

Ethical Problems in Connection with The Delivery of Legal Services

WALTER P. ARMSTRONG, JR.*

CODE PROPOSALS FOR EXPANDED LEGAL SERVICES TO THE PUBLIC

When the Code of Professional Responsibility was presented to the House of Delegates of the American Bar Association at its 1969 annual meeting by the Special Committee on the Evaluation of Ethical Standards, the only exception taken to any of its provisions was to that dealing with cooperation by a lawyer with an organization engaged in facilitating the delivery of legal services to the public.¹ The Code, as drafted by the Committee, and as ultimately adopted at that time by the House of Delegates, provides that "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." To this,

* B.A., Harvard University, 1938; J.D., Harvard Law School, 1941. Member of the firm of Armstrong, Allen, Bradden, Goodman, McBride & Prewitt, Memphis, Tennessee.

While the author was a member of the ABA Special Committee on the Evaluation of Ethical Standards which drafted the Code of Professional Responsibility and also for a time a member and Chairman of the ABA Standing Committee on Ethics and Professional Responsibility charged with its interpretation, the views expressed herein are his own and should not be attributed to either of those committees.

1. Disciplinary Rule 2-103 (D).

certain exceptions are made; e.g., a lawyer may cooperate in a dignified manner with legal service activities of a legal aid office, a military legal assistance office, a lawyer referral service, or a bar association representative of the general bar of the geographical area.² A fifth exception, however, is the one which precipitated the controversy. It permits cooperation with:

(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 organizations do not include the rendition of legal service.

(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.³

For this, the Association's Special Committee on Availability of Legal Services recommended the following substitute:

(5) Any other organization that recommends, furnishes or pays for legal services to its members or beneficiaries, but only when and if the following conditions are met:

(a) The lawyer shall not have solicited the use of his services by the organization or its members in violation of any Disciplinary Rule in this Code of Professional Responsibility.

(b) The organization shall not derive a profit or commercial benefit from the rendition of legal services by the lawyer.

(c) A written agreement between the lawyer and the organization is in force containing provisions insuring that:

(i) Any member of the organization may obtain legal services independently of the arrangement from any attorney of his choice;

2. The Code was subsequently amended to define such a bar association to include "... a bar association of specialists as referred to in Disciplinary Rule 2-105(A) (1) or (4)." 95 A.B.A. REP. 146, 304 (1970).

3. Disciplinary Rule 2-103(D) (5). This had been substituted by the Committee for the following language which appeared in an earlier draft:

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.

(ii) No unlicensed person will provide legal services under the arrangement;

(iii) Neither the organization nor any member thereof shall interfere or attempt to interfere with the lawyer's independent exercise of his professional judgment;

(iv) The member to whom the legal services are rendered, and not the organization, is the client of the lawyer;

(v) All parties agree that in providing legal services the lawyer must comply with all the Disciplinary Rules contained in this Code;

(vi) The nature and extent of the legal services to be rendered to the members of the group are fully disclosed;

(vii) Any publicity given by the organization to its members will not describe the lawyer beyond giving his name, address and telephone number and such other information as may be required to facilitate the access of a member to the services of the lawyer and any publicity disseminated by the organization to non-members will not identify the lawyer; and

(viii) The agreement will be terminated in the event of any substantial violation of the foregoing provisions.

(d) Such written agreement has been filed with the regulatory agency having authority to discipline the lawyer.⁴

(e) In the case of such an organization created or operated solely or primarily for the purpose of providing legal services, the lawyer shall not render any legal services until there has been obtained from the regulatory agency having authority to discipline the lawyer a certificate stating that the operation of the legal services program complies with all applicable laws and court rules and with these Disciplinary Rules. The certificate shall provide that it will be revoked and the lawyer will terminate his services in the event of any substantial breach of these Rules or of the agreement provided for herein.

The reason for the Committee's recommendation is stated in its report to be that it eliminates "unfortunate and inept language" in the Disciplinary Rule which "furnishes no reliable standard for either the public or the profession, invites further regulation by judicial intervention and places the profession in the deplorable position of conceding with obvious reluctance that we will honor the constitutional rights of our prospective clients—but no more."⁵ At the same time, in the Committee's opinion, the proposed language "greatly strengthens the safeguards which will protect both the public and the profession in the operation of group arrangements [in that] the controls are carefully tailored to preserve the independent exercise of the lawyer's professional judgment and to prevent the exploitation of his services [while the controls remain] perfectly proper under the Supreme Court decisions."⁶

4. 94 A.B.A. REP. 389, 694 (1969). This action was taken pursuant to a reference to that Committee at the Mid-Year Meeting. 94 A.B.A. REP. 138 (1969).

5. 94 A.B.A. REP. 695 (1969).

6. *Id.*

The debate upon the proposed substitute language is instructive, as it raises most of the issues which have since proved fundamental to the problem of the delivery of legal services under the Code of Professional Responsibility. William F. McAlpin, of St. Louis, Chairman of the Special Committee on Availability of Legal Services, moved for the substitute on behalf of the Committee, saying that while both the Committee's proposal and the language of the Code recognized the existence of group legal services, the language of the Code made no provision for disclosure or operational regulation of those services. Furthermore, he said, the Code provision is unworkable, as it leaves open the question of what groups may provide legal services and fails to indicate whose constitutional interpretation is to be applied, which "may lead to confusion where state and federal courts differ." "The rule really is an invitation to further judicial regulation of our profession by more litigation," he declared.⁷

On the other hand, in his words the Committee's proposal "proceeds from the principle that we, by the nature of our profession and by virtue of our exclusive license to practice law, have an obligation, a high obligation, to make our services as readily and fully available to the public as possible, subject only to such safeguards as may be necessary to protect a clearly defined public interest."⁸

William J. Fuchs, of Philadelphia, Chairman of the Section of General Practice, then took up the cudgel in support of the Code provision, saying that a poll of the more than nine thousand members of his section indicated overwhelming opposition to the McAlpin Committee's approach, based upon a belief that the need for more legal services on the part of low and middle income groups can be met through traditional methods coupled with better law office management, better information retrieval systems, legal Blue Cross plans,⁹ and expansion of lawyer referral services. He also suggested allowing a tax deduction for legal fees similar to the medical expense deduction presently allowed.¹⁰

The fundamental objection to the proposal for expanded group

7. 94 A.B.A. REP. 391 (1969). Mr. Smith characterized the opposing arguments as "heifer dust".

8. *Id.*

9. Mr. Fuchs offered no explanation of this reference.

10. 94 A.B.A. REP. 391 (1969).

legal services espoused by the McAlpin Committee, in his view, is that, if adopted,

the laymen will run the practice, and not the lawyers. All the evils that you can imagine will result from allowing laymen to run the law practice and not the lawyers: loss of the independence of the Bar, loss of the traditional client-lawyer relationship, the encroachment of advertising, solicitation and the morals of the marketplace [and] a reduction in the quality of legal services.¹¹

Chesterfield Smith, of Florida, later President of the American Bar Association, supported the McAlpin Committee (of which he was a member), saying that its proposal would regulate group legal services, not expand them, and the choice was whether the legal profession regulates group legal services or whether it leaves the regulation to be determined on a case by case basis.¹² Henry L. Pitts, of Chicago, then rose to the defense of the Code, saying that any liberalization might encourage unions to seek legal services for their members as fringe benefits, as well as the organization of lay groups for the express and sole purpose of furnishing legal services. "Most shocking of all," he concluded, "if this amendment were adopted, it would permit any lawyer employed by the lay agency who has given advice to a layman in the performance of the lawyer's duties for that group then to accept employment and fees from that layman."¹³

Arthur W. Liebold, Jr., of Philadelphia, summed up the argument by saying that he was afraid that members of the profession were looking at what they wanted to see rather than at what the Supreme Court had said. A vote was then taken and, the McAlpin Committee's amendment having failed, the Code was adopted as originally proposed.¹⁴

The decisions of the Supreme Court to which Mr. Liebold referred and which the drafting committee clearly had in mind as the reporter's annotation shows,¹⁵ are *NAACP v. Button*,¹⁶ *Brotherhood of R. R. Trainmen v. Virginia*,¹⁷ and *United Mine Workers v. Ill. State Bar Ass'n*.¹⁸ The first of these validated on constitutional bases¹⁹ a plan under which the N.A.A.C.P. provided the services

11. *Id.*

12. 94 A.B.A. REP. 392 (1969).

13. *Id.*

14. *Id.*

15. See Note 123 to Disciplinary Rule 2-103(D) (5), CODE OF PROFESSIONAL RESPONSIBILITY (Final Draft, at 42, July 1, 1969).

16. 371 U.S. 415 (1963).

17. 377 U.S. 1 (1964).

18. 389 U.S. 217 (1967).

19. Specifically, the first and fourteenth amendments.

of lawyers in civil rights cases despite provisions in the Virginia statutes and the Canons of Ethics which apparently would have precluded the same. Thereafter, in the *Trainmen* case, the Court upheld, also on constitutional grounds, an arrangement whereby, in violation of the Virginia statutes and the Canon of Ethics, the Brotherhood channeled F.E.L.A. claims of its members to pre-designated attorneys. In *United Mine Workers* the Court held that a union could retain an attorney to assist its members in specified legal matters.

The basic issue which seems to have divided the two schools of thought in regard to the provisions of the Code when it was adopted appears to be whether these opinions represent a delineation by the Court of the extreme limits to which it is necessary to go in order to protect rights guaranteed by the Constitution, or whether they are merely indicative of a general philosophy which must be permitted to manifest itself in other aspects as well if those rights are to be adequately protected; in other words, as legal jargon has it, whether they should be confined to their specific facts. By permitting the otherwise prohibited activities only "to the extent that controlling constitutional interpretation at the time—requires the allowance of such legal service activities,"²⁰ the drafting committee appears to have adopted the more restrictive interpretation and, as noted, the House of Delegates of the American Bar Association (its official governing body) followed its recommendation. Subsequent events, however, cast grave doubt upon the correctness of this interpretation and upon whether it is presently tenable.

Both the drafting committee and the Special Committee on Availability of Legal Services terminated their activities in August, 1970. In the latter's final report, it noted the filing in July, 1964 of the Progress Report²¹ of the Group Legal Services Committee of the California State Bar, and the signing by President Johnson two months later of the Economic Opportunity Act, to which the American Bar Association, at its Mid-Year 1965 meeting, pledged its encouragement and cooperation in providing legal services for indigents.²² It also noted that the states of California²³ and Florida²⁴

20. Disciplinary Rule 2-102(D) (5).

21. The Committee characterized the Progress Report as "monumental."

22. 95 A.B.A. REP. 754 (1970).

23. Rules of Professional Conduct 20 and 21.

24. Article XIX, Integration Rule of the Florida Bar.

had adopted rules philosophically closer to the Committee's position than to that of the Code; that a poll of the membership of the bar of the District of Columbia indicated a preference of more than two to one for an earlier draft of the Code;²⁵ that the Oregon bar had recommended similar action and the Washington bar was considering doing the same; and that the Supreme Court of Nebraska, while adopting the balance of the Code, had reserved action upon this particular section pending further study.²⁶ From this the Committee concluded:

It seems clear that the last words have neither been spoken nor written on the subject of group legal services. This Committee is advised that numerous groups of citizens are considering providing the services of lawyers to their members through group legal service arrangements of one kind or another. This Committee has regretfully concluded that Disciplinary Rule 2-103(D) (5) as adopted can only lead to further litigation. We are gratified that the courts and the Bars in the states noted are moving in the direction of the kind of enlightened recognition and regulation which alone can avoid further judicial inter-ven-tion. [sic]²⁷

The prediction of the Committee appears not to have been without foundation. In the final adoption of the Code of Professional Responsibility, nine states amended the section cited so as to liberalize its provisions;²⁸ but four deleted it in its entirety,²⁹ thus leaving the rule even more restrictive than before. Much of this was no doubt due, on both sides, to an additional opinion of the Supreme Court in which it appears to put an end to any argument about limiting the *Button*, *Trainmen*, and *United Mine Workers* cases to their facts. In *United Transportation Union v. State Bar of Michigan*³⁰ the Court approved a union legal assistance and referral plan under which the union recommended specific attorneys who had agreed to limit their fees for handling certain legal matters for union members and their beneficiaries, saying:

[T]he principle here involved cannot be limited to the facts of this case. At issue is the basic right of group legal action. . . . The common thread running through our decisions in *NAACP v. Button*, *Trainmen* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.³¹

25. See note 3, *supra*.

26. 95 A.B.A. REP. 759 (1970).

27. *Id.*

28. Florida, District of Columbia, Missouri, Tennessee, Oregon, Hawaii, Washington, Montana, New Mexico.

29. Louisiana, Mississippi, Iowa, Idaho.

30. 401 U.S. 576 (1970).

31. *Id.* at 585 (emphasis added).

In February, 1968, a Special Committee on Legal Services Insurance had been created by the Board of Governors of the American Bar Association³² on the recommendation of the Committee on Availability of Legal Services³³ for the purpose of "limited experimentation with various insurance plans."³⁴ This it accomplished by the institution of two experimental prepaid legal service plans, one an insurance pilot project in Los Angeles, California (jointly sponsored by the Association and the Los Angeles County Bar Association with the financial assistance of the American Bar Endowment, the Ford Foundation, and the Los Angeles County Bar Association), and the other, a pilot project in Shreveport, Louisiana (jointly sponsored by the Association, the Shreveport Bar Association and the Louisiana State Bar Association with the financial assistance of the Association and the Shreveport Bar Association).³⁵ In May, 1970, the Board of Governors transferred the jurisdiction of this Committee to a newly created Special Committee on Prepaid Legal Cost Insurance,³⁶ which assumed the duties of the subsequently terminated³⁷ Committee on Availability of Legal Services.³⁸ In October, 1970, the Committee reported to the Board that its initial investigations had revealed the magnitude of the legal cost insurance problem, the rapidly spreading interest in the program, and the complexity of the legal ramifications involved. In recognition of the volume and urgency of the Committee's work, the services of a full time staff attorney were authorized, and the Committee was empowered to approach law schools and foundations for research assistance.³⁹ Such staff assistance was obtained⁴⁰ and, in August, 1971, the name of the committee was changed to Special Committee on Prepaid Legal Services,⁴¹ under which name it continues to be active.

In a report to the 1970 annual meeting, the Special Committee on Availability of Legal Services recommended to the American

32. 93 A.B.A. REP. 125, 143 (1968). One member of the House of Delegates characterized this action as "a first step towards legal socialism."

33. 93 A.B.A. REP. 125, 231 (1968).

34. 93 A.B.A. REP. 143 (1968).

35. 95 A.B.A. REP. 586 (1970).

36. *Id.*

37. The Committee's final report appears at 95 A.B.A. REP. 754 (1970).

38. 95 A.B.A. REP. 586, 587 (1970).

39. 96 A.B.A. REP. 168 (1971).

40. 96 A.B.A. REP. 282 (1971).

41. 96 A.B.A. REP. 517, 723 (1971).

Bar Association that it sponsor an expanded program of institutional advertising and public relations to educate members of the public to recognize their legal problems and the need for legal services.⁴² In doing so, the Committee recognized that although advertising by legal aid agencies was still sometimes challenged, the Standing Committee on Ethics and Professional Responsibility had issued an opinion that it is permissible for such agencies to advise the poor of the availability of legal services to solve their problems,⁴³ and pointed out that the Code of Professional Responsibility obligates the legal profession "to educate laymen to recognize their legal problems to facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available."⁴⁴ The Committee then noted:

In attempting to aid middle income individuals to recognize legal problems, it has from time to time been suggested that the prohibitions on advertising and solicitation by individual practitioners be relaxed. Barlow F. Christensen, in his study entitled "Bringing Lawyer and Clients Together," published by the American Bar Foundation in 1968, ably argues that lawyers should "be free to engage in many of the activities now prohibited as 'advertising and soliciting,' provided they did so in a 'dignified manner.'" Within this restriction, an attorney would be allowed more directly to assist individuals to recognize their legal problems. In a limited sense, this is now being done. Attorneys are permitted to write books and for other publications. They may give public addresses on legal questions of general interest. Further, as stated in Disciplinary Rule 2-104 of the Code of Professional Responsibility they may give laymen unsolicited advice to seek legal services; however, employment can only be accepted in such instances if the advice is given to a close friend, relative or former client, or if the arrangement comes within other enumerated categories of the Disciplinary Rules.⁴⁵

The Committee makes it clear, however, that its proposal is not for any relaxation of the ethical prohibition against advertising by individual lawyers, but for a program of institutional advertising and public relations designed to educate the public about serious legal problems, again citing the Code of Professional Responsibility in support of its position:

[L]awyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities

42. 95 A.B.A. REP. 751 (1970). The recommendation was approved. 95 A.B.A. REP. 545 (1970).

43. ABA INFORMAL OPINION 992 (1967).

44. Ethical Consideration 2-1.

45. 95 A.B.A. REP. 752 (1970).

include preparation of institutional advertisements⁴⁶

LEGAL AID AGENCIES AND CLINICS

The American Bar Association Standing Committee on Ethics and Professional Responsibility, which under the Association's by-laws is charged with the duty both of interpreting the Code of Professional Responsibility and recommending appropriate amendments to it,⁴⁷ has dealt with this problem on several occasions.⁴⁸ Most often, it arises in connection with the operation of legal aid agencies. The objectives of these agencies are stated by the Committee to be as follows:

Recent years have fortunately witnessed a burgeoning of legal aid programs for the poor and others unable to afford reasonable fees for legal services. Subject to local variations, legal aid programs have as their goals one or more of the following: (1) providing legal assistance for persons unable to afford the cost of legal services; (2) educating the community as to the existence of legal problems; (3) achieving law reforms through suggested legislation or test cases; and (4) conducting research into the substantive and procedural law affecting the poor and others whom legal aid programs serve.⁴⁹

On August 9, 1970, the Committee promulgated a formal opinion⁵⁰ which, assuming these ends to be desirable, directed itself to the degree to which lawyers cooperating with a legal aid agency could allow their activities to be controlled by lay directors of the agency and still come within the ethical requirements of the Code of Professional Responsibility.⁵¹ Quoting Canon 5 to the effect that "A lawyer should exercise independent professional judgment on behalf of a client,"⁵² and also DR 2-103(D) (1) and DR 5-107(B), the Committee reached the conclusion that these provisions "militate

46. Ethical Consideration 2-2.

47. ABA BY-LAWS § 30.7.

48. ABA FORMAL OPINIONS 179, 205, 227 and 307, all promulgated prior to the adoption of the Code of Professional Responsibility. However, in Formal Opinion 191, the Committee held that advertising by lawyer members of a non-bar association sponsored plan violated Canon 27.

49. ABA FORMAL OPINION 324 (1970).

50. *Id.*

51. Particularly Disciplinary Rules 2-103(D) (1), 4-101(B) (1) and 5-107(B).

52. And also referring to Ethical Considerations 5-1, 5-21, 5-23 and 5-24 thereunder.

against any interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff attorney."⁵³ Accordingly, the Committee held that the relationship between a board of directors of a legal aid society and the society's staff attorneys should be governed by certain principles. Such principles would entail limiting the board's function to that of formulating broad goals and policies of the society. To this end the board could establish guidelines respecting the categories or kinds of clients staff attorneys could represent and the types of cases they could handle. The board could also require staff attorneys to disclose such information about clients so as might be necessary to determine if the broad policies of the society are being carried out.⁵⁴

The Committee subsequently elaborated upon this view in an informal opinion⁵⁵ holding improper a requirement that a legal clinic operated by a college of law obtain the approval on a case-by-case basis of a committee consisting of the dean and faculty members before such clinic undertook representation. The Committee stated:

. . . the case-by-case review makes it likely that the independent judgment of the five clinic lawyers and their loyalty to their clients will be impaired. Thus the proposed limitations in the third proposal violate the professional ethics and responsibilities of the Dean and of the lawyer-directors of the clinic. The fact that the Dean is a lawyer is not relevant for the reason that the Ethical Considerations and Disciplinary Rules of Canon 5 do not contemplate an exception permitting outside influence by one who happens to be lawyer.⁵⁶

Nevertheless, in a later informal opinion⁵⁷ the Committee held that there is nothing improper in the establishment of a committee of a state bar to oversee the operation of a legal services program, in a purely advisory capacity, for the purpose of assuring compliance with guidelines formulated by the Office of Economic Opportunity, and that a requirement of prior consultation with such a committee is likewise not improper. However, in the same opinion, the Committee held that a requirement of prior approval by the Executive Director of such a program on a case-by-case basis before any class action is filed is improper. The opinion does not seek to rationalize these holdings but merely cites the formal and informal opinions cited above as authority.

53. ABA FORMAL OPINION 324 (1970).

54. *Id.*

55. ABA INFORMAL OPINION 1208 (1972).

56. *Id.* at 3.

57. ABA INFORMAL OPINION 1232 (July 14, 1972).

This opinion aroused a veritable storm of protest among those actively engaged in the operation of legal aid agencies. On January 8, 1973, the chairman of the Standing Committee on Legal Aid and Indigent Defendants of the National Legal Aid and Defender Association (NLADA) addressed on behalf of his Committee a letter⁵⁸ to the chairman of the ABA Committee on Ethics and Professional Responsibility seeking some modification of the latter committee's views as expressed in the informal opinion referred to above. In that letter, the Committee supports the establishment of a pure liaison committee, if that is truly the function conceived for it, citing the standards of its own organization on the subject of "Relations with the Bar":

Every legal aid organization should seek to establish working relationships with the organized bar and other attorneys in the community and should vigorously pursue efforts to gain understanding, participation, and support from them. A Liaison Committee can usefully perform some of this function.⁵⁹

However, the letter expresses doubt that this is truly the intended function of the contemplated committee, as its charge to assure compliance with OEO guidelines implies an investigative function. Accordingly, the letter continues:

Beyond subjecting legal services attorneys to a special form of professional oversight or scrutiny not applied to private practitioners this committee will needlessly duplicate functions of existing bodies. First, there is no reason to expect that the standards embodied in the Code of Professional Responsibility and enforced by appropriate committees of local bar associations will provide insufficient protection against improper conduct by legal services attorneys.

Second, Formal Opinion 324 recognized that the Board has the obligation to ensure that its policies are being carried out by the staff. It can be assumed that such policies are in line with the Economic Opportunity Act, OEO Guidelines and grant conditions or the grant to the program would not be made by OEO. If there are complaints against the activities of the program the above finding of Formal Opinion 324 dictates that the board, at least insofar as the allegations refer to activities which violate the board's guidelines, should properly hear these complaints. If the complaints allege a violation of the Economic Opportunity Act or OEO Guidelines by the legal aid society, the complaint should be made to OEO as a function of its responsibility to monitor the activities of its grantees. In this regard Section 222(a) (3) of the Economic Opportunity Act and OEO instruction 6140-1, dated June 13, 1969, already ade-

58. Reproduced in full at 31 NLADA BRIEFCASE 381-83 (1973).

59. NLADA STANDARDS AND PRACTICES FOR CIVIL LEGAL AID No. 16.

quately provide for the state and local bar associations in the community served by the Legal Aid Society to be consulted by OEO and afforded ample opportunity to submit to OEO comments and recommendations on the operations of the project. Informal Opinion 1232 stated that your Committee did not 'think that the existence of this committee to perform the functions outlined in the correspondence . . . violates the Code of Professional Responsibility.' If that is true, we respectfully submit to our brethren that the true reason therefore is that the Code was not drafted with an eye to these kinds of situations. Rather, the situation presented is more in the nature of a political question, one that neither the Code nor your Committee was established to answer. Stating that the condition does not violate the Code may leave the reader with the impression that the Code approves of such conduct. If the question is one for which the Code does not provide an answer, that should be clearly stated.⁶⁰

The letter also takes issue with the opinion on the question of control by the Executive Director. It again cites the NLADA standards upon this point which notes that the internal operation of a legal aid organization should follow the model of a private law firm. "Like senior partners, the directing or executive attorneys must have final authority over the decisions that are made by the legal staff."⁶¹

On February 27, 1974, the ABA Committee on Ethics and Professional Responsibility declined to reconsider its opinion, saying "the Committee does not see how it can be a violation of the Code to require consultation with a committee of lawyers if that is desired."⁶² Thereafter, the Committee released another informal opinion predating both its refusal to reconsider and the NLADA letter,⁶³ holding a restriction upon legislative advocacy on behalf of qualifying clients to be permissible, on the grounds that the Code's prohibition against interference with attorneys' exercise of independent judgment does not render improper rules of the organization prohibiting staff attorneys from undertaking such activities on behalf of clients in the first instance.

Again NLADA requested reconsideration by the Committee, saying:

I [sic] submit that the 'matters' these attorneys undertake on behalf of their clients are the problems poor people come to the lawyer for professional assistance in resolving and that restricting these lawyers from utilizing certain services or legal tools on their clients' behalf, such as legislative advocacy or litigation if the other party is a governmental agency, is a most dangerous encroachment

60. 31 NLADA BRIEFCASE 383 (1973).

61. NLADA STANDARDS AND PRACTICES FOR CIVIL LEGAL AID No. 12.

62. ABA INFORMAL OPINION 1262 (1973).

63. ABA INFORMAL OPINION 1252 (1972). Actually the opinion was not released publicly until March, 1973.

on the ethical foundations of the profession, discriminates against those attorneys because they are being paid for by someone other than the client, and prevents their clients from receiving full, competent, professional representation, simply because they cannot afford to pay for the services.⁶⁴

And again the NLADA standards were cited, this time to the following effect:

Assistance furnished by the organization should encompass all legal work required by the case, including representation before administrative, judicial, and legislative bodies. Appeals should be taken in all cases where appellate review might result in a decision that would better the condition or enhance the legal rights of the persons served by the organization and if such an appeal is in the interest of and desired by the client.⁶⁵

A comment appended to this standard appears to be in direct conflict with the informal opinion:

The type of service available to a legal aid client should not be limited by the forum in which assistance is needed. If clients seek representation in securing changes in legislation or in presenting contentions before county boards or city councils or in procuring loans from a bank or governmental agency, nothing in the nature of legal aid work or the functions of the legal aid lawyer should preclude such assistance being given. In like manner, if the case requires presentations to an appellate court, there should be no rule or standard preventing such representation.⁶⁶

In the September, 1973, issue of the *American Bar Association Journal*,⁶⁷ the Committee on Ethics and Professional Responsibility published notice of a public hearing to be held in San Diego, California on October 25, 1973, during the annual meeting of the NLADA for the purpose of discussing the following issues:

(1) Canon 2 requires a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available. To what extent

64. 31 NLADA BRIEFCASE 462 (1973). In an earlier statement, the NLADA had stated that the two earlier opinions "exhibited little sensitivity to the letter and spirit of the ABA's own Code of Professional Responsibility, especially as it applies to legal service attorneys," that they were obviously "arrived at intentionally," and that the later opinion and the reasons supporting it "exhibit the most serious misunderstanding yet by the Ethics Committee of the manner in which restrictive conditions allow political and other improper pressures to interfere with the kind of professionalism legal service attorneys strive for in living up to their obligations under the Code." *Id.* at 383.

65. NLADA STANDARDS AND PRACTICES FOR CIVIL LEGAL AID No. 9.

66. *Id.*, comment.

67. 59 A.B.A.J. 976 (1973).

may a nonprofit legal assistance office publicize its activities and those of the lawyers acting on its behalf without a violation on the part of those lawyers of the prohibition against solicitation? (D.R. 2-101, D.R. 2-102(A), D.R. 2-103(A) and (B), and D.R. 2-104(A).) To what extent may a nonprofit legal assistance office suggest to individuals that its services be utilized without the lawyers acting on its behalf violating the rule against barratry? (D.R. 2-104.)

(2) Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. To what extent may the organizational rules and regulations or operational methods of a nonprofit legal assistance office limit or restrict the activities of lawyers acting on its behalf without placing those lawyers in violation of the rule requiring the exercise of their independent judgment in legal matters? (D.R. 5-107(B).) To what extent may a non-profit legal assistance office act on behalf of various clients without causing the independent professional judgment of the lawyers acting for them to be adversely affected? (D.R. 5-105(B).)

(3) Canon 4 requires a lawyer to preserve the confidences and secrets of a client. To what extent may a nonprofit legal assistance office allow its activities to be examined and administered without violating the rule requiring the preservation of the confidences and secrets of a client? (D.R. 4-101.)

(4) Canon 3 requires a lawyer to assist in preventing the unauthorized practice of law. To what extent may a nonprofit legal assistance office subject itself to the control of laymen or lay organizations without the lawyers acting on its behalf violating the rule against associations between lawyers and laymen for the handling of legal matters? (D.R. 3-102 and 3-103.)⁶⁸

The hearing was held and produced a substantial response including numerous suggestions for liberalizing the Committee's position in regard to the activities of legal services lawyers.⁶⁹ In response, the Committee prepared and published in the March, 1974, issue of the *American Bar Association Journal*⁷⁰ a draft of a new formal opinion⁷¹ dealing with the subject, which was promulgated in its final form on August 10, 1974.⁷²

This opinion deals with the subject under three headings: publicity, independence of professional judgment, and preservation of confidences. As to the first, it makes no radical departure from preexisting opinions on the subject⁷³ except to interpret one of them⁷⁴ to permit a legal service office to advertise its availability to handle a certain type of litigation desired to test a specific legal

68. *Id.*

69. *See Ethical Aspects of Restrictions on (Non-Profit) Legal Assistance Offices*. NLADA, 1973.

70. 60 A.B.A.J. 329 (1974).

71. ABA FORMAL OPINION 334.

72. *See generally* 60 A.B.A.J. (October, 1974).

73. Primarily, ABA INFORMAL OPINIONS 1172 and 1227.

74. ABA INFORMAL OPINION 1234.

situation, although it may not solicit individual plaintiffs for that purpose. However, under the heading of independence of judgment, while previous opinions on the subject⁷⁵ are generally reaffirmed, it is made clear that once a staff attorney has undertaken to represent a client no limitation can be placed upon the means which he uses to do so other than that prescribed by the Code of Professional Responsibility itself, and no requirement of prior consultation which would interfere with this right can be permitted. However, the requirement of prior approval of a senior attorney in a legal services office was expressly upheld. The Committee stated:

It must be recognized that an indigent person who seeks assistance from a legal services office has a lawyer-client relationship with its staff of lawyers which is the same as any other client who retains a law firm for a fee. It is the firm, not the individual lawyer, who is retained. In fact, several different lawyers may work upon different aspects of one case, and certainly it is to be expected that the lawyers will consult with each other upon various questions where they may seek or be able to give assistance. Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers, the chief attorney, or the executive director (if a lawyer), as the case may be, just as associates of a law firm are subject to the direction and control of their seniors. Such internal communication and control is not only permissible but salutary. It is only to control the staff lawyer's judgment by an external source that is improper.⁷⁶

On the question of seeking legislative relief on behalf of clients of a legal services office, the Committee interpreted its former opinion⁷⁷ as follows:

The opinion certainly does not hold that a lawyer employed by a legal services office may not engage in law reform or seek to secure the passage of legislation. In fact, it says specifically that 'any lawyer, whether he drafted legislation for a client or not, may of course as a citizen, gratuitously engage in activities of a political nature in support of it.'

What the opinion does hold is that the governing body of a legal aid society may broadly limit the categories of legal services its lawyers may undertake for a client, and that in doing so it may, but need not, exclude political activity and lobbying. There are three important qualifications inherent in this statement. First, in the absence of such affirmative action by the board, no such limitation exists. Second, the action of the board must be a broad limitation upon the scope of services established prior to the ac-

75. ABA FORMAL OPINION 324; ABA INFORMAL OPINIONS 1232 and 1252.

76. ABA FORMAL OPINION 334.

77. ABA INFORMAL OPINION 1252.

ceptance by the staff lawyer of representation of any particular client, and preferably made known to its public and staff in advance like any other limitation on the scope of legal services offered. Once that representation has been accepted, under DR 5-107(B) and DR 7-101 nothing can be permitted to interfere with that representation to the full extent permitted by law and the disciplinary rules, including, of course, legislative activity.⁷⁸

On the subject of preservation of confidences, the Committee again reiterates the holding of an earlier opinion⁷⁹ to the effect that under proper safeguards such information as is necessary for reasonable research and statistical study as well as for the normal operation and supervision of the legal services office may be made available.

Finally, the Committee concludes:

Viewing the problems discussed above on the aspirational level of the code's ethical considerations, we stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist. All lawyers should support all proper efforts to meet the public's need for legal services.⁸⁰

GROUP LEGAL SERVICES

Meanwhile in the area of group legal services a similar re-evaluation was taking place. At the annual meeting of the American Bar Association in 1970 the General Practice Section had opposed any liberalization of the Code of Professional Responsibility, saying:

The Section has opposed the expansion of "Group Legal Services" beyond that already permitted by various Supreme Court decisions, on the basis that expanded "Group Legal Services," including the practice of law by laymen-dominated groups organized solely for the purpose of practicing law, would inevitably destroy the independence of the Bar. The quality of legal services would diminish. The advertising that even the proponents of "Group Legal Services" admit will necessarily accompany the new group practice, would reduce the legal profession to the level of the ordinary market place.⁸¹

Nevertheless the Special Committee on Legal Cost Insurance re-

78. ABA FORMAL OPINION 334.

79. ABA INFORMAL OPINION 1081. An earlier report of an American Bar Foundation committee studying Wisconsin Judicare took the position that "the threat that divulging such minimal information poses to 'privilege,' 'confidentiality,' or 'personal privacy' has been overstated, and the result in fact is to exhibit more concern for the sensitivities of those delivering the service than for those receiving it."

80. ABA FORMAL OPINION 334. Cf. Ethical Consideration 2-25.

81. 95 A.B.A. REP. 1111 (1970).

ported to the Mid-Year meeting of the Association in the following year, that

there is a developing demand in a representative cross-section of communities and groups across the country for prepaid legal service arrangements [which] will probably increase [with] a fairly well defined trend towards group legal services in some areas based largely upon the relative speed and simplicity (and some possessiveness by the lawyers involved) as compared with the more complex insurance program, requiring the bar if it is interested in fostering and promoting plans based upon insurance principles and incorporating the concept of free choice of attorney—[to] be prepared to move swiftly to cut through the myriad problems involved in setting up such programs.⁸²

And six months later, it reported to the annual meeting that during the interval it⁸³ had received over 200 inquiries regarding prepaid legal services, at least ninety percent from lawyers and covering four-fifths of the states of the United States, England and Canada. From this it concluded that "It is clear that there is a growing interest by the profession in exploring prepaid legal services."⁸⁴

The next year saw the publication of an extensive study funded by the American Bar Foundation of the responsibility of the bar for the delivery of legal services in which the following statement is made:

The profession has a duty. Fine! But nowhere has the Code spelled out a duty on the part of the individual practitioner. The Ethical Considerations in Canon 2 prayerfully suggest that the individual will take the responsibility of serving those who cannot normally pay for services. What is prayed for in the Ethical Considerations is negated by the Disciplinary Rules. There one finds not the slightest hint of disciplinary action against a lawyer who refuses to take a client who cannot pay, or an unpopular client, or a client who is unable to get service elsewhere. In fact, the old ethical standards are retained. Discipline is promised only to those who would seek to aid a client through other than approved channels.⁸⁵

82. 96 A.B.A. REP. 283 (1971).

83. And the Shreveport and Los Angeles projects, which it sponsored.

84. 96 A.B.A. REP. 283 (1971).

85. F. MARKS, K. LESWING & A. FORINSKY, *THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY* 263 (1972). The report elsewhere stated, however, that the Code of Professional Responsibility "reflected an understanding of the need to extend services to new groups through existing forms of professional organization, and contemplated the probable emergence of new forms." *Id.* at 187, citing Ethical Consideration-25 [sic].

To this challenge the Committee on Ethics and Professional Responsibility responded with two opinions⁸⁶ rendered on the same day, the first upholding cooperation by lawyers with a so-called "open panel" group legal services arrangement provided their professional judgment remains unimpaired and there is otherwise compliance with the Code of Professional Responsibility,⁸⁷ and the other holding that cooperation with a so-called "closed panel" plan is not per se improper.⁸⁸ In the first of these, the Committee had before it certain standards proposed by the Committee on Prepaid Legal Services and adopted by the House of Delegates with the amendment that the Association "strongly urges that each plan provide that the members or beneficiaries have freedom of choice of attorneys ['open panel'] in the rendering of legal services under the plan."⁸⁹ Under these circumstances, the Committee felt the function of the plan was to serve as no more than "a source of funds with which to pay the attorney." Further, it was held that the publicizing of the plan as such did not constitute a violation of the canonical provision against solicitation, but was merely institutional advertising. The Committee, therefore, did not consider whether such a plan came within a permissible exception to DR 2-103 (D).

In the case of "closed panel" plans, however, the Committee held that "it is a question of fact in each situation whether an acceptance of employment under the plan violates any of the three rules," that is, against publicity, promoting the use of the lawyer's services, and obtaining employment as the result of unsolicited advice. Even if there were a violation of one or more of these rules, the panel noted, the plan might still come within one of the exceptions created by DR 2-103 (D).

The opinions represented a substantial advance from the Committee's earlier position but still it was not enough. As John G. Bonomi stated in his very informative remarks delivered at a conference on prepaid legal services in Washington, D. C. on April 28, 1972:⁹⁰

[A]ny thoughtful consideration of Disciplinary Rule 2-103 inevitably leads to one conclusion: This Disciplinary Rule was not designed to cope with the solicitation and other ethical problems presented by the legal service plans which have been published since 1969. While this Disciplinary Rule was an adequate instrument for regulating solicitation under the conventional union sponsored

86. ABA FORMAL OPINION 332 (1973); ABA FORMAL OPINION 333 (1973).

87. ABA FORMAL OPINION 332 (1973); 59 A.B.A.J. 442 (1973).

88. ABA FORMAL OPINION 333 (1973); 59 A.B.A.J. 443 (1973).

89. See generally 97 A.B.A. REP. (1972).

90. See Disciplinary Rules 2-101(B), 2-103(D) and 2-104(A).

legal service plans, the framers of the Code did not and could not have foreseen the type of plans which have emerged over the past three years.⁹¹

Obviously some alteration in the Code itself was needed. So, in October, 1973, the Committee gave notice of another public hearing⁹² to be held in Chicago on December 1 of that year. Again the hearing was well attended, and a variety of views were expressed. Out of it came proposals for changes in the Code of Professional Responsibility which were presented to the House of Delegates of the Association at its Mid-Year 1974 meeting.

Meanwhile, forces outside the legal profession were converging to bring pressure for changes in the Code. On September 20, 1973, the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee⁹³ began its hearings, in the course of which the American Bar Association was called upon to express its views. In a letter to Senator Tunney, the Committee's Chairman, Chesterfield Smith, President of the American Bar Association, stated that "there is no activity of the Congress which is more important to the American Bar Association and to the national legal profession for which it speaks than that of your subcommittee; nor is there in my judgment any other congressional activity which has a greater possibility for lasting benefit for the citizens of our country in our never ending search for equal justice for all."⁹⁴ President Smith pledged the cooperation of the officers and staff of the American Bar Association, and noted the pending report of a survey of legal needs and the utilization of legal services initiated by the Association⁹⁵ as well as the recent appointment in May, 1973, of a Special Committee on the Delivery of Legal Services⁹⁶ which was

91. Transcript of proceedings, National Conference on Prepaid Legal Services, American Bar Association at 142. Mr. Bonomi while not a member of the drafting committee for the Code, met with it on numerous occasions.

92. 59 A.B.A.J. 1189 (1973). The Committee circulated its proposed changes in the Code widely prior to the meeting.

93. Under the Chairmanship of Senator John V. Tunney (hence the "Tunney Committee"). An informative report on "Reducing the Costs of Legal Services" was prepared for the Subcommittee by Thomas Ehrlich and Murray L. Swartz, deans respectively of the Stanford and University of California Law schools, under date of October 8, 1974.

94. 59 A.B.A.J. 1299 (1973).

95. B. CURRAN & F. SPAULDING, *THE LEGAL NEEDS OF THE PUBLIC* (1974).

96. The Committee filed its joint report at the Mid-Year 1974 meeting of the American Bar Association.

charged with studying alternative methods of providing legal services to various moderate income groups and the public generally, making recommendations concerning the provision of legal services, and educating and involving members of the bar in improving the delivery of legal services.

The proposals made to the Mid-Year 1974 meeting of the House of Delegates for amendments to the Code of Professional Responsibility⁹⁷ are described by the Committee on Ethics and Professional Responsibility as follows:

The primary changes are designed to eliminate the portions of DR 2-103(D) (5) which we believed to be of doubtful constitutionality under the *UTU* decision; to require, as a matter of ethics, compliance by 'qualified legal assistance organizations' (as defined in the recommendations) 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 consistent with the lawyer's 'duty to make legal counsel available.' (Canon 2).⁹⁸

However, the Section of General Practice took issue with these proposed changes, and offered substitute amendments of its own.⁹⁹ The Section's report notes in regard to "closed panel" group legal procedures, that "during the past ten years, this method of delivery has undergone a remarkable expansion," but goes on to state that "to permit the present trend to continue is not in the interest of the public," saying:

Is the closed panel method of delivering legal services likely to provide the public with the quantity and quality of lawyers' time to which it is entitled under our system of government? There is already a disaffection with such institutions, a feeling that in this society the individual counts for too little. A union member will not be able to distinguish a union lawyer from other union officials. If he is compelled to disclose his personal problems to the union lawyer, he will lose a little more of his individuality. There will be yet a greater percentage of his income which will be expended without his personal exercise of choice. The union member will wonder why the lawyer to whom he is directed should not have been first tested in the open market and selected by him on the basis of reputation in the same manner as the wealthy select their lawyers. He may also wonder how a union lawyer may be expert in the two hundred specialties into which the practice of law may be divided.¹⁰⁰

97. Similar proposals had been made to the 1973 Annual Meeting but withdrawn pending the public hearing.

98. ABA 1974 MID-YEAR MEETING, SUMMARY AND REPORTS, REP. 127 at 10, as amended by a substitute resolution.

99. ABA 1974 MID-YEAR MEETING, SUMMARY AND REPORTS, REP. 118, as amended by a substitute resolution.

100. ABA 1974 MID-YEAR MEETING, SUMMARY AND REPORTS, REP. 118, at 14.

Accordingly, the Section drafted its proposed amendments to the Code upon a different philosophy from those advanced by the Committee:

The purpose of the proposed revisions to the Code of Professional Responsibility are [sic] to enable the disciplinary authorities in each state where the amendments are adopted to better police and control the growth and development of prepaid legal service plans and to assist lawyers to determine the plans with which they may properly and ethically cooperate. The proposed new ethical consideration, EC 2-33, alerts lawyers to the possibility of conflict of interest when employment is accepted under prepaid legal service plans which do not offer the members or beneficiaries a free choice of counsel.¹⁰¹

After heated debate, the proposals of the Section were adopted by the House of Delegates.¹⁰² However, at the 1974 annual meeting, upon the recommendation of the Special Committee on Prepaid Legal Services, an Ad Hoc Study Group was created to make recommendations to the House of Delegates at its 1975 Mid-Year meeting with regard to amendments to DR 2-103 and 2-104 and the adoption of EC 2-33.¹⁰³ Meanwhile it was suggested to all interested entities that any action in regard to amending the Code in accordance with the resolution adopted earlier "be taken only with the knowledge that the matter is scheduled for further consideration by this association."¹⁰⁴ And so, the question remains open pending such consideration.

A FINAL NOTE ON OUR DUTY

During the ABA 1974 Mid-Year meeting, Senator Tunney held fact finding hearings at Houston, and at the annual meeting in Honolulu he spoke to a joint session of the American Judicature Society and the National Conference of Bar Presidents. In that speech he suggested that the bar is more interested in financial return than public service and is failing to live up to Canon 2 of the Code of Professional Responsibility.¹⁰⁵ If there is foundation

101. *Id.* at 13.

102. ABA 1974 MID-YEAR MEETING, GENERAL PRACTICE SECTION, SUMMARY OF ACTION REP. 118, at 6.

103. This ad hoc committee has now filed its preliminary report, in which it basically follows the suggestions of the General Practice Section.

104. ABA 1974 ANNUAL MEETING, SUMMARY OF ACTION 8.

105. 19 ABA NEWS 522 (1974). See also 58 AM. JUD. SOC. J. 108 (October, 1974).

for this view, then it is indeed a sad commentary upon our profession. Obviously the public demand for adequate legal services at a reasonable cost is growing, and if the Code of Professional Responsibility presents an obstacle to the furnishing of such services then the Code should be altered to meet the exigencies of the situation, while retaining traditional safeguards to the maximum extent compatible with such an objective, but only to that extent. If we fail in this, we fail in that duty which alone justifies the preferred position which we, as lawyers, enjoy in the exclusive right to practice law. But we must not fail; and, if we have the breadth of vision to put aside self interest for public interest, we will not fail. Then at last we may reach the point which with remarkable clairvoyance Justice Roger Traynor saw clearly almost a quarter of a century ago when he said in his dissent in *Hildebrand v. State Bar of California*:¹⁰⁶

Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty.

106. 36 Cal. 2d 504, 522, 225 P.2d 508, 519 (1950).