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Constitutional Law - The Right of a Labor Union to Provide Free Legal Counsel to Members - *United Mine Workers v. Ill. State Bar Ass'n*, 386 U.S. 941 (1967)

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In *Escobedo*, the Supreme Court required that an individual be warned of his right to remain silent when the investigation focused on the accused, i.e., when it shifted from the investigatory to the accusatory stage.²⁸ Without exception, the authorities have regarded *Miranda* as a liberalization of the rights assured in *Escobedo*.²⁹ A questioned individual must now be informed of his rights whenever he has been substantially deprived of his freedom of action whether or not the accusatory stage has been reached. In the instant case, the accusatory stage had obviously been reached before any questions were asked, yet the New York Court of Appeals held that the accused need not have been warned of his rights. It is possible that this decision deprived the accused of rights he had before the *Miranda* decision.

Constitutional Law—THE RIGHT OF A LABOR UNION TO PROVIDE FREE LEGAL COUNSEL TO MEMBERS. A program whereby District Twelve of the United Mine Workers of America furnished its members free legal counsel in presenting their individual workman's compensation claims to the Illinois Industrial Commission resulted in a charge of unauthorized practice of law against the union.¹ Under the

lieve that he would be detained until he answered and that he had been significantly deprived of his freedom of action. *Id.* at 8-9, 233 N.E.2d at 262-63, 286 N.Y.S.2d at 235-36.

The dissent went so far as to say that police intent to arrest, alone, was a sufficient reason to find that an individual had been deprived of his freedom in a significant way. See also *People v. Reason*, 52 Misc.2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966); *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A.2d 765 (1967).

28. See note 6 *supra*. *Escobedo* was generally restricted to its facts. *Birnbaum v. United States*, 356 F.2d 856 (8th Cir. 1966); *United States v. Cone*, 354 F.2d 119 (2d Cir. 1965); *United States v. Childress*, 347 F.2d 448 (7th Cir. 1965); *United States v. Konigsberg*, 336 F.2d 844 (3d Cir. 1964), *cert. denied*, 379 U.S. 933 (1964); *People v. Hartgraves*, 31 Ill. 2d 375, 202 N.E.2d 33 (1964); *Commonwealth v. Tracy*, 207 N.E.2d 16 (1965); *State v. Coleman*, 46 N.J. 16, 214 A.2d 393 (1965); *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 204 (1965); *Biddle v. Commonwealth*, 206 Va. 14, 141 S.E.2d 710 (1965); *Browne v. State*, 24 Wis.2d 491, 131 N.W.2d 169 (1964). *Contra*, *People v. Dorado*, 40 Cal. Rptr. 264, 394 P.2d 952 (1964), *rev'd on rehearing*, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). The *Miranda* decision actually determined four different cases (*Miranda v. Arizona*, *Westover v. United States*, *California v. Stewart*, and *Vigera v. New York*); therefore, *Miranda* could not be restricted to a single set of facts. Perhaps, the Supreme Court implied by this that *Escobedo* should not be so restricted, either.

29. E.g., Kamisar, *A Dissent from the Miranda Dissents*, 65 MICHIGAN L. REV. 59 (1966).

1. *United Mine Workers of America, Dist. 12 v. Ill. State Bar Ass'n*, 88 S.Ct. 353 (1967).

program, a salaried attorney selected by the union's executive board automatically filed a complaint with the Industrial Commission upon a member's reporting injuries to the legal department. All necessary forms were processed by the union office with the attorney usually not meeting his client prior to their appearance before the commission.²

After the Illinois Supreme Court issued an injunction against the United Mine Workers,³ the United States Supreme Court granted certiorari⁴ to determine whether the Illinois court's ruling conflicted with the recent Supreme Court decisions in *NAACP v. Button*⁵ and *Brotherhood of Railroad Trainmen v. Virginia*.⁶

In *United Mine Workers of America, District 12 v. Illinois State Bar Association*,⁷ the Supreme Court reversed the Illinois ruling and held that the first amendment freedoms of speech, petition and assembly⁸ do include the right of a labor union to retain a salaried attorney to represent its members in individual workman's compensation suits.⁹

Prior to the Supreme Court's recent change of position, courts consistently held that organizations did not have a right to provide legal counsel to members¹⁰ on the ground that such practices violated canons of professional ethics.¹¹ Such courts stressed their own power and duty

2. *Illinois State Bar Ass'n v. United Mine Workers of America*, Dist. 12, 35 Ill.2d 112, 114-15, 219 N.E.2d 503, 504-05 (1966); 65 Mich. L. Rev. 805 (1967).

3. *Illinois State Bar Ass'n v. United Mine Workers of America*, Dist. 12, 35 Ill.2d 112, 219 N.E.2d 503 (1966).

4. *United Mine Workers of America, District 12 v. Ill. State Bar Ass'n*, 386 U.S. 941 (1967).

5. 371 U.S. 415 (1963).

6. 377 U.S. 1 (1964).

7. 88 S.Ct. 353 (1967).

8. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. CONST. amend. I. The first amendment freedoms were made applicable to the states by the fourteenth amendment. See U. S. CONST. amend. XIV.

9. *United Mine Workers of America, District 12 v. Ill. State Bar Ass'n*, 88 S.Ct. 353, 358 (1967).

10. E.g., *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958); *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935); *Rhode Island Bar Ass'n v. Auto. Service Ass'n*, 55 R.I. 122, 179 A. 139 (1935); see *Hildebrand v. State Bar of Cal.*, 36 Cal.2d 504, 225 P.2d 508 (1950).

11. Generally the charges in such cases arose from alleged violations of Canons 27 (solicitation), 28 (stirring up litigation), 35 (intermediaries), and 47 (aiding in unauthorized practice of law) of the ABA CANONS OF PROFESSIONAL ETHICS, the general provisions of which are often incorporated into state statutes. See ILL. REV. STATS. ch. 13.

to regulate the legal profession,¹² often ignoring the individual rights of organization members. Typical of the earlier cases were those involving automobile clubs' furnishing legal counsel to members,¹³ and the numerous cases involving the legal aid department of the Brotherhood of Railroad Trainmen.¹⁴

Early in the 1960's two Supreme Court cases, *NAACP v. Button*¹⁵ and *Brotherhood of Railroad Trainmen v. Virginia*,¹⁶ altered the Court's position in this area. The first of these, *Button*, was grounded on the Court's allowing constitutionally guaranteed individual freedoms to prevail over the state's interest in policing legal ethics.¹⁷ The NAACP legal

12. *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 349, 8 N.E.2d 941, 944 (1937); *Rhode Island Bar Ass'n v. Auto. Service Ass'n*, 55 R.I. 122, 179 A. 139, 142 (1935).

13. *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935); *Rhode Island Bar Ass'n v. Auto. Service Ass'n*, 55 R.I. 122, 179 A. 139 (1935); *Zimroth, Group Legal Services and the Constitution*, 76 YALE L.J. 966 (1967).

14. While the operations of the Brotherhood's legal aid department have varied from time to time and area to area, prior to 1959 the program consisted generally of attorneys in sixteen regions throughout the country who had been selected by the union and who had agreed to handle all union member claims for a set low fee, usually a flat twenty-five per cent. *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958). Included was the agreement that the attorneys would pay all operating costs of the union's legal aid department office and the costs incurred by union members in investigating accidents. In return for such consideration on his part, the lawyer was assured a large enough volume of business to justify the low fee. See *Hildebrand v. State Bar of Cal.*, 36 Cal.2d 504, 225 P.2d 508 (1950). This large volume of business was assured by the local investigators' virtual solicitation of claims on behalf of the regional counsel by such practices as the investigators' furnishing the lawyer's employment contract forms to injured parties. *In re Brotherhood of R.R. Trainmen, supra*. The charges brought against attorneys serving as counsel to the Brotherhood usually stemmed from these solicitation practices, but under certain types of programs the attorneys were also liable for splitting fees with the union. *In re O'Neill*, 5 F. Supp. 465 (E.D.N.Y. 1933).

In a marked change from earlier courts, the Illinois Supreme Court in 1958 set forth an alternative plan which would be acceptable to that court. That Illinois decision recognized the union's right to recommend specific attorneys but forbade any financial connections between such attorneys and the union. *In re Brotherhood of R.R. Trainmen, supra* at 167. While the Illinois holding could be interpreted as an indication of a liberalization in the control of group practice, that decision is distinguished from the later United States Supreme Court decisions by one notable factor: the consideration of the first amendment rights of the litigants, the very basis of the later holdings, is given no importance in the Illinois decision.

15. 371 U.S. 415 (1963).

16. 377 U.S. 1 (1964).

17. *Button* presented a good occasion for the Court to establish the right of organization members to provide themselves with legal counsel. First, *Button* came before the Court at a time when the Court was acutely aware of the Negro community's

plan upheld by the Court involved the organization's retention of lawyers for a per diem fee who served as counsel to parties in litigation, often at NAACP urging, aimed at achieving the group's goals.¹⁸

In *Trainmen*, the Court upheld a recently altered legal aid plan which provided that each local's secretary recommend to an injured member that he contact the union-selected attorney before making any settlement.¹⁹ The Court also further refuted the arguments advanced on behalf of state control of legal ethics by stating that the joining together of laymen to preserve and enforce one another's federally granted rights could not be a threat to legal ethics.²⁰ In effect, then, *Trainmen* simply amplified *Button*.

Even with the background of *Button* and *Trainmen*, the Illinois Supreme Court would not uphold the legal aid plan presented in *United Mine Workers*.²¹ In considering the Illinois court's holding, the United

dilemma. Secondly, the litigation sought by the NAACP was aimed at achieving realization of constitutionally guaranteed civil rights so that in a balancing of equities the state's rights of regulation appeared insufficient to justify the denial of rights to the NAACP litigants. 371 U.S. at 444. Thirdly, litigation was the only means of political expression available to the Negro group, for the Negro community's weak economic position made their voice in the community unheard and their weak voting position made the voices of their representatives unheard. The only means of participation open to them was through the courts, for there they could act as a stronger group would act in other branches of government. "For the Negro, litigation was like lobbying." Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 989-90 (1967). Thus, the situation was one in which such litigation could more easily be brought under the protection of the first and fourteenth amendments. 371 U.S. 415, 429-30.

18. NAACP v. Button, 371 U.S. 415, 420-21 (1963).

19. In 1964, the Brotherhood had an investigatory staff paid entirely from union funds, and the Brotherhood contended there had been no splitting of fees since the Illinois Supreme Court ruling in *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958), which forbade such practices. 377 U.S. 1, 4 n.8, 5 n.9.

The *Trainmen* plan was accepted over a dissenting Justice Clark and Justice Black, who distinguished *Trainmen* from *Button* by noting that the object of the litigation protected in *Trainmen* was personal damages, not constitutionally guaranteed civil rights. 377 U.S. 1, 10 (dissenting opinion).

20. *Id.* at 7.

21. The Illinois Supreme Court distinguished *United Mine Workers* from both *Button* and *Trainmen*, noting that the United States Supreme Court had recognized the right of states to regulate the legal profession so long as such regulation did not infringe upon the rights of individuals. The Illinois court interpreted the Supreme Court's holdings as condoning a balancing of state rights against individual rights. By this analysis the Illinois court reasoned that the desirability of upholding the state interest in regulating the legal profession sufficiently outweighed the undesirability of any infringement on individual rights so as to justify the court's overruling the mine

States Supreme Court recognized the state's right to regulate the practice of law,²² but the Court stated: "[I]t is equally apparent that rules framed to protect the public and preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms."²³ Thus, in its balancing of state rights of regulation against individual first amendment rights, the Court concluded that the individual rights should prevail.²⁴

In upholding the "associational freedoms" of the mine workers, the Court relied heavily on *Button* and *Trainmen*. However, while the programs involved in the two earlier cases both utilized solicitation among potential litigants and provided for the handling of attorney-client communications, the United Mine Workers' program provided additionally that the union pay the attorney a flat salary for his services.²⁵ All such intermediary practices are expressly forbidden by Canon 35 of the ABA *Canons of Professional Ethics* as adopted by the Illinois State Bar Association.²⁶

workers' program. *Illinois State Bar Ass'n v. United Mine Workers of America*, Dist. 12, 35 Ill.2d 112, 123-24, 219 N.E.2d 503, 509-10 (1966).

22. In a strong dissenting opinion, Justice Harlan maintained: "[L]itigation is more than speech; it is conduct. And the States may reasonably regulate conduct even though it is related to expression." *United Mine Workers of America*, Dist. 12 v. Ill. State Bar Ass'n, 88 S.Ct. 353, 358 (1967) (dissenting opinion).

23. *Id.* at 356.

24. *Id.* at 357.

25. *Id.* at 355.

26. Canon 35 reads:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

This canon as applied to a fact situation in which an employer or association or union agrees to reimburse legal costs paid by employees or members has been interpreted by the ABA Committee on Professional Ethics. The committee held such practice to be ethical so long as the attorney is selected and employed by the member and has no responsibility to the employer, association, or union. The committee stated, however, that "where the lawyer is selected and employed as well as paid by the

Supreme Court approval of the United Mine Workers' plan therefore signifies an extension of the principles espoused in *Button* and *Trainmen* in that while the *United Mine Workers* holding rests on the same ground as the earlier decisions, it has broadened the scope of those decisions to allow even greater deviations from standard legal ethics to further protect the right of individuals, assembled in an organization, to secure legal counsel for themselves.

The import of *United Mine Workers* lies in the trend it signifies,²⁷

employer or association to represent its employees or members, the employment may well be unethical." ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINION NO. 469 (1961).

In another interpretation of Canon 35, the ABA Committee on the Unauthorized Practice of Law was presented with this situation: "II. A labor union employs a lawyer, *on full time*, part of whose duties is to be available to advise and assist its members, if they desire such assistance: (1) in connection with disputes between the employee-member and the corporation under the union contract; (2) in connection with their personal problems such as the drawing of wills, deeds or leases for their dwellings, claims against third parties for injuries to persons or property, etc. The by-laws of the union provide that they shall be entitled to this service, which is paid for out of their dues." The committee was asked to determine whether such activities constituted the unauthorized practice of law.

In answering the inquiry, the committee referred to the provisions of Canon 35 which allow a lawyer to represent an organization as an entity but forbids his rendering legal service to the organization's members. The committee then notes: "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. If such were permissible, it would permit the corporation or lay agency to do that which the lawyer could not do; namely, the solicitation of business. [*Richmond Ass'n of Credit Men, Inc. v. The Bar Ass'n of the City of Richmond*, 167 Va. 327, 189 S.E. 153 (1937)]."

While the committee concluded that the practices set out constituted the unauthorized practice of law, the committee also stated: "However, whether it is professionally improper for a lawyer to represent an individual member of a corporation or lay agency, at the expense of the latter, where such representation is for the promotion of the common interest of the shareholders of the corporation or members of the lay agency and not merely for the benefit of the individual . . . is a matter involving ethics alone, which this committee does not seek to pass upon." ABA COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW, INFORMATIVE OPINION A (1950).

While the CANONS do not carry the weight of statutes, they were the standard for the Illinois court's interpretation of the less explicitly worded statutes. *Illinois State Bar Ass'n v. United Mine Workers of America*, Dist. 12, 35 Ill.2d 112, 119-20, 219 N.E.2d 503, 507 (1966). See ILL. REV. STATS. ch. 13.

27. There have been strong predictions as to where the trend set by *United Mine Workers* will lead. Some see a further departure from the profession's standards of ethics, *Brotherhood of R.R. Trainmen v. Va.*, 377 U.S. 1, 9, 12 (1964) (dissenting opinion), a demise of the attorney-client relation, noted in 65 MICH. L. REV. 805, 812 (1967), and a substantial commercialization of the profession, *Illinois State Bar Ass'n v. United Mine Workers of America*, Dist. 12, 35 Ill.2d 112, 125, 219 N.E.2d 503, 510

for the holding delineates a change in the Court's position regarding the legal profession in this country. This change appears to be toward more permissiveness, if such permissiveness is aimed at aiding a client in attaining his constitutionally guaranteed freedoms, and its effect on the profession will undoubtedly be marked.

Military Law—APPLICATION OF MIRANDA TO COURTS-MARTIAL ADMISSIONS. Specialist Fourth Class Richard C. Lincoln, on trial for premeditated murder before a general court-martial, testified that he did not intend to kill the deceased. Without initially proving that the accused had been warned of his rights, trial counsel sought to impeach his testimony with statements Lincoln had made at a pretrial interrogation. The statements were admitted as evidence and Lincoln was subsequently convicted of voluntary manslaughter. The sentence was approved by the convening authority and affirmed by the Army Board of Review.

In reversing the Board's decision, the Court of Military Appeals held that without prior proof of compliance with the warnings against self-incrimination set forth in *Miranda v. Arizona*¹ and *United States v. Tempia*,² allowing the introduction of an admission used to impeach the accused's testimony was prejudicial error and a denial of due process of law.³

Due process has always been guaranteed to the armed forces of the United States,⁴ however, military due process had been defined as the fair and uniform application of military law enacted by Congress.⁵ Consequently, military courts were bound by Article 31 of the Uniform Code

(1966). In considering *United Mine Workers*, the Illinois Supreme Court felt that upholding the Mine Workers program might lead unions to expand into the offering of legal advice in areas unrelated to the members' jobs. The court also saw the possibility of any group with a similarity of interests being allowed to form to hire an attorney to deal with individual problems. Illinois State Bar Ass'n v. United Mine Workers of America, Dist. 12, *supra* at 510. One writer, looking ahead to the *United Mine Workers* holding, concluded that, taken together, *Button*, *Trainmen*, and *United Mine Workers* may well establish "a strong impetus for reform." Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 984 (1967).

1. 384 U.S. 436 (1966).
2. 16 U.S.C.M.A. 629, 137 C.M.R. 249 (1967).
3. *United States v. Lincoln*, 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1967).
4. *E.g.*, *Reaves v. Ainsworth*, 219 U.S. 296, 304 (1910).
5. *French v. Weeks*, 259 U.S. 326 (1922); *United States v. Grisby*, 335 F.2d 652 (4th Cir. 1964); *Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944).