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THE CONSTITUTIONALITY OF RESTRICTIONS ON POVERTY LAW FIRMS: A NEW YORK CASE STUDY

MICHAEL BOTEIN*

Government-funded poverty law firms are presently providing essential legal services to poor people throughout the country. These firms have met with varying responses from the bar and the courts. In this article, Professor Botein examines the response of New York's Appellate Division, First Department—a comprehensive set of regulations governing the practice of law by poverty law firms. After analyzing these regulations and the constitutional issues they raise, the author concludes that both procedurally and substantively there is strong doubt concerning their validity.

I

INTRODUCTION

THOUGH few Office of Economic Opportunity (OEO) projects have won accolades from local powers-that-be, Legal Services probably has the distinction of being the most unpopular program around. From its inception, it has been under attack from local legal establishments,¹ and more recently the Nixon Administration singled it out as the first OEO program to be emasculated.² General questions of federal-state relations do, of course, figure into this formula for disaster,³ but the prime lesson of the Legal Services experience may simply be that poverty lawyers are remarkably effective at attacking previously sacrosanct local interests. The heat generated by Legal Services is therefore a tribute to the power of the profession. Unfortunately, the bar's response has not been a gracious acceptance of Legal Services, but rather an attempt to straitjacket it.

The New York City experience with Legal Services has been noteworthy—first, because of the city's size and visibility, and second, because of OEO's huge investment in New York. Nearly 10% of the total Legal Services budget finds its way

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¹ Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 805, 833-34, 843-44 (1967) [hereinafter *Harvard Note*]. See *Troutman v. Shriver*, 417 F.2d 171 (5th Cir. 1969), where several local bar associations sought an injunction against a Legal Services office but were held to lack standing.

² See, e.g., *N.Y. Times*, Jan. 17, 1970, at 21, col. 4.

³ See, e.g., *Nat'l Institute on Fed. Urban Grants: Policies and Procedures*, 22 Ad. L. Rev. 113, 114 (1969).

into the city.⁴ The Appellate Division, First Department has reacted to this massive federal commitment by imposing a variety of restrictions on poverty law firms. An analysis of these restrictions and their constitutionality may anticipate similar developments in other jurisdictions.

II

THE NEW YORK EXPERIENCE

A. Background to Appellate Division Regulation

Poverty law firms must receive Appellate Division approval in order to practice law in New York.⁵ In 1966, Community Action for Legal Services (CALs) petitioned the Appellate Division, First Department, for such approval.⁶ In *Matter of Community Action for Legal Services, Inc., (CALs)*, the court's initial reaction was totally negative.⁷ The court rejected CALs' petition and indicated by way of dictum its opposition to most of the proposed innovations, *i.e.*, solicitation,⁸ group representation⁹ and lobbying.¹⁰ Though CALs' application was ultimately approved after extensive modification,¹¹ the court continued its

⁴ Office of Economic Opportunity, Evaluation, Community Action For Legal Services, Inc. 6 (1970) [hereinafter CALS Report].

⁵ N.Y. Judiciary Law § 495 (McKinney 1968) bans the practice of law by corporations and voluntary associations. An exception is made, however, for "organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the Appellate Division."

⁶ The application was made to the First Department because the principal offices of the proposed corporations were to be located in that Department. *Matter of Community Action for Legal Services, Inc.*, 26 App. Div. 2d 354, 356 n.2, 274 N.Y.S.2d 779, 783 n.2 (1st Dep't 1966). Two other petitioners joined with CALS in the action. They were the New York Legal Assistance Corporation and Harlem Assertion of Rights, Inc.

⁷ 26 App. Div. 2d 354, 274 N.Y.S.2d 779 (1st Dep't 1966).

⁸ *Id.* at 362-63, 274 N.Y.S.2d at 789.

⁹ *Id.* at 363.

¹⁰ *Id.* at 362, 274 N.Y.S.2d at 788: "[A]ll the proposals are deficient . . . in not prohibiting entirely and without evasive qualification political, lobbying, and propagandistic activity."

¹¹ Order, *Matter of Community Action for Legal Services, Inc.* (App. Div. 1st Dep't, Oct. 10, 1967) [hereinafter CALS Order]. The provisions of the order were, in several significant aspects, less restrictive than the rules later promulgated. Thus, the rules prescribe extensive procedures concerning application for and renewal of court approval of the legal corporation's operations (N.Y. Ct. Rules, App. Div., 1st Dep't, Part 608, §§ 608.2, .3 (McKinney 1970) [hereinafter Part 608]) and require extensive annual reports (*id.* § 608.8)—topics dealt with only generally in the CALS Order. In addition, the rules add strong curbs on the dissemination of information (*id.* § 608.7(e)) and on referrals (*id.* § 608.7(f)), and dispense with the preroval hearing requirement of the CALS Order (*id.* § 608.9). The rules are, however, no more stringent than the order,

regulation by informal means. In what has become known as the "Stevens Letter," Presiding Justice Harold A. Stevens made the court's position still clearer by advising CALS not to sacrifice service to individual clients upon the altar of law reform.¹²

In both its initial *CALS* decision and in later actions the Appellate Division has reflected an apparent apprehension that local politicians would take over poverty law firms and run them with little regard for either efficiency or ethics. Recent history has, in fact, partially borne these predictions out.¹³ The court's concern has led it, however, to paint over these legitimate evils with a brush far broader than necessary and in a possibly unconstitutional manner.

In 1970, the Appellate Division promulgated a comprehensive set of regulations governing the practice of law by poverty law firms.¹⁴ The rules represent, in a sense, an expansion and codification of the court's dictum in *CALS*¹⁵ in that they severely limit poverty lawyers' rights regarding solicitation, group representation, referrals and lobbying.

A variety of poverty law firms and clients soon challenged the constitutionality of the rules in *Young Lords v. Supreme Court*.¹⁶ The three-judge district court that heard the case refused to pass on the rules' constitutionality, deeming it a "wise exercise of discretion" to allow the Appellate Division to confer with the plaintiff law firms.¹⁷ While the court retained

for example, in restricting civil protest and political activity (id. § 608.8(c)), limiting representation of organizations and groups rather than individuals (id. § 608.8(b)), and defining the membership of boards of directors (id. § 608.6). The rules may even be more liberal in some areas, such as in the use of law students as legal counsellors.

¹² Letter from Presiding Justice Harold A. Stevens to Community Action for Legal Services, Inc., Oct. 2, 1969 [hereinafter Stevens Letter] (on file at the New York University Law Review offices). Though Presiding Justice Stevens appeared to speak as an individual, his letter began by noting that he was writing "[u]pon direction of the court." Id. at 1.

¹³ An OEO evaluation team found in 1970 that some Legal Services offices had become dominated by local politicians and had been transformed into sources of patronage. See *CALS Report*, supra note 4, at 80.

¹⁴ Part 608, supra note 11. While affecting all poverty law offices, the rules influence most strongly Legal Services offices, since these offices handle the bulk of all civil poverty law practice in New York City. The rules also apply to other groups organized "for benevolent or charitable purposes." Id.

¹⁵ See text accompanying notes 8-10 supra.

¹⁶ Civil No. 70-5179 (S.D.N.Y., May 19, 1971). The primary assertions of the complaint were that the rules denied free speech, free association and equal protection of the laws. Id. at 4.

¹⁷ Id. at 7. The court indicated that "[w]e do not reach these arguments because counsel for defendants has represented that at least partial, and perhaps full, resolution of the controversy may be accomplished if plaintiff Legal Rights Organizations apply . . . for approval under Part 608 and for such exceptions for their activities as they believe are necessary." Id. at 5.

jurisdiction, it will likely never reach the merits, but rather will probably follow its current practice of leaving challenges to the Appellate Division to be resolved informally.¹⁸

Running throughout the web of Appellate Division activity is a distinct thread of participation by the private bar. The Stevens Letter referred to recommendations by the City Bar Association's Committee on Professional Responsibility¹⁹ and advised CALS that it could get "more detail" regarding Appellate Division requirements in that committee's report.²⁰ In addition, the rules were formulated in consultation with the Bar Association's committee;²¹ they require poverty law firms to serve copies of their applications on the Association;²² and they are administered with the help of the committee.²³ Finally, counsel for the Appellate Division in *Young Lords* was one of the Association members who is responsible for assisting in the administration of the rules.²⁴

B. Procedural Infirmities of the Rules

Though it might answer some of the federal constitutional questions surrounding the rules, a decision in *Young Lords* would not resolve several collateral procedural points. First, the Appellate Division's very power to promulgate the rules may be an unlawful delegation of power. Although the delegation doctrine is now hopefully a dead letter of the law on the federal level,²⁵ it is still alive and well in the New York courts. The Appellate Division's enabling legislation²⁶ contains no standards at all, not even a ritualistic invocation of the "public interest."²⁷ And, though the New York courts sometimes appear to be satisfied with ritual,²⁸ they have been especially sensitive to a

¹⁸ Cf. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd*, 401 U.S. 154 (1971).

¹⁹ Stevens Letter, *supra* note 12, at 1.

²⁰ *Id.* at 3.

²¹ See 25 Record of N.Y.C.B.A. 466 (1970).

²² Part 608, *supra* note 11, § 608.2 (copies must also be served on the New York County Lawyers' Ass'n and the Bronx County Bar Ass'n, *inter alia*).

²³ See 25 Record of N.Y.C.B.A. 466 (1970).

²⁴ *Young Lords v. Supreme Court*, Civil No. 70-5179 (S.D.N.Y., May 19, 1971).

²⁵ 1 K. Davis, *Administrative Law Treatise* § 2.01 (1958); W. Gellhorn & C. Byse, *Administrative Law: Cases and Comments* 60-61 (5th ed. 1970); L. Jaffe & N. Nathanson, *Administrative Law: Cases and Materials* 80-81 (3d ed. 1968).

²⁶ N.Y. Judiciary Law § 495(5) (McKinney 1968).

²⁷ See 1 K. Davis, *Administrative Law Treatise* § 2.03, at 81-82 (1958).

²⁸ See, e.g., *Calzadilla v. Dooley*, 29 App. Div. 2d 152, 286 N.Y.S.2d 510 (1st Dep't 1968) (standard of "public interest, convenience or necessity" was not so indefinite as to confer unlimited authority).

lack of standards where, as here, licenses²⁹ or constitutional rights³⁰ have been at stake.³¹ Moreover, the First Department has been disturbed by private participation in the administrative process,³² a factor which, as noted above, is present in its own regulation of poverty law firms.

Second, the adoption and administration of the rules may violate the due process right to notice and a hearing. While the promulgation of the rules was superficially a quasi-legislative act requiring no due process safeguards,³³ the rules affect only a

²⁹ *Packer Collegiate Institute v. University of State of N.Y.*, 298 N.Y. 184, 81 N.E.2d 80 (1948); *Seignious v. Rice*, 273 N.Y. 44, 6 N.E.2d 91 (1936).

³⁰ *Packer Collegiate Institute v. University of State of N.Y.*, 298 N.Y. 184, 191-92, 81 N.E.2d 80, 83 (1948). The constitutional rights involved in the instant situation are more compelling than the somewhat tenuous substantive due process right to attend private schools which the *Packer* court derived from *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

³¹ The New York courts have, however, recognized that a seemingly vague standard may, through custom and practice, acquire a definite meaning. *Cherry v. Board of Regents*, 289 N.Y. 148, 44 N.E.2d 405 (1942) ("unprofessional conduct"); *Mandel v. Board of Regents*, 250 N.Y. 173, 164 N.E. 895 (1928) ("unfit or incompetent from negligence, habits or other cause" to practice the profession). The Supreme Court itself has held that "[l]ong usage in New York and elsewhere has given well-defined contours" to New York's requirement of good character and fitness for admission to the bar. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971). But cf. *Konigsberg v. State Bar*, 353 U.S. 252, 262-63 (1957). Although the courts might thus be willing to read meaning into a similarly vague standard, the statute at issue here lacks even this vestige of judicially construable language.

It might also be argued that the provisions of the regulations could be read by implication into the statute, thus following another time-honored judicial method of finding standards. See *Lichter v. United States*, 334 U.S. 742, 785 (1948). The only problem with this approach is that the regulations themselves set no standards. While it might be possible to read standards into the regulations by construing the provisions in Part 608, supra note 11, §§ 608-2,-7,-.8 (relating to reporting requirements and restrictions imposed upon the actions of poverty law firms), as initial licensing standards, this thrice-removed canon of construction would presumably be too extreme for even the most sympathetic court.

³² *8200 Realty Corp. v. Lindsay*, 34 App. Div. 2d 79, 309 N.Y.S.2d 443 (1st Dep't), rev'd, 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733 (1970). Though the Court of Appeals reversed the Appellate Division, it did recognize that any significant delegation of administrative power to private parties was invalid.

³³ 1 K. Davis, *Administrative Law Treatise* § 7.07, at 436 (1958). In *Young Lords v. Supreme Court*, Civil No. 70-5179 at 5 (S.D.N.Y., May 19, 1971), the court said that in promulgating the rules the Appellate Division had been acting "in a legislative or, as it is now usually phrased, in an administrative capacity." The court, however, neither raised nor reached the issue of the right to a hearing. It was concerned solely with whether the rules could be appealed directly to the New York Court of Appeals. In *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162-63 (1971), however, the Supreme Court refused to express an opinion as to whether in controlling admission to the bar the Appellate Divisions acted as "courts" or "administrative agencies." In *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1866), the Court stated that admission to the bar "is not the exercise of a ministerial power. It is the exercise of judicial power."

small number of poverty law firms and presumably were aimed only at them.³⁴ Therefore, in fact if not in form,³⁵ the promulgation of the rules may have been an adjudication, thus requiring both notice and a hearing.³⁶

Furthermore, the rules themselves provide for little or no procedural due process upon application for or revocation of the Appellate Division's approval.³⁷ Due process requires full notice and a hearing prior to the denial of admission to the bar,³⁸ and there seems to be no reason to treat a poverty law firm's right to practice differently. In addition, the New York courts have been very strict in the analogous area of licensing. The Court of Appeals has held, for instance, that a driver's license may not be revoked without a hearing;³⁹ presumably,

³⁴ The original *CALS* decision was apparently adjudicatory in nature and involved the applications of only three groups. Although an agency is, of course, free to change from adjudication to rulemaking and indeed may be encouraged to do so, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), the original mode of regulation is certainly relevant in characterizing later modes of regulation.

³⁵ Some courts are willing to look beyond form. In *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Comm'n*, 389 F.2d 962, 968 (D.C. Cir. 1968), for example, the court held that an order which invalidated provisions in a large number of longshoremen's contracts amounted to an adjudication. See also *Philadelphia Co. v. SEC*, 175 F.2d 808 (D.C. Cir. 1948), vacated, 337 U.S. 901 (1949). Though the reasoning of these two cases seems sound, it has not been followed by other courts and has been criticized. See 1 K. Davis, *Administrative Law Treatise* § 7.01, at 409-10 (1958).

³⁶ In commenting upon the Appellate Division rules, a committee of the New York County Lawyers Association noted that, "it would have been desirable for the Appellate Division to have given some form of notice of proposed rule-making, either formal or informal . . . in advance of the issuance of Part 608." Memorandum from Comm. on Legal Aid to Bd. of Directors, New York County Lawyers Ass'n at 5 (Jan. 8, 1971) [hereinafter *County Lawyers Report*] (on file at the New York University Law Review offices).

³⁷ Part 608 makes no provision at all for notice and a hearing upon application for approval. Two different provisions are applicable to revocation of approval. Part 608, *supra* note 11, at § 608.4(b), allows revocation for the violation of any of the conditions and limitations in the Appellate Division's order of approval "on such notice and after such hearing as the Appellate Division may deem appropriate." Procedural niceties are thus apparently left entirely up to the Appellate Division's whim. Section 608.9, on the other hand, provides for revocation for any other reasons "[u]pon good cause shown . . . on not less than twenty days' notice," but has no provision for a hearing.

³⁸ *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 108 (1963) (concurring opinion); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926). In *Willner* the Court made the perhaps overly optimistic assumption that "[c]ertainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect, the demands of due process." 373 U.S. at 106.

³⁹ *Matter of Wignall v. Fletcher*, 303 N.Y. 435, 103 N.E.2d 728 (1952). See also *People v. Faxlanger*, 1 N.Y.2d 393, 135 N.E.2d 705, 153 N.Y.S.2d 193 (1956) (license to operate gasoline station); *English v. Tofany*, 32 App. Div. 2d 878, 302 N.Y.S.2d 221 (4th Dep't 1969); *Sculetto v. Sheridan*, 12 App. Div. 2d 801, 210 N.Y.S.2d 20 (2d Dep't 1961) (taxi license).

the courts should protect poverty law firms as thoroughly as automobile drivers.

Thus, the regulations suffer from a variety of procedural defects. More importantly, however, they impose severe substantive restrictions upon essential poverty law activities—restrictions which may, unfortunately, be emulated by other jurisdictions.

III

EMERGING CONSTITUTIONAL ISSUES

A. *Solicitation*

The Appellate Division rules severely limit the range of permissible solicitation by allowing a poverty law firm to distribute only information which concerns the nature of its services and states its economic eligibility requirements.⁴⁰

These rules strike at the lifeblood of any law firm—its clients. They are especially harsh in light of poor people's ignorance of the law and of their need for lawyers. While the middle class may have some notion of when to consult an attorney, the poor generally do not.⁴¹ In addition, the poor, unlike the middle class, have little social contact with lawyers. Aggressive education and advertising are therefore necessary in order to make an impact in their communities.⁴²

In *NAACP v. Button*, the Supreme Court recognized this need and cloaked solicitation with first amendment protection.⁴³ In *Button*, the NAACP organized meetings at which attorneys encouraged black people to bring desegregation lawsuits. They also tried to induce participants to become plaintiffs for particular actions.⁴⁴ In holding the NAACP's activities to be con-

⁴⁰ Part 608, supra note 11, § 608.7(e), provides:

[A group] formed solely for the purpose of rendering or furnishing legal services to persons without means, may publish and/or distribute and/or disseminate information of the nature of the services it is authorized to render, with an inclusion, however, of a statement of the eligibility and general qualifications of persons to receive such services.

This subsection is somewhat vague, since it is unclear whether: (1) the firm must serve only poor people; (2) all clients solicited must be poor; or (3) both criteria must be met. The language of the provision was, in fact, apparently added as an afterthought. By comparison, the original CALS Order specifically gave CALS the power "to inform the public, and in particular the poor of legal problems, the availability of legal counsel and the basic legal rights of all citizens." CALS Order, supra note 11, at 3.

⁴¹ Cf. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964).

⁴² Harvard Note, supra note 1, at 821-22.

⁴³ 371 U.S. 415, 428-29 (1963).

⁴⁴ *Id.* at 421-22.

stitutionally protected, the Court sanctioned solicitation far stronger than that preached or planned by any poverty law firm.⁴⁵ In two later cases, the Court went even further and permitted direct personal approaches to potential litigants⁴⁶—a technique beyond even the most ambitious community education project.

In fact, solicitation by a poverty law firm poses far fewer dangers than the activities involved in *Button* and later cases. Since poverty lawyers usually receive a fixed salary, they have no economic incentive to foment litigation. Moreover, a conflict between an organization's goals and a client's interests is far less likely in a poverty law firm than in a case like *Button*, since a poverty lawyer is associated with an independent law firm, not with the organization bringing suit.

Furthermore, restrictions on solicitation are inconsistent with the current development of professional ethics. The prohibition on advertising originally evolved not as an ethical principle, but rather as part of the "rules of professional etiquette."⁴⁷ As such, the prohibition has a rather tenuous foundation today, especially when applied to the provision of legal services to the poor, as both bar and bench have recognized. On a national level, the American Bar Association has traditionally sanctioned any advertising necessary to help the poor or vindicate constitutional rights.⁴⁸ Moreover, OEO encourages solici-

⁴⁵ *Id.* at 428-29. The Court may have actually meant to protect a narrow range of activities since it read the Virginia court's decree as prohibiting "any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." *Id.* at 433 (emphasis added). This reading of the case is, however, belied by the Court's later more expansive holdings. See note 46 *infra*.

⁴⁶ *United Transp. Union v. State Bar*, 401 U.S. 576, 578 (1971) (union representatives transported potential claimants to the offices of attorneys chosen by the union); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 4 (1964) (union representatives visited injured workers and urged them to retain particular attorneys to prosecute their claims). These two cases, and *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967), clearly demonstrate that *Button* cannot be distinguished as a "civil rights" or "speech" case. "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." *United Transp. Union v. State Bar of Mich.*, *supra* at 585. To a certain extent the Court may have been combining first amendment protection with its recent development of a due process and equal protection right of access to the courts. See note 106 *infra*.

⁴⁷ H. Drinker, *Legal Ethics* 211 n.3, 212 (1953).

⁴⁸ The ABA has allowed newspaper and radio advertisements designed to inform poor people of their rights and encourage them to seek legal assistance. ABA Comm. on Professional Ethics, *Opinions*, No. 148 (1935); *Informal Opinions*, No. 992 (1967), No. 786 (1964), No. 764 (1964). See also Fla. Comm.

tion by Legal Services offices.⁴⁹ On a local level, the New York State Bar Association has approved direct mail solicitation of defendants in eviction proceedings.⁵⁰ In addition, the courts have always followed the bar's lead in recognizing the special needs of poor people with regard to solicitation.⁵¹

Thus, broad prohibitions on solicitation by poverty law firms are probably unconstitutional and certainly not ethically mandated. Although the possibility that poor people will be forced into unwanted litigation is a real problem, it can be resolved by narrowly drawn limitations. Such restrictions, however, must be grounded upon the protection of poor people—not upon some hypothetical interest of the bar or of the middle class.⁵²

on Professional Ethics, Opinions, No. 66-56 (1967), 1 CCH Poverty L. Rep. ¶ 6100.15, at 7153 (1971); Padnos, *Legal Aid and Legal Ethics*, 5 Ga. S.B.J. 347 (1969). In addition, the ABA's new Code of Professional Responsibility codifies the bar's historical commitment by expressly exempting poverty law firms from its general ban on solicitation. ABA Code of Professional Responsibility D-R 2-103(D) (1969). In fact, the drafters of the code seem to have attempted to incorporate constitutional standards by reference, since D-R 2-103(D)(5) n.123 explicitly refers to *NAACP v. Button*, 371 U.S. 415 (1963), *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964), and *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

⁴⁹ Office of Economic Opportunity, *How to Apply For a Legal Services Program*, 1 CCH Poverty L. Rep. ¶ 6705.50, at 7730-32 (1968). See also Note, *Beyond the Neighborhood Offices—OEO's Special Grants in Legal Services*, 56 Geo. L.J. 742, 750 (1968). The National Legal Aid and Defender Association, another organization with experience and expertise in poverty law, also encourages extensive community education. NLADA, *Handbook of Standards for Legal Aid and Defender Offices* 14 (1970). OEO's encouragement of solicitation also raises questions of preemption. See text accompanying notes 108-116 *infra*.

⁵⁰ N.Y. State Bar Ass'n Comm. on Professional Ethics, Opinions, No. 75 (1968), 23 Record of N.Y.C.B.A. 374 (1968). See also N.Y. State Bar Ass'n Comm. on Professional Ethics, Opinions, No. 71 (1968), in which the committee authorized distribution of pamphlets which portrayed aspects of the law important to the poor.

Most recently and dramatically, the District of Columbia Bar Association approved full-page newspaper advertisements in which the Stern Community Law Firm, a private "public interest" organization, listed toys which the Food and Drug Administration had found to be defective and urged consumers to assert their right to return the toys. The advertisement suggested that consumers contact the law firm if their dealer refused a refund. D.C. Comm. on Legal Ethics and Grievance, Report (1971) (on file at the New York University Law Review offices).

⁵¹ See, e.g., *In Re Ades*, 6 F. Supp. 467 (D. Md. 1934); *Stanislaus County Bar Ass'n v. California Rural Legal Assistance, Inc.*, 1 CCH Poverty L. Rep. ¶ 6100.05, at 7152 (Cal. Super. Ct. 1967); *Gunnels v. Atlanta Bar Ass'n*, 191 Ga. 366, 12 S.E.2d 602 (1940); *Touchy v. Houston Legal Foundation*, 432 S.W.2d 690 (Tex. 1968). In fact, even the Virginia court reversed by *Button* held that solicitation was entitled to some, albeit limited, first amendment protection. *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960).

⁵² See note 118 *infra*.

B. Group Representation

Group representation is an essential poverty law tool.⁵³ It is not only an effective means of making contact with the community, but is also the only feasible way to secure relief in many situations, e.g., a rent strike. In addition, poverty law firms' limited resources often make individual representation merely a gesture and group representation a necessity in order to meaningfully help the community.⁵⁴

The Appellate Division's rules on group representation seem to have been motivated largely by a fear that poverty law firms would take cases with controversial political, social and economic issues.⁵⁵ The rules begin with an outright ban on group representation,⁵⁶ but make an exception for "legal services rendered to groups or organizations of persons primarily for the purpose of promoting the interests of persons eligible as indigent individuals."⁵⁷ This proviso is obviously somewhat ambiguous, but it appears to allow a firm to represent only groups whose membership is primarily indigent.

Such a limitation encroaches upon the constitutional right of association.⁵⁸ This right, upheld in *Button* as regards the NAACP, applies equally as well to groups which seek representation by a poverty law firm. Freedom of association would be meaningless in many cases if groups were denied such representation. First, an organization often needs an attorney to effectuate its beliefs and goals; second, lack of money or espousal of unpopular causes will often deprive such groups of any counsel other than poverty lawyers. The right to such representation is not limited to the indigent. In *Button* and in two later cases involving unionized workers,⁵⁹ the Supreme Court specifi-

⁵³ See Harvard Note, *supra* note 1, at 317-18.

⁵⁴ See CALS Report, *supra* note 4, at 20.

⁵⁵ In *Matter of Community Action for Legal Services, Inc.*, 26 App. Div. 2d 354, 363, 274 N.Y.S.2d 779, 789 (1st Dep't 1966), the court noted that "[i]t would be one thing to allow neighborhood law offices to handle poor men's credit unions. It would be quite another to have them handle, advise, and represent political factions or organizations of social and economic protest, however worthy."

⁵⁶ "Except as may be specifically authorized by order of the Appellate Division, no corporation, association or organization shall be entitled to procure or furnish legal services to another corporation, association or organization." Part 608, *supra* note 11, § 608.7(b).

⁵⁷ *Id.*

⁵⁸ "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

⁵⁹ See note 46 *supra*.

cally allowed representation of nonindigent individuals. The rules' limitation on group representation therefore amounts to an unconstitutional interference with many organizations' freedom of expression and association.

As with solicitation, the restrictions on group representation are not only unconstitutional, but they are also inconsistent with contemporary legal ethics. Even the leading authority on legal ethics can find no rational basis for the prohibition of group representation.⁶⁰ In addition, both the bar⁶¹ and the courts⁶² have traditionally allowed group representation of individuals with common interests. Perhaps even more importantly, OEO views group representation as an integral part of Legal Services⁶³ and specifically requires CALS to give it priority.⁶⁴

Thus, by limiting group representation the Appellate Division has imposed unconstitutional restrictions. If the court's purpose in promulgating these restrictive rules is to prevent poor people from becoming the ideological pawns of poverty lawyers, the court can assert its traditional disciplinary powers over individual attorneys without posing issues of constitutional magnitude.

Coupled with the restrictions on group representation is a requirement that poverty law firms refer cases only through

⁶⁰ H. Drinker, *Legal Ethics* 163-64 (1953).

⁶¹ ABA Comm. on Professional Ethics, *Opinions*, No. 111 (1934). The ABA has, however, consistently prohibited plans calling for representation of an organization's members. E.g., ABA Comm. on Professional Ethics, *Opinions*, No. 56 (1931), No. 8 (1925).

⁶² See, e.g., *Royal Oak Drain Dist. v. Keefe*, 87 F.2d 786 (6th Cir. 1937); *Davies v. Stowell*, 78 Wis. 334, 47 N.W. 370 (1890).

⁶³ OEO, *Guidelines for Legal Services Programs*, 1 CCH Poverty L. Rep. ¶ 6700.35, at 7702 (1968).

⁶⁴ OEO's grant to CALS requires that its offices undertake group representation. OEO, *Special Conditions Applicable to CALS and All Delegate and Affiliated Corporations* § 3.16 (1971) [hereinafter OEO Special Conditions] (on file at the New York University Law Review offices). Under the OEO eligibility requirements, a Legal Services office may represent nonprofit unincorporated associations if the majority of members are poor and if the group as an entity does not have the funds required for private representation. Nonprofit corporations are eligible if the corporation cannot borrow funds and does not have sufficient income to pay for private representation, *and* if most of the members are poor and the group's primary goal is to alleviate significant poverty problems. Such a corporation would also be eligible if "assertion of the particular legal principle at issue bears substantial significance to the achievement of justice for poor people generally." *Id.* § 3.1(2)-(3). See also CALS Report, *supra* note 4, at 30-31, which states that a rule preferable to Part 608, *supra* note 11, § 608.7(b), "would be one which makes a group eligible if it lacks money in its treasury to hire a lawyer, or if private lawyers have refused to represent the group or if the group seeks representation on an issue of wide significance to the poor." (emphasis added).

conventional channels.⁶⁵ Any commercial lawyer, of course, is very protective of his right to refer—and be referred—cases at bar association functions. Poverty lawyers have an even greater need for selective referral, however, since some of their clients receive unsympathetic treatment from attorneys with conflicting ideologies.⁶⁶ Both *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*⁶⁷ and *United Transportation Union v. State Bar of Michigan*⁶⁸ recognized this problem and upheld systems of highly selective referral; even Mr. Justice Harlan, who dissented in *Button* and subsequent cases, would have probably given the system his stamp of approval.⁶⁹ Moreover, OEO requires merely that Legal Services units “consider” using conventional referral systems, but leaves them free to adopt their own methods where they feel existing ones are “inadequate.”⁷⁰

C. Lobbying

Lobbying is an essential function of the poverty lawyer, since it is often a far more effective means of changing the law than test cases.⁷¹ Legal Services has always emphasized law reform as a high-priority component of its overall program,⁷² and naturally, lobbying is an integral part of this commitment. Thus, OEO specifically authorizes CALS to engage in law reform, including “legislative activities.”⁷³ Furthermore, the American

⁶⁵ Part 608, supra note 11, § 608.7(f).

⁶⁶ See generally *Sacher v. United States*, 343 U.S. 1, 13 (1952).

⁶⁷ 377 U.S. 1 (1964).

⁶⁸ 401 U.S. 576 (1971).

⁶⁹ See *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 228-30 (1967) (Harlan, J., dissenting).

⁷⁰ OEO, Guidelines for Legal Services Programs, 1 CCH Poverty L. Rep. ¶ 6700.35, at 7702 (1968). See also *Touchy v. Houston Legal Foundation*, 432 S.W.2d 690 (Tex. 1968).

⁷¹ Salisch, *Reform Through Legislative Action: The Poor and the Law*, 13 St. Louis U.L.J. 373 (1969).

⁷² Recommendations of Project Advisory Group of Legal Services Program on Nat'l Strategy for Law Reform, 1 CCH Poverty L. Rep. ¶ 6010, at 7033 (1968); Memorandum from Earl Johnson, (former) Director, Legal Services Program of OEO, to Board of Directors and Staff of Community Action Agencies and Legal Services Agencies, 1 CCH Poverty L. Rep. ¶ 6010, at 7032 (1968); Johnson, *Professional Responsibility Aspects of Legal Services Programs*, 41 U. Colo. L. Rev. 319, 324-25 (1969); Note, *Beyond the Neighborhood Office—OEO's Special Grants in Legal Services*, supra note 49, at 756-57.

⁷³ OEO Special Conditions, supra note 64, § 4.2 (1971). See also CALS Report, supra note 4, at 31, which states that Part 608, supra note 11, § 608.7(c), in prohibiting lobbying and propagandistic activities is “more restrictive than current OEO guidelines,” even though it allows testimony to be given at legislative hearings.

Bar Association's Code of Professional Responsibility allows lawyers to lobby for their clients.⁷⁴

Nevertheless, in its initial *CALS* decision, the Appellate Division opposed lobbying by poverty law firms.⁷⁵ This dictum subsequently took on concrete form in the rules' prohibition against "any political, lobbying, or propagandistic activities" by poverty law firms.⁷⁶

While the Supreme Court has never squarely held that lobbying comes within the first amendment, it has always granted lobbying a measure of protection. In both *United States v. Rumely*⁷⁷ and *United States v. Harriss*,⁷⁸ the Court, in order to avoid constitutional questions, essentially rewrote federal legislation involving lobbying.⁷⁹ The Court might be less willing to go to these lengths today, however, since *Harriss* relied in part on an analogy to criminal libel statutes⁸⁰—an analogy effectively destroyed by *New York Times Co. v. Sullivan*.⁸¹ In addition, the Appellate Division's rules are considerably more restrictive than the legislation involved in *Rumely* and *Harriss*.⁸²

⁷⁴ ABA Code of Professional Responsibility EC 7-16 (1969).

⁷⁵ See note 10 supra.

⁷⁶ Part 608, supra note 11, § 608.7(c). See text accompanying note 85 infra for the exception to this prohibition. The rules also prohibit poverty lawyers from organizing "protest or civil disobedience groups or social movements." These prohibitions apply to attorneys employed by the applicable groups both when they act on behalf of the group and when they act on behalf of any other person or group.

⁷⁷ 345 U.S. 41 (1953). *Rumely* involved a prosecution for contempt of Congress for failure to disclose, pursuant to a resolution, information relating to certain "lobbying" activities.

⁷⁸ 347 U.S. 612 (1954). *Harriss* involved a prosecution, pursuant to the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-70 (1964), for failure to register as a lobbyist and to disclose lobbying activities and support. By its terms, the act applied to anyone paid "to aid . . . (a) The passage or defeat of any legislation by the Congress of the United States. (b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States." 2 U.S.C. § 266 (1964).

⁷⁹ In *Rumely*, the Court construed "lobbying" to mean "representations made directly to the Congress, its members, or its committees." 345 U.S. at 47, quoting the lower court opinion, 197 F.2d 166, 175 (D.C. Cir. 1952). In *Harriss* the Court rephrased the test slightly as "direct communication with members of Congress on pending or proposed federal legislation." 347 U.S. at 620. In both cases, the Court said that its construction was necessary to avoid a violation of the first amendment. 345 U.S. at 46-47; 347 U.S. at 625-26.

⁸⁰ 347 U.S. at 626.

⁸¹ 376 U.S. 254, 277-78 (1964). Though *New York Times* involved a civil libel action, its principle was, of course, immediately extended to criminal libel in *Garrison v. Louisiana*, 379 U.S. 64 (1964).

⁸² See *NAACP v. Patty*, 159 F. Supp. 503, 524-25 (E.D. Va. 1958), rev'd on other grounds sub nom. *Harrison v. NAACP*, 360 U.S. 167 (1959), which held unconstitutional a Virginia lobbying registration statute encompassing anyone who promoted or opposed legislation "in any manner" on the ground that it was more restrictive in limiting free speech than the federal statute as interpreted in *Harriss*.

They do not merely require the registration of lobbyists and the disclosure of their activities, but instead they forbid lobbying absolutely.⁸³ Moreover, in *Harriss* the Court gave consideration to Congress' need to know the sources of "pressures" directed at it⁸⁴—a need obviously not shared by the Appellate Division.

Although a proviso to the rules—presumably inserted out of deference to *Rumely* and *Harriss*—allows poverty lawyers, with the permission of the Appellate Division, to "suggest, testify, comment on, review and interpret legislation,"⁸⁵ the permitted activity falls far short of the lobbying sanctioned in *Rumely* and *Harriss*. Upholding the rules' restriction on lobbying would thus require judicial surgery far more drastic than that performed in *Rumely* and *Harriss*.

Furthermore, by prohibiting lobbying, the Appellate Division has prevented poverty lawyers from exercising their right, as members of the bar, to criticize the law.⁸⁶ The Appellate Division's fear of lobbying by poverty lawyers is hard to understand, especially since commercial lawyers regard lobbying as such an integral part of their profession.⁸⁷ The potential evils of lobbying do not justify a blanket ban, but instead can be effectively dealt with through existing state and federal law.⁸⁸

D. Disclosure

The Appellate Division's rules require a poverty law firm to submit an annual report disclosing an extremely broad spectrum of information, including its activities,⁸⁹ the names and addresses of all employees,⁹⁰ and the principal objectives of any group represented.⁹¹

The requirement of identifying all employees is the most

⁸³ In addition, "political and propagandistic" activities are absolutely proscribed. Part 608, supra note 11, § 608.7(c). Cf. *Seasongood v. Commissioner*, 227 F.2d 907, 911 (6th Cir. 1955), "[i]f all address to the public or to authority is to be condemned because [it is] propaganda, the right of petition . . . becomes meaningless. So, also, with the constitutionally protected right of free speech."

⁸⁴ 347 U.S. at 625.

⁸⁵ Part 608, supra note 11, § 608.7(c).

⁸⁶ *In Re Sawyer*, 360 U.S. 622, 631 (1959); *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957).

⁸⁷ Cf. County Lawyers Report, supra note 36, at 2.

⁸⁸ See 2 U.S.C. §§ 262-70 (1964); cf. N.Y. Election Law § 460 (McKinney 1970).

⁸⁹ Part 608, supra note 11, § 608.8(f).

⁹⁰ *Id.* § 608.8(c).

⁹¹ *Id.* § 608.8(g). This subsection requires the disclosure of activities involving "the advocacy or representation of a group of persons in connection with social, economic, civil rights, reform or group programs, movements, goals or protests," but includes a proviso preserving "the anonymities of the individuals involved."

objectionable.⁹² It immediately runs afoul of the cases in which the Supreme Court has struck down efforts to obtain NAACP membership lists as violative of the rights of free speech and free association.⁹³ As the Court is well aware, publicly identifying the members of an unpopular organization not only stigmatizes the individuals, but also inhibits the organization's ability to attract support.⁹⁴ Although lawyers are presumably hardier than laymen and the bar is supposedly more tolerant than lay groups, the young lawyer cannot fail to be influenced by the attitudes of his contemporaries. Moreover, law students—often employed by poverty law firms—must anticipate their appearance before the Committee on Character and Fitness.⁹⁵

Furthermore, the Appellate Division seems to have no real need for disclosure. It certainly lacks any of the traditional justifications, *i.e.*, possible violence,⁹⁶ Communist infiltration⁹⁷ or fraudulent practices.⁹⁸ Indeed, the court already possesses much of the information sought; like all other lawyers, poverty lawyers must file notices of appearance and, more importantly, must pass the scrutiny of the Committee on Character and Fitness. Thus, the rules create a type of "double admittance" re-

⁹² Although the required disclosure of the firm's activities certainly seems unnecessary and burdensome, see County Lawyers Report, *supra* note 36, at 4, it probably does not present problems of great constitutional magnitude as long as it is restricted to requiring fairly general information. Interpreting it more expansively to require disclosure of a firm's specific activities, however, would run afoul of the same first amendment bans that limit the other disclosure provisions. See text accompanying notes 93-102 *infra*.

⁹³ See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *cf. Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961). The ordinance in *Bates v. Little Rock*, 361 U.S. 516 (1960), had a provision very similar to § 608.8(c)'s required disclosure of all attorneys. The ordinance there provided that all organizations within the city "list with the City Clerk . . . [t]he officers, agents, servants, employees or representatives of such organization, and the salaries paid to them." *Bates v. Little Rock*, *supra* at 518-19 n.3. A list of those paying dues was also required. The Court found that compelling disclosure of membership lists was violative of the right of free association. It did not, however, discuss the required disclosure of officers and employees. It might, of course, be argued that these cases are distinguishable from the Appellate Division requirements in that they involved membership as opposed to employee lists. Nevertheless, this appears to be a distinction without significance since an organization can be straitjacketed by public identification of its employees just as well as by public identification of its members.

⁹⁴ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

⁹⁵ See *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 185 (1971) (Marshall & Brennan, JJ., dissenting).

⁹⁶ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465-66 (1958); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 75-77 (1928).

⁹⁷ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546-48 (1963).

⁹⁸ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958).

quirement, which the Supreme Court recently seems to be frowning upon.⁹⁹

The rules also require a poverty law firm to submit as part of its annual report copies of any publication distributed to twenty-five or more persons and a statement of the nature and extent of the distribution.¹⁰⁰ This requirement is also constitutionally questionable for reasons akin to those applicable to the identification provisions. In *Talley v. California*,¹⁰¹ the Supreme Court struck down an ordinance which required that all pamphlets identify the publisher. The Court held that such a requirement restricted the freedom to distribute information and therefore the freedom of expression.¹⁰² The Appellate Division's rule is even more inhibiting since it requires not only disclosure of the publisher's identity but also submission of the publication to the licensing authority—once again with no guarantee of secrecy. The rules, in fact, do not provide for the confidentiality of these annual reports.

E. Equal Protection of Lawyers

Any self-respecting Wall Street lawyer would, quite naturally, be outraged if suddenly ordered not to represent corporations, not to refer cases to his friends and, in addition, to give the Appellate Division a blow-by-blow description of his internal office workings. This is, of course, exactly what the Appellate Division requires poverty lawyers to do. As articulated in the original *CALS* decision, the court's rationale seems to be that the corporate practice of law demands special safeguards.¹⁰³ Unfortunately, history has overtaken this traditional analysis. New York's Business Corporation Law now permits commercial law firms to incorporate, and the Appellate Division has not yet subjected these firms to regulation.¹⁰⁴ As a result, the Ap-

⁹⁹ See *In Re Stolar*, 401 U.S. 23, 29 (1971).

¹⁰⁰ Part 608, supra note 11, § 608.8(i).

¹⁰¹ 362 U.S. 60 (1960). The *Talley* principle is, in fact, closely related to that of the membership list cases, note 93 supra, as witnessed by the *Talley* Court's citation of *Alabama* and *Bates* as analogous cases. *Id.* at 65.

¹⁰² *Id.* at 64.

¹⁰³ In *Matter of Community Action for Legal Services, Inc.*, 26 App. Div. 2d 354, 356, 274 N.Y.S.2d 779, 783 (1st Dep't 1966), the court noted that "the allowable practice of law by corporations is highly exceptional, permissible only in carefully circumscribed conditions consonant with the policy of limiting the practice of law to licensed professionals."

¹⁰⁴ N.Y. Bus. Corp. Law § 1503(e) (McKinney Supp. 1970) states that "[a] corporation authorized to practice law shall be subject to the regulation and control of, and its certificate of incorporation shall be subject to suspension, revocation or annulment for cause by, the appellate division of the supreme court and the court of appeals in the same manner and to the same extent

pellate Division's special treatment of poverty law firms now can rest only upon the nature of the firms and their clientele.

Any classification based upon poverty, however, is at least "suspect" and perhaps even "forbidden,"¹⁰⁵ thus bringing it within the equal protection clause. Even if the rules' classification is not inherently invalid, it is invidious in its effect, since it interferes with poor people's right of access to the courts—a right which the Supreme Court has recently begun to recognize.¹⁰⁶

In fact, the Fifth Circuit recently applied an equal protection analysis to a closely related issue. In *Trister v. University of Mississippi*,¹⁰⁷ the court held that equal protection prohibited the university from firing two law professors because of their participation in a Legal Services program. If a law school is barred from discriminating against poverty lawyers, the Appellate Division presumably is also.

F. Federal Preemption

The courts might understandably want to avoid either going into "the business of supervising the practice of law in the various states"¹⁰⁸ or dealing with the far-reaching constitutional issues that the Appellate Division's rules raise. However, they need not go so far. The courts could invalidate the rules—or at least their application to CALS—on the less controversial

provided in the judiciary law with respect to individual attorneys and counselors-at-law." The Appellate Division has not exercised the power that this statute apparently has given it to regulate corporations authorized to practice law.

¹⁰⁵ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). The terms are those of Tussman and TenBrock. See Tussman & TenBrock, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 353-56 (1949).

¹⁰⁶ E.g., *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). The exact constitutional source of this right is somewhat hazy. Initially, the Court seemed to base it upon a conception of equal protection. (In *Griffin*, while the plurality spoke in terms of "[b]oth equal protection and due process," id. at 17, the holding must be viewed as based on equal protection alone, since Mr. Justice Frankfurter, who cast the deciding vote, spoke solely in terms of equal protection. Id. at 21-22. Ten years later, however, the Court treated *Griffin* as having been decided under both provisions. *Rinaldi v. Yeager*, 384 U.S. 305 (1966).) More recently the Court again shifted the right of access to the courts, this time to the manageable confines of the due process clause. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), it was held that a state divorce filing fee violated due process by inhibiting access to the courts. Whatever the basis for the right, state action which colorably violates due process is sufficiently invidious to violate equal protection. See generally Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435, 438 (1967).

¹⁰⁷ 420 F.2d 499, 502-03 (5th Cir. 1969).

¹⁰⁸ *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 234 (1967) (Harlan, J., dissenting).

grounds of preemption,¹⁰⁹ since federal administrative regulations are supreme over state law.¹¹⁰ The Supreme Court has, in fact, in an analogous area, indicated that a state may not restrict the activities of a federally licensed attorney.¹¹¹

OEO's general guidelines,¹¹² the specific CALS requirements¹¹³ and CALS' explicit authority to supervise its attorneys' ethics,¹¹⁴ should thus preempt the Appellate Division's rules. The only rub with preemption, however, is simply that OEO has never come out and said that it intends to preempt state rules.¹¹⁵ As a result, the courts would have to engage in a bit of judicial telepathy—an art which they have not been loathe to practice in the past.¹¹⁶

IV

CONCLUSION

Mr. Justice Harlan has commented, perhaps by way of understatement, that "the organized bar may be thought to have been too slow in recognizing" poor people's need for legal services.¹¹⁷ The remedy, however, is not to be found in the Appellate Division's restrictions, despite the court's well-intentioned attempts to protect the public.¹¹⁸ The poor need protection from the private attorneys who make the law a tool of oppression, not from the poverty lawyers who are beginning to reverse the bal-

¹⁰⁹ Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959). The very few privately funded poverty law firms would, of course, not receive the benefit of preemption, since OEO's policy and rules are not applicable to them.

¹¹⁰ See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

¹¹¹ In *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379 (1963), the Court stated that a local bar association could not prohibit from practicing patent law a nonlawyer practitioner authorized to practice before the Commissioner of Patents but not admitted by the state. Accord, *Silverman v. State Bar*, 405 F.2d 410 (5th Cir. 1968).

¹¹² OEO, Guidelines for Legal Services Programs, 1 CCH Poverty L. Rep. ¶ 6700.35 (1968).

¹¹³ OEO Special Conditions, *supra* note 64.

¹¹⁴ *Id.* § 2.1.

¹¹⁵ For a critique of OEO's general failure to lay down clear and affirmative guidelines, see Hannon, National Policy Versus Local Control: The Legal Services Dilemma, 5 Calif. W.L. Rev. 223 (1969).

¹¹⁶ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹¹⁷ *United Transp. Union v. State Bar*, 401 U.S. 576, 599 (1971) (Harlan, J., concurring and dissenting).

¹¹⁸ In *Matter of Community Actions for Legal Services, Inc.*, 26 App. Div. 2d 354, 356, 274 N.Y.S.2d 779, 784 (1st Dep't 1966), the court said that restrictions on poverty law firms "are justifiable only as protective of the public . . . not for the economic preservation of the Bar."

ance of legal power. Though there must, of course, be professional ethics for poverty lawyers, these ethics must reflect pragmatic problems—not figments of the judicial imagination.¹¹⁹ Unfortunately, both bench and bar have yet to leave the comforts of their marbled halls and face the realities of the street.

¹¹⁹ The Committee on Legal Aid of the County Lawyers Association somewhat politely noted that it has been “handicapped by a lack of information as to the precise nature of the problems faced by the Appellate Division which gave rise to the issuance of Part 608.” County Lawyers Report, *supra* note 36, at 5.