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William F. Swindler
William & Mary Law School

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TOWARD A RESTATEMENT OF PROFESSIONAL ETHICS

William F. Swindler*

The attitude of the courts and the practitioners is in a state of change, recognizing instances where group-practice is necessary and proper. Professor Swindler asserts that the Canons of Ethics must be revised to indicate the acceptance by the legal profession of such group-practice, particularly if the indigent and low-income client is to be served properly. Suggested revisions to the applicable Canons reflect the author's opinion.

I. A CHANGING CONTEXT OVER SIXTY YEARS

In August 1964 the House of Delegates of the American Bar Association appointed a Special Committee on Evaluation of Ethical Standards to study the current state of professional practice with reference to "the adequacy and effectiveness of the present Canons of Professional Ethics," and "to make recommendations for changes it deems appropriate to encourage and maintain the highest level of professional standards by our profession." The incoming ABA President, Lewis F. Powell, Jr., pointed out the problem:

Many aspects of the practice of law have changed significantly since 1908. When the original canons were framed, the typical lawyer was a general practitioner, usually alone, who divided his time between the courts and a family-lawyer office practice. There were few large law firms, few corporate legal departments and few lawyers working for government. There was virtually no administrative law; no income tax law; no great body of corporate law practice; and little specialization in the practice. The flood of tort litigation was yet to come.\(^2\)

Thus, as the Special Committee continues its assigned study,\(^3\) a long-overdue dialogue has developed on the matter of professional ethics—

* A.B., B.S., Washington University; M.A., Ph.D., University of Missouri; LL.B., University of Nebraska. Professor of Law, Marshall-Wythe School of Law, College of William & Mary.


3. See the progress report of the Special Committee on Evaluation of Ethical Standards to the 1965 ABA convention, digested in 51 A.B.A.J. (1965). See also REPORT OF THE JOINT CONFERENCE ON PROFESSIONAL RESPONSIBILITY (Chicago, 1958). The Joint Conference was established in 1952 by the Association of American Law Schools and the American Bar Association.
or, as the more modern and inclusive expression has it, professional responsibility. The first thirty-two Canons were adopted almost sixty years ago, in 1908, and the only substantial addition, that of thirteen new Canons, occurred in 1928. Canon 47, the latest to be adopted, dates from 1937. Although there have been periodic amendments up to the present, these amendments are manifestly limited to the scope of the subject matter in the Canons themselves. Thus the content and thrust of the Canons is as significant as the time-lag suggested by the foregoing chronology.

A somewhat arbitrary classification of the present Canons shows eight broad categories: 1. general attorney-court relationships; 2. general attorney-client relationships; 3. relations with other parties, essentially in a courtroom context; 4. standards of conduct during a trial; 5. elementary fiduciary principles; 6. details as to fees and expenses; 7. the highly sensitive areas of associates, intermediaries, specialization and the like; and 8. a number of generalized statements of professional principles. Such a classification tends to confirm the fact that the Canons were, and increasingly have become, retrospective—preserving a Victorian aura of trial practice as the paramount and often exclusive concern of the average attorney, or at least as the area in which most of his ethical problems and questions of public responsibility will be raised.

To state this fact is also to declare that the Canons need to be supplemented and/or revised to take into account the changes wrought in the profession in the past six decades and suggested in Powell's admonition. The last substantial supplementing of the Canons was prior to the period when the administrative process through the regulatory agencies, particularly those of the federal government, began its pro-

5. American Bar Association, Canons of Professional Ethics, Canons 1-5 [hereinafter cited and referred to as ABA Canon (and the particular number)].
6. ABA Canons 6-8, 15, 16, 19, 37.
7. ABA Canons 9, 17, 18, 39.
8. ABA Canons 20-22.
9. ABA Canons 11, 38.
10. ABA Canons 12-14, 42.
12. ABA Canons 10, 28-32, 40, 44.
13. For example, the GUIDES TO PROFESSIONAL CONDUCT FOR THE NEW CALIFORNIA PRACTITIONER (1961), published by the Board of Governors of the California State Bar Association and the Conference of Barristers of the State of California, recapitulates the basic canons on solicitation, fees and duties to clients and courts. A slightly broader statement is found in the excellent handbook of the Illinois bar, TRAICOFF, YOU AND YOUR PROFESSION: A HANDBOOK ON ETHICS FOR ILLINOIS LAWYERS (1959).
14. See text at note 2 supra.
liferation. The middle third of the twentieth century has also been marked not only by a substantially greater emphasis upon a lawyer's office practice in proportion to his trial work, but also by a fundamental change in the character of this practice. A high technical competence in tax law and analogous accounting procedures is only the most obvious of a long list of skills demanded of the modern practitioner which have (or at least he and his client hope will have) little or no relationship to forensic tactics. Aside from the problems of specialization or interprofessional collaboration which these facts suggest, there are finally the corollary problems bred by the always accelerating output of technical knowledge, in both social and natural sciences, which so frequently demand consideration and application in complex legal questions.15

Even in the traditional areas of legal practice, the practice has not stood still. In 1956 the American College of Trial Lawyers adopted a Code of Trial Conduct which, as the preamble itself stated, was found necessary “not to supplant, but to supplement and stress certain portions of the Canons of Professional Ethics.”16 That document, as adopted, contained twenty-eight clauses which the sponsors considered necessary to bring up to date the ABA Canons, then half a century old.17 Fifteen years before this, the New York County Criminal Courts Bar Association had drawn up a special Code of Ethics for the Prosecution and Defense of Criminal Cases, the first of its kind to attempt to inject more meaningful principles into the genteel tradition of Canon 5.18

15. In the Preface to Freeman, Legal Counseling and Interviewing (1964) at page x, Dean Erwin Griswold of the Harvard Law School stated: "Whole areas of the law never get into court. An example may be found in the problems of legal ethics which are considered frequently in every busy law office, but which are resolved by the partners without any court decision. And much business advice consists of caution and forewarning, designed, and usually effectively, to keep the business out of court." See also Freeman, The Role of Lawyers as Counselors, 7 W. & M. L. Rev. 203 (1960).

16. American College of Trial Lawyers, Code of Trial Conduct 1 (rev. ed. 1965). See also the statement by the author of the Code, indicating that it was made necessary by the fact that the ABA Canons were "lacking in clarity, or ambiguous and grammatically confusing" due to their piecemeal interpretation and amendment over the years in an attempt to cover changing conditions. Welpton, Code of Trial Conduct, 12 Syracuse L. Rev. 464, 465 (1961).

17. Compare the wording of Canons 1 & 2 of the Code of Trial Conduct, "Employment in Civil Cases," & "Continuance of Employment in and Conduct of Civil Cases," with ABA Canons 8, 31 & 44; Canons 3 & 4 of the Code of Trial Conduct, on criminal cases, with ABA Canon 5; Canon 5 of the Code of Trial Conduct, "Conflicting Interests and the Confidences of a Client," with ABA Canons 6 & 97; and, see generally, the more detailed formulae in the Code of Trial Conduct set out in Canons analogous to ABA Canons 7, 9, 17, 18, 29, and 23.

With reference to another set of explicit guidelines for courtroom conduct see Christenson, Courtroom Decorum as an Aid to Proper Judicial Administration, 27 F.R.D. 445 (1961).

18. The Code of Ethics for the Prosecution and Defense of Criminal Cases contains
It has been—in the newer areas of professional activity, however, that the static condition of legal ethics has been most acutely discernible. The vast expansion of administrative law, and the lethargic response of the organized bar to the manifest need for a corresponding expansion of the Canons to accommodate the new responsibilities developing therewith, led to the drafting of their own ethical codes by certain of the agencies themselves—the Interstate Commerce Commission General Rules of Practice being the most striking example. Even this eventuality, however, did not notably accelerate the response of the profession itself. In the decade since the ICC code was promulgated, the chief concern of the organized bar vis-à-vis governmental agencies has been to control and minimize, if it cannot altogether eliminate, the function of the non-lawyer in practice before these agencies.

Of more concern to the bar, economically and professionally, has been the matter of unauthorized practice of law by members of other professional groups which have developed in the past thirty years. The ABA House of Delegates at its meeting in January 1940 inaugurated a program of endeavoring through full disclosure of unauthorized practice problems to secure wherever possible the cooperation of national associations of laymen and acceptance of principles relating thereto. This led to a series of agreements with trust officers of banks, insurance adjusters, realtors, life insurance underwriters, accountants, and collection agencies in the course of the next two decades. Discussions are currently in progress with casualty insurance companies and social workers' groups. In the important field of labor arbitration a code

twenty-five canons, as compared with ABA Canons 4 & 5 which deal specifically with persons accused of crime. The reprint of the text of the New York County Criminal Courts Bar Association Code appears in 8 John Marshall L.Q. 80 (1942).


has been drafted by the American Arbitration Association and the National Academy of Arbitrators.\textsuperscript{23}

Adding to the complexity of, as well as further emphasizing the need for, a revision and modernization of the code of legal ethics are at least three other considerations. First, and probably hardest to assess, is the extent and effect of changing public and professional attitudes toward socio-economic-legal issues (\textit{e.g.}, divorce counseling, client security funds, "annual legal checkups," and the like). As a traditionally conservative institution, the legal profession has reacted slowly to these issues and attitudes. Yet times do change, and the profession ultimately is compelled to face up to the fact that it has no choice but to adjust its own position to take these changes into account. For too long the bench and bar, for example, have continued to treat domestic relations issues in the context of a vanished society rather than as prime ingredients in the current process of social ferment.\textsuperscript{24} The ancient concept of virtually all legal proceedings being adversary proceedings has obviously militated against the acceptance of many features of modern counseling which must be based upon a premise that the counselor (\textit{e.g.}, the lawyer) will sooner or later need to bring the parties together in an attempt to work out their problems.\textsuperscript{25} The steady development of a corporately organized society replacing the individualistic orientation of the nineteenth century has required—but has not yet achieved—a reorientation of the lawyer-client relationship.

The second problem is the related fact that the nineteenth-century frame of reference for the codes of professional conduct has been crystallized into statute law in many jurisdictions.\textsuperscript{26} While, theoretically, the job of amending or repealing such legislative enactments is not overly-difficult, in reality the psychological barricade against change is formidable. The pro forma apostrophe to a virtuous past threatened with desecration by a contemporary revisionism is a standard and almost predictable reaction by provincial lawmakers, whether the subject be fluoridation, modernization of divorce laws, or standardized daylight saving time. It is one thing, therefore, to propose a general restatement of professional responsibility and another to reconcile it (\textit{i.e.}, by repeal of obsolescent statutes) with the cultural lag of most legislation.


\textsuperscript{25} \textit{But see} A.B.A. Informal Opinion C-524; Note, 73 \textit{Yale L.J.} 1058 (1964).

\textsuperscript{26} Brand, \textit{Bar Associations, Attorneys and Judges: Organization, Ethics and Discipline passim} (1956).
The third problem is perhaps first in magnitude—in any event, the main portions of the present article are addressed to it. This problem is epitomized in the trends of adjudication in several subject-areas which directly (as in the case discussed in Part II) or indirectly (as in the circumstances reviewed in Part III) affect the postulates of professional conduct. The group as the client in place of the individual is a characteristic of the process of transition to the corporate organization of society referred to above, and the handwriting on the wall is already discernible: the legal profession is going to have to take this fact of modern life into account. Conversely, the more zealous effort to preserve the individual’s personal rights and liberties in this ever more closely organized society represents the other side of the coin. When the tumult and the shouting die, or in other words when the restatement of professional ethics has been effectuated, the fact will remain that these judicial trends—shunting the profession toward accommodation of the new corporate social order and at the same time charging it with much greater responsibilities in the defense of individual rights—represent the force and counterforce which provide such equilibrium as can exist in the sixth decade of our fast-moving century.

II. The Brotherhood Case and Canons 35 and 47

Canon 35 is one of the more “recent” Canons; i.e., it was among the group added during the comprehensive enlargement of the original list at the American Bar Association convention in 1928. Canon 47 is the most “recent,” having been adopted in 1937. The groundwork for Canon 35 apparently was laid three years earlier when the ABA Committee on Professional Ethics and Grievances delivered an advisory opinion condemning the acceptance by lawyers of employment by an automobile club under circumstances permitting the club to profit from the lawyers’ professional services. This opinion relied on more than a dozen judicial decisions in point, as well as on Canons 27 and 28, but the special committee of the ABA appointed that year to draft supplementary Canons, gave particular attention to the problems of fee-splitting and intermediaries and, in its report four years later, pro-

28. This is the crux of the Brotherhood case.
30. This zealous effort underlies the rationale of the indigent accused’s right to counsel, treated in part II infra.
posed the related Canons 34 and 35 which, after considerable discussion on the floor, were eventually adopted.\textsuperscript{32}

For the ensuing quarter of a century, case law and advisory opinions consistently held to the propositions set out in these Canons: "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervene between client and lawyer. A lawyer's responsibilities and qualifications are individual."\textsuperscript{33} "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."\textsuperscript{34} In \textit{People ex rel. Chicago Bar Ass'n v. Chicago Motor Club},\textsuperscript{35} an auto club was the specific target of adjudication, and there was general agreement with the observation of the Illinois Supreme Court that where the auto club is organized for the purpose of rendering service to motorists for a stipulated membership fee, hires lawyers and has a regular staff of attorneys who defend motorists, paying for such services out of fees received without any further charge to parties in such suits, it must be held to be in the business of practicing law for its members. Subsequently, the ban was extended readily to other groups. In 1937 the Virginia Supreme Court of Appeals, in \textit{Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n},\textsuperscript{36} held improper the practice of credit men who solicited liquidated commercial accounts for collection and when the association needed the services of a lawyer, selected him, made contact with him and employed him as agent for the creditor, although the creditor himself often did not even know who the attorney was. Under such circumstances, said the court, "while technically the relation of attorney and client is established between the lawyer and the creditor ... the association is the ... real client" and "its business [was that] of supplying for a consideration to others the legal services of lawyers ... ."\textsuperscript{37}

The consistency of judicial posture in this area was assumed to be further established by somewhat analogous cases relating to other professions which came before the Supreme Court of the United States.

\textsuperscript{32} 53 A.B.A. Rep. 117 (1928). The sensitivity of the subjects is reflected in the amendments to both Canons 34 and 35 adopted in 1933, exempting "the established custom of receiving commercial collections through a lay agency." See discussion at 58 A.B.A. Rep. 428 (1933). In 1937, Canon 34 was rendered more stringent by striking the permissive clause on forwarding fees involving a non-lawyer. See discussion at 62 A.B.A. Rep. 350 (1937).

\textsuperscript{33} ABA Canon 35.

\textsuperscript{34} ABA Canon 47.

\textsuperscript{35} 362 Ill. 50, 199 N.E. 1 (1935).

\textsuperscript{36} 167 Va. 327, 189 S.E. 153 (1937).

\textsuperscript{37} Id. at 341, 189 S.E. at 160.
Semler v. Oregon State Bd. of Dental Examiners involved an Oregon statute aimed at controlling advertising by dental practitioners, the Court finding that it was within the authority of the state to estimate the effects of dental advertising and to protect the community not only against deception but against practices which, though they be free from deception in particular instances, tend nevertheless to lower the standards of the profession and demoralize it. Another case involved an Oklahoma statute which undertook to prohibit optometric services except by licensed practitioners, and the United States Supreme Court found that this did not fall within any prohibitions of the due process clause of the fourteenth amendment.

There was, however, one sign of impending change which was reflected in a dissent in a California case where lawyers acting—strangely enough—for the Brotherhood of Railroad Trainmen were censured by the majority for permitting their professional services to be "channeled" by the union "contrary to professional standards." Justices Carter and Traynor dissented with the argument that the plan "in no way lowers the dignity of the profession." Justice Carter opined that it was "nothing more than a proper joining of forces for the accomplishment of a proper legal objective of mutual protection." He stated further that it was not a case "where the purpose, motive and result is stirring up or exciting litigation," but one where "the essential objective of the instant plan is not to obtain clients for any attorney. It is to enable the organization [the Brotherhood] to assist its members in a matter of vital concern to them."

Buttressing the judicial position were the advisory opinions of state and national bar associations. ABA members were admonished not to permit banks to list their names in advertisements announcing the banks' will-drafting services, or otherwise to cooperate with a trust company or like institution in furtherance of its unauthorized practice of law. The Committee on Unauthorized Practice of the Virginia State Bar condemned a plan whereby a corporation paid an attorney to come to its office periodically to advise its employees on legal matters and draw up simple instruments—an arrangement which was held to

38. 294 U.S. 608 (1935).
41. Id. at 527, 225 P.2d at 522.
42. Id. at 515, 225 P.2d at 515.
43. Ibid.
44. Id. at 517, 225 P.2d at 516.
violate both the Canons and the rule of the Richmond Ass'n of Credit Men case.47

Rather ironically, it was the social revolution bred by Brown v. Board of Education48 which prepared the way for the eventual judicial overthrow of this long-entrenched professional position. In the effort to facilitate the "reasonable expédition" of desegregation of public schools, the National Association for the Advancement of Colored People encouraged its state and local branches to alert their membership to the legal and constitutional issues involved therein. The Virginia State Conference of NAACP Branches specifically encouraged local branches to invite a member of the Conference legal staff to address a meeting of parents and children and explain the legal steps necessary to achieve desegregation. The staff member brought with him printed forms authorizing him or other lawyers retained by the Conference or by the national NAACP Legal Defense and Educational Fund to represent the signers in desegregation litigation. In 1956 the Virginia General Assembly undertook to broaden its statutory prohibitions against solicitation of legal business by including these specific practices within its definition of "running" and "capping,"49 and in due course the state supreme court of appeals, in NAACP v. Harrison,50 ruled that the NAACP activities violated both the statute and Canons 35 and 47 of the ABA Canons of Professional Ethics.

The Supreme Court of the United States, with five Justices in support and Mr. Justice White concurring in part, reversed the Virginia Supreme Court of Appeals.51 In a portentous pronouncement, Mr. Justice Brennan stated in the majority opinion that under the guise of legislation against solicitation

a State cannot foreclose the exercise of constitutional rights by mere labels. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community of this country.52

The opinion went on to declare that "the State's attempt to equate the

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47. VA. STATE BAR OPINIONS, Opinion 10 [1947] (1965).
49. VA. CODE §§ 54-74, 54-78, 54-79 (Supp. 1964). These sections were amended in 1956 by the Extra Session, c. 33. There was a subsequent amendment to sections 54-74 and 54-78 in 1964, and in that year section 54-79 was rewritten.
52. Id. at 429.
activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly,"53 was an improper encroachment upon the protected freedom of expression asserted in the first amendment and extended to the states by the fourteenth.

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed in this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious.54


In 1958 the Supreme Court of Illinois in a declaratory judgment had condemned as illegal and unprofessional the practice of the Brotherhood of fee splitting between the union and its regional counsel in prosecuting injury claims of union members, presenting blank employment contracts to prospective claimants and compensating investigators in injury cases.57 The Brotherhood discontinued these practices and reorganized its legal services for its members by April 1959, and set up these facts in its answer to a complaint filed on behalf of the Virginia State Bar in June 1959. The complainant, however, insisted that the continuance of the Brotherhood's legal counseling services to injured members constituted a solicitation of legal business and the unauthorized practice of law, and in January 1962 the chancery court awarded an injunction. The Supreme Court of Appeals of Virginia refused an appeal and supersedeas in June and denied a petition for rehearing in August 1962. Having thus exhausted its local remedies the Brotherhood thereupon petitioned the Supreme Court of the United

\begin{itemize}
\item 53. \textit{Id.} at 438.
\item 54. \textit{Id.} at 439-40.
\item 55. 371 U.S. 415 (1963).
\item 56. 377 U.S. 1 (1964), 26 U. Pitt. L. Rev. 142.
\end{itemize}
States for a writ of certiorari, noting that *NAACP v. Button* was by then before the Court, and relying upon the first and fourteenth amendments to the federal Constitution and the Federal Employers' Liability Act.

Delivering the opinion of the Court, Mr. Justice Black noted that certiorari had been granted "to consider this constitutional question in the light of" the rule handed down in the *NAACP* case. Extending the constitutional protection to the Brotherhood, the majority opinion held that "what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. . . . The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of business." In dissent, Mr. Justice Clark protested the unreality of the majority view in the light of "the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct," as well as the continuing disciplinary actions directed at the union procedure.

Sharing Justice Clark's concern over the consequences of the decision and considering "the alleged uncertainty or misconception of the opinion of Mr. Justice Black," the Richmond Chancery Court on remand reviewed the transcript of the original proceedings, as well as the Black opinion, and concluded that the latter "referred to and approved only advice and recommendation" and "does not approve of unauthorized law practice." "With all due deference," the Chancellor continued, "it must be stated that Virginia does not attempt in this suit to prevent 'recommendation' and that the injunction of this court did not apply to 'recommendation,' but to unethical solicitation and the unauthorized practice of law." Thereupon the chancery court issued a permanent injunction as its final order, reiterating in terms the basic stipulated restraints in its decree of January 1962, but providing that "nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant . . . to advise the defendant's members or their families or others, to obtain legal advice . . . and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to the

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59. Id. at 6-7.
60. Id. at 9.
61. Id. at 11 n.2.
solicitation of legal employment for or on behalf of any lawyer or lawyers."

The final order thus seeking to confine the effects of the Supreme Court opinion to the narrowest possible area and to salvage and preserve the greatest possible portion of the bar's traditional position reflects the attitude of the organized profession in general. Counterbalancing this position, however, are three sets of facts of an ascending order of importance: first, the likelihood that the injunction will simply breed a new suit seeking to nullify its effect in Virginia; second, the evidence that in other jurisdictions the courts will follow the rule set out in the Supreme Court opinion and enlarge upon it gratuitously until the proposition reflected in the Richmond Chancery Court's order becomes all but moot; and third, the accelerating trend toward group-sponsored services in many fields other than, as well as including, law that underlines ever more emphatically that circumstances themselves will compel a change in the concepts of "unauthorized" practice of law. (Activity which is "unauthorized" may nevertheless be the practice of law by competent lawyers; the question becomes essentially, what is "authorized" and who shall "authorize" it—the bar in the interest of a traditional orientation of its position, or society in the interest of its contemporary needs?)

The legal profession itself has not been unanimous in its opposition to group practice. More than thirty years ago a writer raised the question:

Why is it that individuals may band together to provide themselves with cheaper insurance, cheaper groceries, higher wages, better prices, easier credit, lower taxes, better health—everything, except better or cheaper legal advice and aid? Why is it that taxpayers, though they may organize for their mutual protection, may not retain a lawyer in their corporate name to handle their individual tax suits?

The real objection to corporations practicing law is that it is against public policy. Conceding that this is correct as to corpora-

63. See, e.g., the statement of the American Bar Association following the denial by the Supreme Court of a request for a rehearing:
In spite of all this, the organized bar...firmly supports the Canons of Professional Ethics in their present form; and that each State and Local Bar Association should advise its Membership that, so far as the conduct of individual Lawyers is concerned, this Decision is not a "License to Solicit" and that Soliciting or any other violation of the Canons will, as before, result in disciplinary action. 30 UNAUTH. PRAC. NEWS 114-15 (1964).
tions seeking to engage in the "law business," it is submitted . . . that incorporated associations organized not for profit are entirely different in their nature, and in many cases perform a valuable public service of which the public should not have been deprived by the action of the court. 65

Twenty years later, no less a person than the then chairman of the ABA Standing Committee on Professional Ethics and Grievances, himself a distinguished practitioner, commented in the same general vein:

Where . . . the corporation or association employs and pays the lawyer to advise and represent its employees, patrons, or members in respect to their individual affairs, the prohibition of the Canon [35] is directly applicable, even though the lawyer's relation is direct, although there is no conflict of interest between the client and the organization, and even though the reason and occasion for the service is the bona fide interest of the organization to see that it is performed. This latter consideration is particularly forcible in the case of corporations whose direct interest, as an entity, is to see that their employees are kept free from legal difficulties and entanglements. Business corporations may and do to an ever increasing extent provide free medical services for their employees, as one of their conditions of employment, in order to keep them healthy, and consequently more efficient. Why not similarly free legal service and advice? 66

* * *

It is not believed that the Canon will prevent the labor unions from finding lawyers to advise their members. The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in hands of fewer lawyers. These features do not commend the profession to the public. 67

Most recent and most eloquent of all has been the commentary stimulated by the Progress Report of the Committee on Group Legal Services of the California Bar Association. In the sympathetic aura of the dissents of Justices Carter and Traynor in Hildebrand v. State Bar, 68 the committee has raised the ultimate question, implicit in the passages from Weihofen and Drinker quoted above, of whether (or,
rather, when and how) there should not be a new rationale of professional ethics in this matter.69

One is reminded of another observation by Weihofen made just thirty years ago. Commenting on a then recent Illinois case,70 directed against legal services by automobile clubs, in the ABA Opinion 8 and the 1928 Canon 35, the author said:

The anthropologists have shown that ethical and moral values vary from time to time and from place to place. There is nothing so heinous but that it has been considered proper and even obligatory for moral standing in some ethnic group. And, conversely, there is nothing so innocent that it has not sometime, and somewhere, been taboo.

It seems that the code of ethics for the legal profession is no exception to the rule. The Illinois Supreme Court has just held that the Chicago Motor Club was guilty of contempt of court because it was practicing law without a license, in that it undertook, as part of its service to members, to furnish attorneys to represent members in court in arrest and in property damage cases.71

* * *

If this "fundamental principle" is so inexorable that it requires the court to condemn as a matter of law a practice which it does not condemn from the standpoint of social utility, it seems time to re-examine the principle.72

With group hospitalization and group insurance common features of modern life, with cooperative marketing and purchasing in many areas of business and economics, with investment trusts adapting the corporate or group principle to the needs of the small and casual investor, and even, by a not inappropriate analogy, with the growth of the concept of condominium in modern property law, it is clear that group activity or group-held and group-affected rights are fundamentals of contemporary American life. The ultimate significance of the Brotherhood rule will only be discernible when it has brought about a restatement of the professional rationale related to Canon 35 (aet. 1928) and Canon 47 (aet. 1937).73

69. Cf. Symposium, supra note 29. See also the several short papers on The Availability of Legal Services, 51 A.B.A.J. 1064 (1965), which include a brief description of the California State Bar Association study.


71. Weihofen, supra note 70, at 296.

72. Id. at 300.

73. Cf. the statement in the report on the California Bar Association study: "The profession should move ahead of the rest of society, rather than try to maintain the status quo in the face of the demand and the need for substantial change." 51 A.B.A.J. 1068 (1965).
III. COUNSEL FOR THE INDIGENT: A NEED FOR GREATER ARTICULATION

The other side of the coin reveals the individual in the corporate society, almost chronically on the verge of some criminal or civil litigation. Where he is an indigent defendant, the recent tenor of adjudication, climaxed by *Gideon v. Wainwright*, 74 has developed an elaborate series of propositions of professional responsibility which contrast with the muted, if not downright negative, statement in Canon 4. 75 Where the indigent individual is a party to a civil action, there is an even briefer and more cryptic phrase in Canon 12, 76 although a half-century of growth in the legal aid movement has been a case of actions speaking louder than words. The Economic Opportunity Act of 1964 77 established, as part of the "War on Poverty," a Legal Services Program within the Office of Economic Opportunity to provide legal counseling services to members of low-income groups, often through private law offices situated in the low-income areas. 78 Perhaps even more important has been the effect of the "War on Poverty" in awakening the lay public to the fact that the rights which now may be more effectively asserted for the impoverished are actually rights which they have always had under common and statute law. As Attorney-General Katzenbach has observed:

There are large numbers of poor people who discover that they have a binding obligation to pay a finance company for furniture never delivered or for a TV set that never worked. There are large numbers whose cars or washing machines are repossessed after months of payments—who have no idea they are entitled to the return of their equity. There are large numbers whose public assistance is reduced or revoked—who have no concept of their rights of appeal.

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To be sure, these are not new problems. It is our appreciation of them that is new. There has been long and devoted service to the legal problems of the poor by Legal Aid societies and Public Defenders in many cities; but, without disrespect to this important work, we cannot translate our new concern into successful action simply by providing more of the same. There must be new tech-

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75. "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."
76. "A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all."
niques, new services, and new forms of inter-professional cooperation to match our new interest.\textsuperscript{79}

There may be a lurking prospect of conflict between the "new forms of interprofessional cooperation" and the old debate over lay associates and intermediaries. One is reminded, on the one hand, of the 1939 Opinion 191 of the ABA condemning the effort of a group of lawyers to make low-cost legal counseling available to needy persons through advertisements and through local welfare organizations\textsuperscript{80} and, on the other, of the warning in the 1964 report of the Standing Committee on Legal Aid and Indigent Defendants concerning "the indifference, fear, and, at times, hostility expressed by the poor toward the law generally and its administration through our adversary system."\textsuperscript{81} Yet, challenging new ideas are being advanced in response to the broadening social demands for legal assistance for indigents in both civil and criminal areas; one is the recruiting and training of "subprofessionals" in the legal profession comparable to the medical profession's reserve forces of technicians and other specialists. "It seems clear already," says a leader of the Missouri bar, "that many routine operations in the legal profession could be performed competently by laymen working under the supervision of lawyers."\textsuperscript{82} Aware of the unpalatability of such a proposal, the speaker admonished the bar that its job is to face straightforwardly the facts as they exist and not as we wish they might be. It is to consider all ideas, even the unpopular ones, especially if they offer any promise of satisfying the public's unfulfilled need for legal services. It is, in short, to live, to think and to act in the world of today and tomorrow—not in the nostalgia of yesterday.\textsuperscript{83}

Aid to the indigent in the area of civil cases is manifestly on the threshold of a substantial development, along lines as yet not discernible. In the area of criminal justice, matters have been accelerated by the enactment of the Criminal Justice Act of 1964,\textsuperscript{84} although the degree of realism in the fee schedule and the omission of a plan for public defenders in the federal courts have been obvious targets of criticism.

\textsuperscript{79} Katzenbach, \textit{Extending Legal Services to the Poor}, 23 \textit{Legal Aid Brief Case} 148, 150 (1965).

\textsuperscript{80} It should be pointed out that the opinion concluded by recommending establishment of a free legal clinic or advertisement by a bar association rather than by individually named attorneys.


\textsuperscript{82} McCalpin, \textit{Meeting the Challenge}, 51 A.B.A.J. 1068, 1069 (1965).

\textsuperscript{83} Ibid.

Another problem derives from the tendency of both bench and bar to ignore the fact that a great many practicing attorneys have virtually no criminal law experience; when appointed as counsel in the deliberately random process which has the superficial appearance of being equitable and objective, such lawyers in conceivable situations would prove more of a burden than a benefit to the client. One method of alleviating this difficulty appears to be the expansion of the legal aid agencies, where they exist, to include areas of criminal law with their traditional emphasis on civil cases—either in cooperation with private practitioners appointed as counsel to indigents, or with offices of public defenders where these exist.\(^{85}\)

With the ABA Special Committee currently at work on the general reassessment of the Canons of Professional Ethics, any specific suggestions for modernization would perhaps be premature except as a contribution to the dialogue from which will presumably come, in the Committee's final report, a text for new or revised rules of conduct. The Committee must, like a legislative body enacting amendatory legislation, consider each specific change in the light of its effect on the corpus of the rules generally; moreover, in the case of the particular problems set out in the foregoing paragraphs, it must weigh the lessons of research and experience—e.g., the inequities of bail practices vis-à-vis indigent accused parties,\(^{86}\) or the successes and shortcomings of neighborhood legal services,\(^{87}\) and the vacuum existing in procedural law generally which has been identified in the record of the public defender system.\(^{88}\) With these qualifications and cautions, however, the following suggestions are made with a view to inviting professional attention to the possibilities for reform of those Canons which have been specifically criticized in this paper.

Canon 4 manifestly requires comprehensive revision and broadening, not only to accommodate the new safeguards of rights of the accused underlined by recent judicial decisions, but in the process to

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protect the attorney from unfair aspersions cast upon his competence. It is becoming almost a commonplace in some jurisdictions, in cases usually, although not always, of assigned counsel, for defendants, upon being convicted, to seek relief through original writs alleging lack of skill or diligence on the part of their lawyers. The question of what should constitute minimum standards of professional skill and diligence is difficult at best and subjective at worst.\textsuperscript{89} The manifest lack of familiarity with criminal law procedure and rationale, which derives from the fact that so many lawyers deliberately avoid such cases in practice, provides a general ground of credibility for complaints of malpractice lodged against counsel by convicted parties; but it is no answer, in this age of progressively more complex responsibilities, to reiterate the traditional admonition that a lawyer is chargeable with knowledge of general rules of practice in all areas of law normally considered in the process of admitting him to the bar.\textsuperscript{90}

As a first step toward clarifying the profession's responsibility in the general area of criminal justice, it is suggested that the ABA Canons 4 and 5 both be supplanted by a more specific text modeled after Canons 3 and 4 of the Code of Trial Conduct of the American College of Trial Lawyers.\textsuperscript{91} Because these are not as universally available as the ABA Canons, they are quoted verbatim herewith:

\textbf{III. Employment in Criminal Cases}

A lawyer should not decline to undertake the defense of a person accused of crime, regardless of his personal or the community's opinion as to the guilt of the accused or the unpopularity of the accused's position, because every person accused of a crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though a lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's personal desires, his or public opinion concerning the guilt of the accused, or his repugnance to the crime charged or to the accused.

\textbf{IV. Continuance of Employment in and Conduct of Criminal Cases}

(a) Having accepted employment in a criminal case, a lawyer's duty, regardless of his personal opinion as to the guilt of the accused,

\textsuperscript{89} See, e.g., the facts of the case and the language of the dissent in Conway v. Sauk County, 19 Wis. 2d 599, 120 N.W.2d 671 (1963). See also Note, 49 VA. L. REV. 1531 (1963).
\textsuperscript{91} See notes 16, 17 & 18 supra.
is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or in mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case. However, after a confidential disclosure of facts clearly and credibly showing guilt, a lawyer should not present any evidence inconsistent with such facts. He should never offer testimony which he knows to be false.

(b) The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of such person's probable guilt.

(c) The prosecutor's primary duty is not to convict but to see that justice is done. Evidence which appears credible and which clearly tends to prove the accused's innocence should not be suppressed.

However, these canons standing alone do not cover the subject completely; indeed, they make no specific allusion to the responsibilities of counsel appointed to defend an indigent accused. ABA Canon 4, accordingly, needs to be more positively improved: (1) by a statement which recognizes such problems as the need for and availability of counsel at the preliminary hearing, and in all stages of pretrial procedure;92 (2) by taking into consideration the fact that practical and equitable opportunities for bail and for psychiatric services are part of the requirements for full justice to all accused persons whether indigent or not;93 and (3) by the definition of counsel's responsibilities after judgment in a trial resulting in conviction.94

Even assuming adoption of new or revised canons, such as those from the Code of Trial Conduct quoted above, it seems essential that a new Canon concerning counsel for indigents be drafted to round out the statement of professional responsibilities in the field of criminal law. Such a Canon may indeed have to be phrased in anticipation of its progressive amendment as experience in this area develops—particularly as state legislative remedies are effected in the light of recent judicial decision and congressional action.95 Indeed, the ultimate Canon on indigent counsel is almost impossible to write in the absence of statutory changes in the criminal procedure of many jurisdictions; it is suggested, however, that eventually a statement somewhat like the following may be possible:

93. Id. at 1167.
THE RESPONSIBILITY FOR EQUAL JUSTICE FOR ACCUSED INDIGENTS

While any attorney appointed as counsel for an indigent accused ought not to ask to be excused for any trivial reason, an appointed counsel may properly call attention to, and the court should take into consideration, (a) the practical importance of experience and knowledgeability in criminal practice in providing the accused with adequate professional assistance; and (b) the reasonable amount of time and funds required for the preparation of an indigent's case. Upon appointment, an attorney who is unfamiliar with criminal practice should be encouraged by the court and the local bar to seek advice and if necessary active association in the case from brother lawyers who are experienced in criminal law. Where the services of a legal aid agency are available, and/or where private psychiatric interviewing is part of the allowable expenses of the defense taxable to the public funds, an appointed counsel should take full advantage of these services.

Inasmuch as the availability of trained and qualified professional assistance is essential to the safeguarding of the rights of accused persons, but since in the nature of things such assistance cannot be provided until the need for it is brought to the court's attention, it inevitably follows that appointed counsel enters such a case after numerous preliminaries to prosecution are well advanced. It is proper for appointed counsel to petition the court to bar any evidence obtained from any direct or indirect interrogation of the accused in his absence, and to seek the institution of preliminary procedure de novo if, in his opinion, there has been inadequate safeguarding of the accused's constitutional rights. But counsel for the accused in no case should indulge in gratuitous accusation of arresting or prosecuting officers, and only upon submission of competent evidence of anything prejudicial to a defendant's rights should counsel raise the issue before the court.

The responsibility of appointed counsel in seeking appellate review of an adverse judgment is the same as that of any lawyer retained by a defendant able to pay for the appeal and the services of counsel. Where in forma pauperis proceedings are not provided for in the local jurisdiction, appointed counsel cannot be required by any standards of professional responsibility to prosecute an appeal to his own impoverishment; but in any case and at all times, the attorney as an individual citizen and as a member of his local and/or state bars should take an active part in seeking appropriate legislative remedies to insure that rights of accused persons generally shall be equally available to the indigent accused, and that reasonable reimbursement for all costs required in a criminal defense of an indigent shall be provided by statute or by rule of court.

The present writer does not pretend that the foregoing text is acceptable in its present form; it is, rather, an invitation to proposals for
revision and supplement. In the same vein, Canon 35 warrants amendment—in the first paragraph, in the light of the developing legislative concern with the rights of indigent civil litigants, and in the second paragraph, in the light of changing social convictions as to the practical benefits of legal services made available through groups or associations. As for Canon 47, to the extent that the organized bar becomes adamant in its position on unauthorized practice of law, there are already warning signs that adversely affected interests may successfully challenge the position.96 Confining the present recommendations for reform to the existing text of Canon 35, therefore, the following is submitted for the consideration of the profession:

The concluding sentence in the first paragraph of the present Canon 35 reads “Charitable societies rendering aid to the indigent are not deemed . . . intermediaries.” This is well and good, but it would appear desirable to enlarge upon this proposition by inserting, between the present two paragraphs of the Canon, a new second paragraph perhaps reading as follows:

The bar has a responsibility for insuring equal opportunities to indigents to secure their rights in civil as well as in criminal causes, and to this end the individual attorney and the local bar should encourage and assist all public and private efforts to facilitate legal services to indigents or to persons who are members of low-income groups. An attorney should make every reasonable effort to accommodate any request for his own professional services where his particular competence or the policy of his local bar has prompted the legal aid agency to seek his participation in a particular case or for a specified period of time. The attorney as individual citizen and as a member of his local and/or state bar should work actively for the establishment and adequate support of legal aid agencies and offices by private or public initiative and finance.

To enhance the implementation of the objectives suggested by the foregoing text, it may also be desirable to amend Canon 47, inter alia, by adding a sentence to this general effect: “The services of advanced law students, where permitted by the statutes or rules of court of the local jurisdiction and where supervised by the students’ law school and/or members of the local bar, when used as an auxiliary to the prosecution of an indigent’s rights either civil or criminal, shall not be deemed the unauthorized practice of law.”

In any event, it is the present concluding paragraph of Canon 35 which is of primary importance—to a limited extent, perhaps, with reference to legal aid to indigents but, to a major degree, with reference to the issue developed in the *Brotherhood* case. To what extent Canons 27 and 28, as well as Canon 47, may require modification if and as this last paragraph of Canon 35 is modified, perhaps may be left out of consideration for the moment. The probability of a necessary modifying of this portion of Canon 35, however, in the light of the *Brotherhood* case and the eloquent report of the committee of the California State Bar Association,⁹⁷ has prompted the suggested text which follows. For purposes of typographic clarity, the existing paragraph is reprinted in italics, with editorial changes in brackets and the supplementary text in roman type.

*A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested*[,] *[T]his employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs*[,] *except under circumstances which preserve to the greatest reasonable degree the personal relationships between an attorney and a client. The public interest in providing expert legal service to individuals who are members of a group, by virtue of the interests, consequences or responsibilities deriving from membership in the group, requires an adequate and appropriate response on the part of the bar to the needs of both the public and the individual.

The availability of the services of counsel occasionally or regularly retained by an organized group, to accommodate the needs of members of the group deriving from the interests, consequences or responsibilities of their membership in the group, should be conditioned by these considerations, inter alia: (a) The group should be a bona fide organization for purposes other than the sole one of providing legal services to its members; (b) It should not exercise any control over the attorney's performance of his professional services, nor should it require any division of fees received by the attorney from the member for services performed on behalf of the individual member; and (c) Where any conflict of interest may be in prospect, either within the provisions of Canon 6 or from the circumstances of the attorney's relationship to the group, the attorney has the right and the duty to withdraw from the employment of the one client or the other and thereafter to refrain from subsequent service to the remaining client.

which improperly takes advantage of his knowledge of the affairs of the former client.

To concede that the provisions in the foregoing suggested text require a number of further refinements is to reiterate the practical difficulty of reconciling the established (one might be tempted to say, entrenched) position of the bar and the mounting pressure of lay public opinion augmented by the rationale in the *Brotherhood* case.

In any event, the need for a comprehensive restatement of the Canons of Professional Responsibility (if, in the process, a new title could be introduced as well) is peculiarly emphasized by the developments in the *Brotherhood* case, in the right-to-counsel cases, and in the Economic Opportunity Act and Criminal Justice Act, both of which were passed in the same year. The challenge of modernization is aptly stated in the comments to the 1965 ABA convention by the chairman of the Special Committee on the Availability of Legal Services; the questions of group legal services and available legal aid for indigents demand affirmative answers and "carry a common warning: that our fellow citizens may not be satisfied with the rendition of legal services in the form, by the organizations, at the cost or on the bases that the legal profession now provides them."^98

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98. McCalpin, *supra* note 82, at 1068.