserve existing methods of delivery of legal services by the assertion of ethical principles designed to discourage lawyers from engaging in efforts to bring legal services within range of the pocketbooks of persons of moderate means. The Houston amendments epitomize these efforts. 5 They exalt self-serving economics rather than ethical considerations.

They are part of a sad chapter in professional responsibility. Adopted against a tide of rising expectations on the part of consumers of justice and injustice, they will not prevail.

2. ABA Canons of Professional Ethics, Canons of Judicial Ethics 7 (1957).
4. Id. at 5.
5. Amendments adopted by the House of Delegates of the American Bar Association to Disciplinary Rules 2-103 and 2-104(A)(3) and Ethical Consideration 2-33 at the 1974 Mid-Year meeting at Houston.
II. BACKGROUND

A. Legal Assistance to the Poor

The proposition that the legal profession has a duty to make legal counsel available, except with relation to the poor, would have been rejected by the vast majority of the organized bar twenty-five years ago. Even with relation to the poor, the organized bar was myopic in its approach to providing service. In 1963, immediately prior to the O.E.O. legal services program, all legal aid agencies in the United States spent $4,000,000—less than two-tenths of one per-cent of the total expenditures of $2,218,000,000 for legal services in the United States. Students of the problem concluded that only 10% of those needing legal aid were being served at that time, and that the quality of service rendered was below proper standards.6

The organized bar, except for a small band of dedicated persons, gave little leadership to improving the quality and quantity of service rendered.7 The dominant attitude was that legal aid was the product of private philanthropy and recipients were receiving charity.8

It was not until the social revolution of the 1960's to eliminate discrimination against the Negro, and the war on poverty leading to the establishment of O.E.O., that the organized bar, acting through the A.B.A., exerted leadership to extract substantial appropriations from the Congress to support legal aid work.9 To the credit of the A.B.A., it has since been in the forefront in working for adequate funding and for an independent agency to assure better standards of service free from political influence.

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7. Prominent in this group have been the lawyers who have served as officers of the National Legal Aid and Defenders Association, some of whom have also served as Presidents of the American Bar Association—such as Reginald Heber Smith, Whitney North Seymour, Lewis F. Powell, Orison S. Marden, Chesterfield Smith and John W. Cummiskey.
8. This concept is perhaps unwittingly expressed in the 1940 Report of the Legal Aid Committee of the American Bar Association where it is stated: “Legal Aid is the great organic charity of the bar and its growth is largely attributable to the work and the money which lawyers have contributed.” 65 A.B.A. Rep. 187, 191 (1940).
9. The first suggestion for federal funding of legal services was inspired by Lord Rushcliffe's Report which led to a nationally financed legal assistance program in England. See Elson, The Rushcliffe Report, 13 U. Chi. L. Rev. 13 (1946).
That independent agency was created in 1974 by the Legal Services Corporation Act (Public law 93-353).\textsuperscript{10} Its findings and declarations establish national policy of a far-reaching character:

(1) There is a need to provide equal access to the system of justice in our nation for individuals who seek redress of grievances;

(2) there is a need to provide high-quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;

(3) providing legal assistance to those who face an economic barrier to adequate legal counsel will best serve the ends of justice;

(4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;

(5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and

(6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.\textsuperscript{11}

B. Legal Assistance to Low and Moderate Income Group.

Certain of the Canons of Ethics have acted as the principal brake on making legal service available to the low and moderate income group. Here we have the dark face of the profession. Designed ostensibly to provide standards of conduct for lawyers, their implementation barred lawyers from providing the public service required of a profession.

The conflict between the self-interest of individual practitioners and the need of the public for legal services is highlighted in the Canons concerned with unauthorized practice, use of lay-intermediaries, advertising, solicitation and fixing of fees. These Canons have had the over-all impact of restraining the development of new methods of providing legal services to the moderate and low income groups of our society.

If we were to analogize providing legal services to providing a public utility, we find a profession with power to determine what constitutes the practice of law, to confine that practice to itself, and to fix the price to be paid by the consumer. In a literal sense, until recent developments, it was a monopoly free of any regulation.

Prohibitions against advertising, solicitation and stirring up litigation are designed to avoid commercialism but also have the effect of making it more difficult for a layman to find a lawyer and thus

\textsuperscript{10} Pub. L. No. 93-355, § 1003 (July 25, 1974).
\textsuperscript{11} Id. § 1001.
leave unrepresented persons who do not recognize they have a legal remedy. Suggested schedules of fees may help avoid overcharging but at the same time may discourage lawyers from lowering fees to meet the economic limitation of clients. The Canons against unauthorized practice and use of lay-intermediaries, together with the Canons against advertising and solicitation, protect the public against the unscrupulous and unqualified, but they have also stood in the way of low cost, quality service provided by labor unions, trade associations and other organizations to their members.\footnote{12}

Recognition of the legal needs of the submerged lower and middle income groups has been slow to develop. The prevailing view encouraged by the 1908 Code was that the legal profession should play a passive role in offering its services. A lawyer sat in his office waiting for clients and the burden was placed on individuals to take the initiative to learn about their legal rights and to select an attorney. Bar associations scrupulously avoided giving advice concerning selection of lawyers and had no program for handling persons needing legal service who were rejected by legal aid bureaus. Some legal aid bureaus, \textit{sub-rosa}, followed the practice of referring rejected applicants to private practitioners formerly associated with the bureau.

In 1938, lawyer reference plans were initiated by the Los Angeles and Chicago Bar Associations. They were the product of committees established to consider the economic condition of the bar which at the time was feeling the full impact of the great depression.\footnote{13} The plans were an important step away from handing a

\footnote{12. For a definitive analysis of the relation between the Canons discussed herein and group legal services, see \textsc{Christiansen, Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services} 253-69 (1970).


We wish to reaffirm our conviction that in the circumstances in which the profession finds itself, with large numbers of lawyers either unable to earn a living in the practice, or earnings the barest pittance; with innumerable young lawyers unable to find openings; with many of the older men, after a lifetime of practice, scarcely able to keep going—in these circumstances we think it imperative that the bar should take action both to get at the facts more fully and to experiment with remedies.

The time has come to be bold in striking out along new paths of group effort, which, if properly safeguarded, will not impair
person seeking a lawyer a telephone book and telling him, in effect, to play roulette with the lawyers listed in the book. The plans represented the first significant reaching out on the part of the bar to assist potential consumers in securing legal services. The original proponents of the plans had several motives. In addition to their conviction that this was an important step for the bar to take, there was the hope that the plans might provide an economic benefit to the bar by providing an additional source of legal business. It was not until after World War II that lawyer reference plans were adopted in a substantial number of cities. Even when plans were adopted, there was inadequate publicity and promotion, and this is true today with many such reference plans now in existence in various parts of the country. As a consequence, the number of people reached by this method is relatively low. During 1971, for example, only 260,482 referrals were made.14

The poverty of efforts by the organized bar to meet the situation constructively must be contrasted to its strenuous efforts to knock out existing programs organized by lay groups.

Since the early part of the century, non-lawyers have made efforts to provide legal services to various types of groups. Bar association committees on unauthorized practice of the law have strenuously opposed these efforts. By litigation directed at lay agencies organized for profit, such as banks, trust companies, collective agencies, finance companies, real estate firms and motor club

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either the traditional independence of the lawyer or the dignity of the profession.

This report along with reports of the Chicago Bar Association and the National Lawyers Guild recommended law offices for persons of moderate means.

14. ABA LAWYER REFERRAL BULL. 10 (Spring 1973). For extensive evaluation of Lawyer Referral Services, see Christensen, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES Ch. V (1970). Aside from lawyer reference plans, the only attempt to improve delivery of legal service to the low and middle income group without bar association opposition is the Neighborhood Law Office plan of Philadelphia. This plan came into being November, 1939. Lawyers were permitted to operate offices in outlying neighborhoods and to use the title "neighborhood law office," which could be advertised by displaying the title on the door or windows of their offices. The neighborhood law offices had the great virtue of making access to legal services more visible. Abrahams, The Neighborhood Law Office Experiment, 9 U. CHI. L. REV., 406, 406-26 (1942); see also April, 1950 issue of the Atlantic Monthly under the title "The New Philadelphia Lawyer." Proposed plans for legal service offices for persons of moderate means have never been implemented. See Smith, Legal Service Offices for Persons of Moderate Means, 31 AM. JUD. SOC. 37 (1974); Elson, Extending Legal Service to the Low and Moderate Income Groups, 8 NAT. LAWYERS GUILD REV. (1948); Llewellyn, The Bar's Troubles, and Poultices—and Cures?, 5 LAW & CONTEMP. PROB. 104 (1938); Brown, Law Offices for Middle-Income Clients, 49 J. ST. BAR CAL. 720 (1965).
associations, the bar has sought to maintain its monopoly of the field. Bar associations have also attacked, among others, railroad brotherhood plans to meet the special legal needs of injured members and civil rights organizations for assigning lawyers to advance the civil rights of minority groups. Few activities of the organized bar have been carried on as diligently as these efforts to stamp out what it considered unauthorized practice of the law.15 The bar has invested a substantial amount of manpower and expense in this endeavor. No constructive counterpart was offered by the bar to the services offered by the lay agencies which they attacked.

Because of developments in the 1960's, the attitude of the bar toward providing legal services to persons of moderate means was significantly changed. Foremost were the decisions of the Supreme Court in *Button*, *BRT* and *United Mine Workers*.16 State bar associations relying upon Canon 28, *Stirring Up Litigation, Directly or Through Agents*, Canon 35, *Intermediaries*, and Canon 47, *Aiding the Unauthorized Practice of Law*, sought to terminate legal service plans for members of the NAACP, the Brotherhood of Trainmen, and United Mine Workers. The Supreme Court rebuffed these efforts as violations of the associational rights protected by the First Amendment. These decisions came during a period when, because of the failure of the legal profession to respond realistically to the need for legal service of the middle income group, a strong consumers movement had developed for group legal services plans. The debate within the California State Bar Association on the report of a special committee which recommended support of group legal service plans drew nationwide attention within the profession.17 The first federal infusion of funds to provide legal aid for the poor under the Johnson poverty program highlighted the fact that the poor would be receiving proportionately more legal services than those not eligible for legal aid and unable to pay customary fees even though the latter were taxpayers directly contributing to legal aid.

15. For a comprehensive study see BASS, UNAUTHORIZED PRACTICE SOURCE BOOK (rev. ed. 1965).
An important shift in attitude was reflected in an address to the assembly of the American Bar Association on August 9, 1965, by Mr. Justice Powell, then President of the Association. He said:

[O]ne must recognize the increasing reliance by individuals on group organizations of all kinds, from labor unions and co-operatives to business and trade associations. It is also evident that strong currents of social change—not unrelated to this reliance—appear to be flowing in the direction of new methods of providing legal services.

These currents of change include the ever expanding impact of laws and regulations on the lives of ordinary citizens, the accelerating urbanization of our country, the difficulty of the average citizen in knowing whether and where to seek counsel, the concern of laymen as to lawyers' fees and the growing requirement for specialized legal skills. While the needs and difficulties are thus expanding, there is an absence within the legal profession of anything comparable to the structure of medical insurance and medical clinics that have so significantly broadened the availability of medical services.

... The organized Bar at all levels must press ahead with every available means to improve existing methods—through greater emphasis on lawyer referral services and through wider experimentation with neighborhood law offices and legal clinics...

A special committee under the able and vigorous leadership of William F. McCalpin was created by the A.B.A., at the request of then President Powell, known as the Special Committee on the Availability of Legal Services. From its inception this committee has given strong leadership for extending legal services by a variety of measures including group legal service plans.

III. Open and Closed Plans—Relative Merits

Key terms used in the debate as to the best means of delivery of legal services to the low and moderate income groups should be defined. The terms are “group legal services”, “prepaid plans”, “open panels” and “closed panels.” “Group legal services” refer to lawyer services retained or paid for by an entity or group such as a labor union or a trade association for its members. After the adoption of the Code the concept of prepaid plans was accepted by the American Bar Association and state and local bar associations, and the terms “open panel” and “closed panel” came into vogue. “Open panel” plans give participants a free choice of attorneys. “Closed panel” plans are analogous to “group legal services.” Members eligible for the services of a “closed panel” are supplied with the services of a legal staff which may be employed by the group or entity which provides the services.

18. Address by then President Powell, ABA Assembly, Aug. 9, 1965.
“Prepaid legal service plans” refer generally to the method of payment for legal services. It is used in the same sense as prepaid medical or hospital plans, i.e., the payment in advance for the right to certain specified legal services to be supplied by an “open panel” or “closed panel.”

The obligation of the legal profession should be to provide the most effective delivery of legal services of quality at reasonable cost to the maximum number of clients. All methods for delivery of legal services consistent with high professional standards should be encouraged. In the field of group legal services, both open panels and closed panels should be available to the public, irrespective of the relative merits of these plans. But it is pertinent to an understanding of the present heated confrontation surrounding Canon 2 and DR 2-104 (D) to briefly consider the merits.

The present cost of legal services effectively limits access to service for a substantial part of the population. This does not mean that lawyers overcharge for their service. The 1971 Lawyers Statistical Report shows that 119,000 of 236,000 lawyers in the United States were solo practitioners. Of the 14,042 members of the Section on General Practice almost 80% were in firms of 6 or less. Present modes of practice, with high overhead expense, lack of specialization, inadequate use of paraprofessionals and of modern technology account in large measure for the relatively high cost of legal service.

The chief virtue of open panel plans is that participants are completely free to choose their own lawyer. The lawyers to whom they go for services will presumably serve them as they do their other clients. The attorney-client relationship is fully preserved as is the independence of the attorney. The chief drawback is that there is no incentive to change modes of practice. There is little reason to believe that lawyers will reorganize their practices to reduce

19. Until the current enthusiasm for prepaid plans with open panels, opponents of revising the Code to accommodate group legal services argued that there was no proof that the need for such service existed. The present attitude of most segments of the bar assumes the need. The American Bar Foundation is presently in the process of completing the “Survey of the Legal Needs of the Public.” This is the most comprehensive empirical project measuring need undertaken to date. Prior studies of need are discussed and evaluated in Curran & Spaulding, The Legal Needs of the Public: Preliminary Report of a National Survey by the Special Committee to Survey Legal Needs of the American Bar Association in collaboration with the American Bar Association 5-14 (1974).
costs and thereby fees. Group purchasers of prepaid plans will undoubtedly insist on some procedures for controlling costs and the quality of service. But experience with prepaid plans in the medical field, particularly Medicare, suggest that efforts at control are not likely to be successful. Consumer groups interested in purchasing legal services are concerned with the present level of legal fees. They look upon closed panels as an alternative option with promise of reduced costs of legal services. There is substantial basis for this attitude.

The high volume of work will enable attorneys to concentrate on certain areas where a significant number of legal problems affect the members of the group. This specialized knowledge may also provide empirical background for law reform to reduce the need for legal service. Closed panels will have the necessary financial resources to bring about substantial improvement in office efficiency by the use of computers, magnetic tape typewriters and improved docket and timekeeping systems. It is likely that closed panels will make greater use of paraprofessionals and law students who can perform many assignments under the supervision of attorneys, such as legal research, preparation of routine legal documents and the preliminary interview of clients.

Law offices of the closed panel type will require administrative skills comparable to those essential to the operation of the large law firms of today. The initial capital investment will be high but the end result will be a substantially lower unit cost.

Moreover, closed panel plans will more quickly and effectively develop a client group, whether the potential clients are members of a union or other organization. Open panel plans will require effective marketing techniques. Bar associations do not have background or experience in this area. Of necessity they will have to rely on the insurance industry which has the resources and the marketing ability to do a good job. It may be anticipated that a substantial part of the premiums paid by members in a prepaid open panel insurance plan will go for the cost of these services and for a reasonable profit thereon.

Other advantages may be claimed for closed panels. Such plans should encourage preventive law techniques and the development of educational programs to create greater awareness in the public of the legal problems involved in various transactions. Such plans also eliminate the problem of finding a lawyer of acceptable quality. Free choice of an attorney may lead to the wrong attorney. Finally, the success of closed panel plans will compel lawyers in private practice to reorganize their modes of practice so that they can compete effectively for law business. This raises issues not often
enough brought into the open. These issues were dealt with by the Special Committee on Availability of Legal Services, as follows:

One basis of concern is the frank fear that an increase in groups offering to their members the services of a lawyer will result in a shift in the economics of the profession—that law business now enjoyed by some private practitioners may go to other lawyers retained or employed by groups. Such a result is, of course, possible. No lawyer, however, has a vested right to retain his clientele or any particular part of it. If a portion of a privately practicing lawyer's clientele having enjoyed the benefits of that lawyer's services freely chooses to associate itself with a group arrangement because of the better quality or greater economy or easier accessibility of the legal services to be obtained through the group, then that benefit to the public cannot properly be opposed by the Bar. Any attempt by the Bar to protect the economic interests of a particular lawyer when the public would have it otherwise is unworthy of the Bar.

Another basis of concern though related is broader and more fundamental. Succinctly stated, it is that the proliferation of groups offering the services of a lawyer may cause a decline in the size and strength of the independent, privately practicing Bar to the ultimate disadvantage of the public. This is a legitimate and praiseworthy concern, but on close examination it has seemed to this Committee not likely to be of such magnitude or severity as to cause us to eschew the obvious benefits to be secured by the public through the greater accessibility to legal services which group arrangements promise to provide.

Each of the members of this Committee is a lawyer in private practice. As such, each one of us has a keen appreciation of the value of wearing no man's collar. Yet we all realize that independence is a relative concept—shaped and limited by our own individual pre-conceptions, our clients and perhaps even by the particular practice arrangement in which we exist. Each of us is prepared to argue strongly to any group contemplating a legal services program the value of a completely unfettered professional judgment, but we believe that the ultimate decision must be made by the public.

Looking at the probabilities as to how the public might exercise its judgment we have concluded that the problem is not as serious as some pessimists foresee. The public too values its independence. The fact that a group may provide the services of a lawyer clearly doesn't mean that all groups will do so. The frequent inability of organized labor, for example, to deliver individual members' political votes to a particular candidate suggests that those individual members may as frequently be undeliverable to a particular lawyer. The fact that legal problems are often of a highly personal nature makes it even more likely that many groups of individuals will choose not to go the group legal services route.\footnote{20. ABA, Report of Special Comm. on the Availability of Legal Services 20-21 (1969).}
On the human side of the equation there is an understandable fear that employment as an attorney by a group will be “dehumanizing” but there is little reason to believe that the impact on the employed lawyer will be different from employment in a large law office. True, in large law firms, the associate looks forward to the day when he will be a partner but employment by a group is no more the end of the road than employment by a bank, trust company or governmental agency.

A primary concern is the impact on the independence of the bar. It is important to the maintenance of justice that there will always be lawyers available to handle the unpopular cause or to test the limits of the Constitution. While the long term impact of prepaid plans using closed panels may be to reduce the number of smaller size firms, firms that are more likely to consist of lawyers who place a high value on independence, one can be certain that lawyers of skill, ability and integrity will continue to attract sufficient clients to assure a viable practice.

In the remainder of this article we deal with the struggle within the American Bar Association to formulate ethical standards relevant to group legal practice.

IV. The 1969 Compromise—The Lateral Pass to the Supreme Court

The first systematic attempt to deal with the subject of group legal practice was in the basic 1969 revision of the Canons of Ethics. The initial draft dealt with the subject of group legal services in a simple, direct manner as follows:

(2) A lawyer may accept employment that results from participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are operated or sponsored by:

(c) A professional association, trade association, labor union, or other bona fide, non-profit organization which, as an incident to its primary activities, furnishes, pays for, or recommends lawyers to its members or beneficiaries.

(e) A reputable bar association.

21. I am indebted to John Peter Dowd of the Illinois Bar for his assistance in this part of the article.

22. CODE OF PROFESSIONAL RESPONSIBILITY, adopted at ABA Annual Meeting held in Dallas, 1969. The Code was the product of five years of effort by the distinguished Special Committee on Evaluation of Ethical Standards, appointed in 1964 by then President Lewis F. Powell.

In substance this proposal would sanction participation in group legal service plans subject only to the qualification that the plans be incident to the primary activities of the sponsoring organizations. In addition, lawyers are free to participate in any legal service plan operated by a reputable bar association, and presumably could include prepaid plans funded by insurance, or law offices manned by paid attorneys.

The Section on General Practice of the American Bar Association, state and local bar associations, and individual lawyers, mounted an attack on the proposal. Faced with the necessity of securing approval of the entire Code by the Board of Governors and the House of Delegates, the Special Committee compromised the issues by severely limiting participation in group legal services. As stated by the Reporter for the Committee: "[T]he regulations placed in the final draft of the New Code are more in the nature of a lateral pass of the problem to the United States Supreme Court than an attempt to find solid grounds upon which to regulate group legal services."

The crucial restrictive language of DR 2-103(D)(5) is that con-

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24. Disciplinary Rule 2-103(D) provides, in relevant part, as follows:

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may co-operate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(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.

fining service of non-profit organizations only to "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." The footnote reference to this language is to three Supreme Court decisions, bearing upon group legal services.26

The restrictions contained in subparagraphs 5(a), (b), and (c)27 are designed to limit new forms of associations to the factual circumstances of the three Supreme Court cases cited by the Committee, and the requirements of the subparagraphs are consistent with the facts of those cases. The NAACP and the two unions involved are organizations for which legal services are not the primary function. The activities of the associations in making recommendations, furnishing or paying for legal services of its members, are incidental and reasonably related to the primary purposes of the organization, and in none of the three cases did the organization derive a financial benefit from the rendition of legal services by the lawyer.

At the time that the Code was presented to the House of Delegates at the annual meeting in Dallas, in 1969, DR 2-103(D)(5) was the only provision in controversy. The Special Committee on Availability of Legal Services proposed an amendment to these provisions. Instead of holding lawyer participation down to the minimum standard arising from a narrow construction placed on the Supreme Court decisions, it would have conditioned permission to maintain group plans upon the establishment of a regulatory system administered by the highest court of each state. William J. Fuchs of Philadelphia, chairman of the Section of General Practice spoke in opposition to the amendment. Relying upon a survey conducted by the Section of General Practice of 9,000 lawyers, he claimed that lawyers were strongly opposed to the approach of the McCalpin Committee amendment. He expressed the fear "the laymen will run the practice, and not the lawyers",28 and that traditional methods would meet the hypothetical need for more legal services by the middle or lower income public. Other objections were voiced including a warning that unions would demand legal services as a fringe benefit, that organizations would be formed by laymen whose sole purpose would be the furnishing of legal services, and that a lay agency would act as an intermediary between the attorney and his client. The supporters of the amendment pointed out that the proposed disciplinary rule amounted to a sur-

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27. See note 24, supra.
render of leadership by the American Bar Association, that it was inconsistent with the Supreme Court decisions and that the proposal would be unworkable because of the confusion which arises out of the limitation of service "to the extent of controlling constitutional interpretation." The amendment was defeated.

From its adoption in 1969 to the present time, DR 2-103(D) (5) has been under constant attack by members of the Committee on the Availability of Legal Services and others. The inconsistency of the rule with the ethical considerations preceding it have been criticized. The rule has been attacked on constitutional and pragmatic grounds, and at least five state bar associations have recommended that the adopted provisions be changed as a whole or in part to lessen their restrictiveness.

The most serious setback to the rule was United Transportation Union v. State Bar of Michigan, a 1971 Supreme Court decision (hereinafter UTU). In that case the Supreme Court vacated an injunction issued by the Michigan Supreme Court. The Michigan Supreme Court had adopted verbatim the restrictive injunction of the Virginia state court which tried the BRT case after remand.

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29. Id. at 970-72.
30. Voorhees, Group Legal Services and the Public Interest, 55 A.B.A.J. 535 (1969); Nahstoll, Limitations on Group Legal Service Arrangements Under the Code of Professional Responsibility, DR 2-103 (D) (5): Stale Wine in New Bottles, 48 Texas L. Rev. 334 (1970); Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181 (1972) (proposing a model for a new Canon 2 and Disciplinary Rules); and Note, Group Legal Services: A Blessing in Disguise for the Legal Profession, 58 Iowa L. Rev. 174 (1972) (analyzing pragmatic reasons for opposing and supporting group legal services). California's Rule 20 (eff. Jan. 21, 1970) embodies different principles; Washington adopted the McCalpin amendment with local registration requirements; New Mexico, Hawaii and the District of Columbia dropped the limiting language in (D) (5) restricting developments to that "required" by Supreme Court decision; Nebraska accepted the rest of the Code, but referred 2-103(D) (5) to the state judicial council.
32. The following provisions of the injunction were held to violate the first amendment: forbidding (1) the giving of legal advice to members or their families, (2) supplying names of injured members and investigative reports to attorneys, (3) controlling fees, (4) stating to members that selected counsel would defray expenses and make advances. Two other provisions were vacated as unsupported by the complaint or record: forbidding (5) compensation of members by the attorney for services or referrals and (6) the sharing of legal fees with the union. United Transportation Union v. State Bar of Mich., 401 U.S. 576, 581-85 (1971).
by the Supreme Court. Apparently for tactical reasons, the Union had appealed only three of the injunctive provisions in that case. The Virginia court revised only these provisions vacated, so that its injunction fell within the minimum required by the controlling constitutional interpretation test used by the ABA Code. The Michigan court justified this action by pointing to what it described as the narrow holdings in *Button, BRT* and the *United Mineworkers* case, and attempted to limit the legal significance of the cases to the operative portion of the Supreme Court decisions. The Supreme Court criticized the bar and the Michigan State court for justifying limiting group efforts to secure and control legal services on the basis of the narrow interpretations placed on the prior decisions:

> In the context of this case we deal with a cooperative union of workers seeking to assist its members and effectively asserting claims under the FELA but the principle here involved cannot be limited to the facts in this case. At issue here is the basic right to group legal action.\(^3\)

The Court further stated that it was "upholding the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable,"\(^4\) and that the restrictive approach amounted to a failure to follow prior decisions. The Court made its position explicit:

> The common thread running through our decisions in *NAACP v. Button, Trainmen* and *United Mine Workers* is that collective activity is undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.\(^5\)

The need for change in DR 2-103(D) became further obvious as a result of the strong movement toward prepaid legal services which began in the late 1960's. This movement was spurred by the active encouragement of the American Bar Association which created a special committee in 1970. This was followed in 1971 by

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33. *Id.* at 585.
34. *Id.* at 580.
35. *Id.* at 585. The dissent was concerned primarily with the issue of federalism rather than the rule of the first amendment. Justice Harlan expressed serious reservations about limiting state discretion but stated expressly that the disagreements should not be construed as disagreement over the "desirability of group legal services or the ways in which the traditional concepts of professional ethics should be modified to take account of the changes in social structure and social needs since the 19th century." He took special note of the fact that the organized bar has been too slow to recognize the problems of the people of middle and lower income strata of society in obtaining meaningful access to competent legal advice. *Id.* at 599. He also condemned as "nefarious practices" the kinds of claim settling, fee setting and representation that would force the BRT to develop its group plan to protect its members. *Id.* at 598-99.
the first experimental project in the country to test the feasibility of a comprehensive plan for prepaid legal services in Shreveport, Louisiana, financed by the American Bar Association and the Ford Foundation. The American Bar Association in 1972 formally urged all state and local bar associations to study and experiment with prepaid legal plans. In November, 1973, the Utah State Bar Association launched the first state bar plan known as the Utah Prepaid Legal Service Plan. Almost every other state bar association in the country has or is now considering bar-sponsored prepaid legal service plans. Substantial progress has been made by California, New Mexico, Kansas, Texas and Ohio.

All of the bar plans are open panel plans. Closed panel plans have been adopted by unions including the Laborers Local 423 in Columbus, Ohio, Laborers Washington District Council, Washington, D.C., the Amalgamated Clothing Workers Union of Chicago, Illinois, and others. The insurance industry has also been involved in the development of plans. It held a symposium in the latter part of 1971 for insurance representatives, attended by approximately 80 persons. The lack of reliable statistics upon which to base a realistic premium structure provided a significant hurdle. By 1974, the industry had become much more active than in prior years. Surveys have been conducted by many companies, and the American Bar Association has been contacted by at least 15 insurance companies seeking information. At least five insurance carriers are presently offering prepaid legal service coverage.

It is clear that a fundamental change has taken place in bar attitudes toward prepaid plans. Prior to the Code there was general hostility toward prepaid legal service plans. Today, the organized bar is now much interested in the development of such plans because of the apparent realization that if the organized bar did not step in and take leadership, plans would be developed by lay agencies. Moreover, it became obvious that prepaid plans could provide a substantial additional source of legal business for the profession. It was clear that it would be necessary to change the Code of Pro-

fessional Responsibility, particularly section 2-103(D)(5), if prepaid plans were to be developed. Most state bar associations and the Section of General Practice of the American Bar Association regarded open panel plans as the only acceptable plans. All of the objections voiced to broadening section 2-103(D) in 1969 were now concentrated against the closed panels. It is against this backdrop that the struggle to remove the restrictions of the 1969 Code was played at the Mid-Winter meeting of the American Bar Association in Houston, Texas in February, 1974.

V. THE HOUSTON COMPROMISE

Prior to the Mid-Winter meeting of the American Bar Association in February, 1974, the Standing Committee on Ethics and Professional Responsibility, after long study, circulated its proposed revisions of the Code relating to group legal services, dated September 1, 1973. It held a widely noticed public meeting at which it received various points of view and numerous written comments.

Its brief explanation of the proposed amendments should be noted in full. It said:

This Committee is charged with the duty of recommending appropriate amendments to the Code of Professional Responsibility. Particularly after the decision of the United States Supreme Court in the UTU case, attention was directed to whether DR 2-103(D)(5) which deals generally with group legal services, is constitutional and, in any event, whether it is reasonable, workable and effective, especially in view of the increasing popularity and variety of group legal service plans. The approval by the House in August, 1972, of interim standards to be met by all plans providing for pre-paid legal services further focused attention on their ethical aspects.

Initially, the Committee rendered Formal Opinions 332 and 333 to interpret the Code as it applies to cooperation with prepaid legal service plans. These dealt with open panel and closed panel plans, respectively, and ruled that neither type was per se a violation of the Code.

The primary changes being proposed by the Committee are designed to eliminate the portions of DR 2-103(D)(5) which we believe to be of doubtful constitutionality under the UTU decision; to require, as a matter of ethics, compliance by the general category of group legal service organizations with applicable laws, rules of court and other legal requirements (the new subdivision (e) of DR 2-103(D)(5)); to bar such organizations initiated by lawyers for personal gain (the new subdivision (f)); and to make the ethical requirements reasonable.

In considering these proposals it is fundamental to keep in mind that the standards to be met by group legal service organizations are not all a matter of ethics to be governed by the Code. Such regulatory standards as those adopted by the House on an interim basis in 1972, if and when adopted by state or local laws or by rules of court, are embraced in the Code by the new subdivision (e) of
DR 2-103(D)(5). That subdivision of course also makes it obliga-
tory for a qualified legal assistance organization to comply with all
such laws or rules dealing with unauthorized practice.39

The proposed amendments were submitted to the House of Dele-
gates at the Houston meeting. These amendments dealt with all
aspects of the Canons as they related to group legal services.40

In substance the proposed amendments would permit commercial
publicity of organizations designed to provide legal service to mem-
bers of a group plan so long as there is no identification of a law-
ner by name, and would permit lawyers to accept clients recom-
ended by a qualified legal service organization. A qualified legal
service organization was defined so as to make no distinction be-
tween open and closed panels. The requirements for qualification
were substantially liberalized as follows:

(1) The negative, confusing and regressive “controlling constitu-
tion interpretation” damper of the 1969 draft was eliminated.

(2) The test that the primary purpose of the organization could
not include recommending, furnishing or paying for legal service
was omitted so that non-profit organizations could be organized for
the sole purpose of providing legal service.

(3) There was substituted for the limitation against deriving a
financial benefit, “a profit or commercial benefit.”

(4) A member was given the right to select counsel of his own
choice at his expense, unless his arrangement with the group plan
required it to pay the expense.

(5) Compliance would be required with applicable laws, rules
of court and other legal requirements.

(6) Lawyers could not initiate a legal service organization for
the purpose of obtaining financial or other benefits.

Certain of the proposals of the committee with relation to pub-
licity, recommendation of professional employment, and suggestion
of need of legal services were adopted.41

39. Letter circulated by ABA Standing Committee on Ethics and Profes-
sional Responsibility.

40. ABA STANDING Comm. ON ETHICS AND PROFESSIONAL RESPONSIBILITY,
PROPOSED REVISIONS OF CODE OF PROFESSIONAL RESPONSIBILITY RELATING TO
GROUP LEGAL SERVICES (Sept. 1973).

41. Amendments to the CODE OF PROFESSIONAL RESPONSIBILITY, Disci-
plinary Rules 2-101, 2-103, and 2-104.
The major proposal of the committee, relating to DR 2-103(D), was not adopted at the Houston meeting. Instead the proposals of the Section on General Practice were adopted.

The Section on General Practice had made known to the Special Committee its objections to the proposed amendments to DR 2-103 (D) and (D) (5) during the hearings conducted by the Special Committee. In general, it opposed closed panels on the ground that the potential conflicts of interests between the sponsors of closed panel plans and lawyers employed by them may jeopardize the independence, integrity and competence of the profession and that such plans would deny beneficiaries freedom to select their own attorneys. At the Houston meeting, after extensive debate and by a close vote (144 to 117), the amendments proposed by the Section on General Practice were adopted.42

These amendments draw a sharp distinction between what are “qualified legal assistance organizations,” generally defined as bar association sponsored open panel plans, and non-qualified plans, presumably sponsored by unions, trade associations or others which may be an open plan or closed plan. Bar association plans are free of most restrictions and may be profit or non-profit in character. They may not be initiated by a lawyer, his partner or associates for the purpose of providing financial or other benefits to him or to them; lawyers accepting employment from a beneficiary or a plan may not take a matter not covered by the benefits provided in the plan, and the member or beneficiary must be recognized as the client of the lawyer rather than the organization.

Non-bar sponsored plans, except for non-profit organizations, such as the NAACP or ACLU organized to secure constitutional guaranteed rights, are placed under severe restrictions not applicable to bar-sponsored plans, in addition to the restrictions imposed on bar-sponsored plans:

(1) The restrictions that the organization may not have as its primary purpose recommending, furnishing, or paying for legal services, and that the services rendered must be incidental to the primary purpose, are retained. Put another way, an organization may not be created to recommend, furnish or pay for legal services. The organization may not derive a profit or commercial benefit. (The 1969 draft used the broader test of “financial benefit.”)

(2) The member or beneficiary must be free to select his own attorney. In contrast with the Special Committee restriction, the

42. Amendments to the Code of Professional Responsibility, Disciplinary Rules 2-103 and 2-104.
burden of expense must be assumed by the organization rather than by the member or beneficiary.

(3) The Articles of Organization, by-laws, agreements with counsel, schedule of benefits, subscription charges and a financial statement showing income received, expense and benefits paid or incurred are required to be filed with the court or other authority with final jurisdiction for the discipline of lawyers within the state.

The rationale for these restrictions are set forth in a new Ethical Consideration, EC 2-33, which reads as follows:

EC 2-33: Several Supreme Court decisions apparently give constitutional protection to certain organizations which furnish certain legal services to their members under legal service plans which do not provide free choice in the selection of attorneys. The basic tenets of the profession, according to EC 1-1 are independence, integrity and competence of the lawyer and total devotion to the interests of the client. There is substantial danger that lawyers rendering services under legal service plans which do not permit the beneficiaries to select their own attorneys will not be able to meet these standards. The independence of the lawyer may be seriously affected by the fact that he is employed by the group and by virtue of that employment cannot give his full devotion to the interest of the member he represents. The group which employs the attorney will inevitably have the characteristic of a “lay intermediary” because of its control over the attorney inherent in the employment relationship. It is probable that attorneys employed by groups will be directed as to what cases they may handle and in the manner in which they handle the cases referred to them. It is also possible that the standards of the profession and quality of legal service to the public will suffer because consideration for economy rather than experience and competence will determine the attorneys to be employed by the group. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully consider the risks involved before accepting employment by groups under plans which do not provide their members with a free choice of counsel.43

The thrust of EC 2-33 is that without “free choice in the selection of attorneys” the independence, integrity and competence of the lawyer is endangered. The employment relationship, we are told, involves the possibility that lawyers will be directed as to the cases they may handle, how they should handle them, and that the quality of service will suffer because economic considerations rather than experience and competence will determine who is employed.

43. Amendments to the CODE TO PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-33.
These risks are said to be inherent in employment of groups under plans without a free choice of counsel.

The most remarkable aspect of EC 2-33 is that the assumed dangers to the independence, integrity and competence of lawyers arising out of the employment relationship are confined to group plans for legal service. No explanation is offered why lawyers employed on a salaried basis by legal aid agencies, defender offices, or public interest law firms, or by corporations, banks, trust companies and governmental agencies, do not face similar risks. Why the special lack of confidence in lawyers willing to work in group plans? One cannot avoid the conclusion that having concluded that "open panels" are the wave of the future, EC 2-33 rationalizes that conclusion.

The marginal victory of the General Practice Section in securing the adoption of its proposed amendments must be interpreted in the light of the contradictory action of the House of Delegates on another related proposal. Immediately after the adoption of these amendments a resolution proposed by the Prepaid Legal Services Committee calling upon the bar to support without distinction the growth of legal service plans, open and closed, was adopted by the House of Delegates without amendment.

The adoption of the Houston amendments heated up the controversy between proponents of open and closed panels.

A number of significant developments occurred prior to the 1974 annual meeting in Hawaii:

1. The Senate Subcommittee on Representation of Citizen Interests in May, 1974, held two days of public hearings to consider the effect of the Houston amendments on the development of prepaid legal plans and the role of the federal government in this development. An earlier hearing was held in Houston on February 3, 1974.

2. Legal Services were added as a mandatory subject for collective bargaining under the National Labor Relations Act (Public Law 1973, 93-95). This act also provided for a two-year study by the federal government of prepaid legal service.

3. Members of the Antitrust Division of the Department of Justice indicated concern over the Code's restrictions against participation in closed panels, and have taken strong public positions to the effect that the Houston amendments discriminate against closed panel plans and are possibly in violation of the antitrust laws.44

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44. Address by Ass't Attorney General Kauper, Nat. Conference of Bar Presidents, Aug. 12, 1974; Address by Special Ass't to the Ass't Attorney
VI. HAWAII—PAUSE FOR REFLECTION

Prior to the Hawaii meeting the Special Committee on Prepaid Legal Services submitted a report recommending a reversal of the Houston amendments and the adoption of the amendments proposed by the Committee on Professional Responsibility with minor variations. To avert another divisive debate, the Board of Governors recommended to the House of Delegates a resolution restating the commitment of the A.B.A. to the principle that high quality legal services should be available to all and for experimentation with prepaid legal services in furtherance of this principle. The resolution recognized that the Houston amendments may involve complex questions of Constitutional and statutory law, and stated that the Association had retained counsel to advise it with respect to these questions. The resolution created a special Ad Hoc Study Group, consisting of representatives of American Bar Association Committees concerned with legal services: the Special Committee on Prepaid Legal Services, the Standing Committee on Legal Aid and Indigent Defendant, the Consortium on Legal Services and the Public. Added were two representatives from the Section on General Practice, a representative of the Standing Committee on Ethics and Professional Responsibility, and a member of the Board of Governors. The President, or his designee was named as convenor and chairman of the Ad Hoc Group. The Committee was directed to consult with the Association's counsel, with State Bar Associations, with concerned groups within the Association and to make Recommendations to the House of Delegates at the February, 1975, meeting. The resolution was adopted.

As of the date this article was written, the Ad Hoc Study Group has submitted preliminary recommendations for proposed amendments to the Code for comment and for public hearing. Those recommendations taken as a whole are a vast improvement over the Code provisions adopted in Houston:

(1) To begin with, a new Ethical Consideration is substituted for EC 2-33, which reads as follows:

General, Joe Sims, Committee on Professional Ethics, New York State Bar Ass'n, Aug. 21, 1974. In supporting revision that would eliminate discrimination against closed panels, both speakers made specific suggestions for revision of the disciplinary rules to deal with possible abuses.

Amendments to the Code of Professional Responsibility, Disciplinary Rules 2-101, 2-103, and 2-104.
As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and total devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy rather than competence and quality of service determine the attorneys employed by an organization of the legal services to be performed in connection with an organization. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors before accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence regardless of any standards established by the particular organization.

The new Ethical Consideration implies a positive faith that a lawyer is capable of determining for himself what action will interfere with his ability to maintain the basic tenets of the profession: independence, integrity, competence and total devotion to the interests of individual clients. Unlike EC 2-33 which was directed to lawyers participating in closed panels, the new Ethical Consideration makes no distinction between participation in open panels or closed panels.

(2) DR 2-101(B) relating to advertising is amended by substituting the proposal made by the Standing Committee on Ethics and Professional Responsibility to the House of Delegates at the Houston meeting. The primary change is to extend the right of any organization to publicize by dignified means, specifically without identifying any lawyer by name, the availability or nature of its legal services or legal service benefits, to qualified legal assistance organizations. The term "qualified legal service organizations" is defined to include organizations which recommend, furnish or pay for legal services to its members or beneficiaries, whether by open or closed panels. The Code as revised in Houston limited the privilege of such publicity to bar-sponsored plans which involved only open panels.

46. Proposed Amendments to the Code of Professional Responsibility, Ethical Consideration 2-33.
(3) DR 2-103, relating to recommendation of professional employment is amended by eliminating the distinction made between bar-sponsored plans with open panels, generally referred to as qualified legal service organizations, and other organizations with closed panels.

The proposals of the Ad Hoc Study Committee eliminate the flagrant discrimination between open and closed panel plans. Nevertheless, there remain some restrictions on closed panel arrangements which appear to have no valid justification and which apparently are included to placate lawyers opposed to closed panels.

DR 2-103(D) (4) (a) requires any organization which employs, selects, recommends, directs or supervises lawyers to be a non-profit organization.

It is difficult to understand the concept of a profit ban. Certainly making a profit is not inherently evil. Law is a profession but it still remains one of the few remaining entrepreneurial occupations. Unless we can separate out a compelling state interest that justifies such a broad ban a serious constitutional issue is raised. The abuses which attach to the profit-making motive apply to lawyers practicing as solo practitioners, in partnerships, and in professional corporations. These abuses are dealt with in other disciplinary rules against excess fees, accepting unmeritorious suits, the various rules concerning conflicts of interest, settlement of multiple claims, over-reaching and advertising. Moreover, limiting rendering of legal services to non-profit organizations does not eliminate the possibility of abuse. Non-profit organizations may funnel profits into high salaries and other forms of compensation.

The inclusion of the profit ban would exclude as one method of delivery of legal services, neighborhood law offices of the type operated in Philadelphia for many years and development of low cost legal services offices advocated by Reginald Heber Smith.47

DR 2-103 (D) (4) (b) prohibits the organization or operation of a group plan in such a way as to procure legal work outside of the legal services program of the organization for any lawyer as a private practitioner. This is a restatement of DR 2-104(A) (3) of the Houston amendments which would have prohibited lawyers participating in a closed panel plan from accepting legal work from participants in the plan outside of the plan. It would clearly

47. See note 14, supra.
be inapplicable to lawyers participating in open panel plans since presumably clients coming to them are selecting a lawyer of their own choice.\textsuperscript{48}

One may inquire what ethical consideration is served by restricting clients from choosing a lawyer to do their legal work whom they find congenial and competent on the basis of their experience with him. The danger or temptation of solicitation is amply covered by other provisions of the Code and applies to lawyers functioning in all contexts.

The rule as written places the burden on the organization to structure the plans so as to prevent lawyers from receiving "legal work or financial benefit" outside the plan. It is not clear what "financial benefit" as distinguished from "legal work" might inure to a lawyer in such a plan. If the fear is that a participant lawyer would accept additional compensation or a gift from a participant, such questionable conduct could be simply handled by barring such conduct as a condition of employment. But such a financial benefit would not be "outside of the legal services organization." It is not clear what conduct the provision is intended to reach.

On Constitutional grounds it would be hard to justify denying to an organization the right to operate a plan because the effect of the plan may be to give some law business outside the plan to participating lawyers. On the merits, is it a disservice to the public if, as a result of a group plan, clients are placed in contact with lawyers they may desire to use for other legal work? Why should a client who has entered into a relationship with a lawyer he has found satisfactory be denied the right to use that lawyer on other matters not covered by the plan?

The restriction appears to be motivated by the fear that lawyers participating in the plan would be placed in a better competitive position than lawyers not participating, and that the restriction is designed to protect the non-participating lawyer. Such a consideration hardly satisfies the Constitutional requirement of a compelling state interest.

DR 2-103(D)(4)(c) would bar a lawyer from initiating or promoting a plan for a financial benefit to him. This restriction serves no ethical purpose. The pecuniary motive inherent in the private practice of law does not make that practice unethical. Lawyers are admonished to render legal services to all persons who need

\textsuperscript{48} For the discussion relating to Disciplinary Rule 2-103(D)(4)(b)(c)(d) and (g) I have drawn extensively on the comments of the Chicago Council of Lawyers, December 6, 1974, to the Ad Hoc Committee.
them. Participation in the establishment of new organizations is consistent with this ethical obligation.

Bar associations may initiate and promote organizations to provide group legal service. The restriction would apparently inhibit such sponsorship if members of the bar association participate in the plan unless there be a presumption that such lawyers were not motivated by a desire to participate when the plan was proposed.

A positive factor for lawyer participation from the point of view of professional ethics is that such participation may eliminate or minimize the conflict of interest involved with a "lay intermediary." Other provisions of the Code guard against advertising or solicitation. Insofar as the public is concerned, lawyer participation would not adversely reflect on the dignity of the participation. Indeed, it is likely the public would be unaware of such participation.

Finally, under the rule lawyers would not be barred from encouraging an existing organization to adopt a closed panel plan. There is apparently no ethical difference between initiating a new plan or encouraging an existing organization to adopt a plan.

DR 2-103(D)(4)(e) which preserves the right of a member or beneficiary to select his own counsel is an improvement on the existing restriction D-103(D)(a)(v). The latter would require the organization operating a closed plan to reimburse the member or beneficiary for the fair and equitable fees which it would cost the organization if the organization paid such fees. Subparagraph (e) would substitute reimbursement in "an amount reasonable in relation to the provisions of the plans and to the operation of the plan as a whole." The difficulty lies in the ambiguity of the provision. Does this include a fair portion of the starting up expenses and overhead, or only the out-of-pocket expenses incurred in the specific legal services to be rendered? If the group determines the reimbursement amount is minimal, would it not be reasonable to decide that the administrative burden involved was outweighed by the reimbursement provision? Is there a compelling state interest that would require reimbursement? Certainly, if reimbursement would require payment of an amount equal to the entire out-of-pocket service, the effect would be to make it impossible to operate a closed panel plan. Such a result would be constitutionally indefensible.

DR 2-103(D)(4)(g) requires various reports to the state supreme court or other designated authority. I assume that this provision
applies equally to open panels and to closed panels. If this assumption is incorrect, it is questionable that closed panel plans should be singled out for special treatment. There are many other arrangements, such as contingent fees and referral fees, which would justify reporting requirements of this character. Assuming appropriate safeguard of the attorney-client privilege, I can conceive requiring reporting for all types of legal services, to provide the essential facts for empirical research. Surely, limiting such requirements to closed panel plans would be inappropriate and discriminatory.

The Ad Hoc Committee is to make its final report to the Mid-Year meeting of the American Bar Association scheduled for February, 1975, in Chicago. One may hope that this report will eliminate all restrictions which discriminate against closed panels and that it will be adopted.

CONCLUSION

It is ironic that the strongest force for change in ethical standards to help fulfill the obligation of the legal profession to provide necessary legal services should come as a result of efforts outside the organized bar. This follows the pattern in medical service. As put by a noted labor leader:

This business of the legal problems of consumers is too important to be left entirely to the lawyers. The doctors taught us better. Perhaps because of the complex society in which we live, perhaps because lawyers are supposed to be the purveyors of justice, Will Rogers was so right when he said "Lawyers is everybody's business." 49

This is not to say that lawyers have not exerted effective leadership to bring about change. Within the American Bar Association a number of committees, notably the Special Committee on the Availability of Legal Services, have for a substantial period of time worked diligently to eliminate ethical rules which discriminate against closed panels. Lawyers working independently of the organized bar have been effective in the creation and development of groups such as the National Consumer Center for Legal Services. Of greatest impact has been congressional legislation which has involved the lawyer members of Congress and lawyers working with them.

Because of the possibility of antitrust actions against discriminatory ethical standards, the enactment of amendments to the Na-

49. Leonard Woodcock, President, United Auto Workers, testimony before the Senate Subcommittee on Representation of Citizen Interests, May 14, 1974.
tional Labor Relations Act providing that legal services are a mandatory subject of collective bargaining, the Employment Retirement Income Security Act of 1974 (Public Law 93-406) which introduces the factor of federal pre-emption and sets high standards for persons administering employee benefit plans,\(^5\) and the efforts of important segments of the organized bar, it is possible to predict without qualification that the discriminatory aspects of the Code will be eliminated.

The fulfillment of the obligation of the legal profession to provide legal service to all who need it is an idea whose time has long been with us. At the end of a long and tortuous road, the bright face of the profession will emerge again.

**ADDENDUM**

There is a speculative factor in all predictions, but in the light of events subsequent to the submission of this article, it would appear the dice were loaded. It gives me great pleasure to report that on February 24, 1975, at the Mid-Winter meeting in Chicago of the American Bar Association, Canon 2 was amended to eliminate all ethical distinctions between open and closed panels. In substance, the recommendations of the Ad Hoc Study Group\(^6\) were adopted with several changes which meet some of the criticism expressed. Taken as a whole, Canon 2, as amended, conforms to its aspirations and is a significant step toward extending legal counsel to all persons.

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50. For a discussion of the relevant provisions of this Act and particularly its possible preemptive effect on state action, see 1 ALTERNATIVES: LEGAL SERVICES AND THE PUBLIC, No. 3 at 1-2 (Dec. 1974).

61. See discussion in text at 329-34, supra.