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Solicitation By and For Attorneys

Richard R. Gygli and Gordon W. Larson***

THE YOUNG ATTORNEY often may have time on his hands. He may be tempted to increase his following by advertising or by soliciting clients, but rules of the bar and statutes against solicitation prevent this.

There are, of course, some forms of advertising open to all lawyers. National directories and law lists, such as the *Martindale-Hubbell Law Directory*,¹ theoretically published only for lawyers, not only advertise the attorney and his firm, but also list the names of any clients whom he wishes to give as representative of his practice and his specialties. The *Martindale-Hubbell* directory estimates net worth and legal ability, basing ability on a scale of "very high," "high," and "fair" which takes into account years of experience, and also gives or withholds a recommendation. Any person, corporation, or lawyer² interested in selecting suitable counsel need only consult the directory. There has been no prohibition against such advertising, and in the opinion of the authors, there would be no breach of professional ethics if a similar directory of *all* lawyers were produced and disseminated by the bar associations for wide public use on a local basis.

Practicing attorneys have a legitimate interest in the profession, and they must be ever alert to insure that the high purpose of the profession does not bow to pressure from within and/or without to lower the standards—standards which tend to keep the practice of law independent and free of the monopoly or dominance which non-legal organizations can win for *their* "counsel" over certain classes of clients at the expense of bar members not connected with those associations.³ These standards

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¹ Published by Martindale-Hubbell, Inc., One Prospect St., Summit, N. J.

² A lawyer may be seeking out-of-state aid.

³ This does not include attorneys employed by corporations. The attorney represents the corporation but cannot practice law for the corporation for the reason that a master-servant relation exists between himself and the corporation to the exclusion of an attorney-client relation between himself and any client of the corporation. A corporation cannot practice law. *Meisel & Co. v. Nat'l. Jewelers Board of Trade*, 90 Misc. 19, 152 N. Y. S. 913, 916 (1915); *Midland Credit Adj. Co. v. Donnelby*, 219 Ill. App. 271, 275 (1920).

also prevent individual attorneys from operating "feeder" businesses for the purpose of soliciting legal work, where the legal work is more remunerative than the "feeder" operation. The standards apply against direct solicitation and advertising, such as "ambulance chasing." Competitive business practices for obtaining new or retaining old clients are looked upon with disdain when utilized by members of the bar. Thus, the attorney-at-law lives by a professional code of ethics largely at odds with the practices of our commercial society. The most circumspect attitude is necessary in order not to overstep the customs and ethics of his gentleman's profession.

With rare exceptions lawyers conscientiously observe these rules of the profession as expressed in the Canons of Ethics and rulings of the American Bar Association⁴ and the other state and local bars. Even so, a lawyer sometimes may yield to his pride in his practice or the interest of others in it, and violate the code, committing what Canon 27⁵ of the American Bar Association Code calls self-laudation. Such an offense recently came to the attention of the Florida Bar. The *Miami News* sought an interview with a local attorney concerning his practice. His large negligence practice, his new, circular design, five-story office building, and the organization of his investigative staff, were all of admittedly newsworthy character. The interview resulted in a full-page article with pictures in the Sunday supplement of the newspaper a few weeks later. As a result, the Grievance Committee of the Florida Bar recommended a private reprimand of the lawyer for having violated Canon 27. The Board of Governors of the Florida Bar, on review, recommended a public reprimand. Upon review, the Supreme Court of Florida, in 1963,⁶ had to interpret the American Bar Association's Canons of Legal Ethics as they applied to the case. Canon 27 lists in part various offenses relating to unethical behavior, including

inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance

⁴ American Bar Association, *Opinions of the Committee on Professional Ethics and Grievances with the Canons of Professional Ethics Annotated* 1-44 (1957).

⁵ *Id.* at 19.

⁶ *State of Florida ex rel. the Florida Bar v. Nichols*, ___ Fla. ___, 151 So. 2d 257 (1963).

of the lawyer's position . . . and all other like self-laudation (which) offend the traditions and lower the tone of our profession.⁷ (Emphasis added.)

The court had to determine the permissibility, under the rule of Canon 27, of granting an interview to news reporters for the purpose of publication of matters sure to be blameworthy if instigated by the attorney himself. The court was sure that, if the defendant had solicited the news article himself, Canon 27 was violated. The court found that the article was not solicited. The rule could then have been drawn, as H. S. Drinker (a most respected writer in this field) has written, that a law firm may not acquiesce in the publication by a magazine of a laudatory history of the firm.⁸ The Florida court, however, preferred to use the tests of good faith and good taste. Since they could find no clear showing of a lack of good faith and good taste and, in consideration of the fact that a "lawyer's integrity and his good name are his most precious assets,"⁹ the court dismissed the complaint. It appears that absence of overt effort is not a sufficient protection against charges of solicitation. The ethical lawyer can never rely on others, nor on the nature of the facts, to exercise the proper restraint. He must himself be the watchdog for Canon 27.¹⁰

The lawyer, in the course of his duty, often finds himself in close association with professional men in other fields, such as the certified public accountant, and with laymen and organizations which, in the course of business, are working with problems and performing services associated with, or included in, the legal services commonly executed by an attorney. Only by extra care can situations be forestalled that violate the spirit of the canons of ethics. The confidential and fiduciary character,¹¹ which is the touchstone of the attorney-client relation, gives the client the right to expect and receive from the lawyer the application of all

⁷ *Op. cit. supra* n. 4, at 19.

⁸ Drinker, *Legal Ethics*, 260 (1953).

⁹ *Florida v. Nichols*, *supra* n. 6 at 261.

¹⁰ *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272, 105 A. L. R. 1360 (1936). Nothing should exist between attorney and client to destroy the confidential and fiduciary relationship.

¹¹ *In re Droker*, 59 Wash. 2d 722, 370 P. 2d 242 (1962). Escrow business belonging to attorney was operated as an assembly line, including preparation of documents (by a layman). Held to be unethical practice of law. Firm advertisements were also unethical solicitation.

his professional ability in rendering such service.¹² If there exist legal problems not apparent to the client, it is the lawyer's duty to so advise him concerning them.¹³ For example, an attorney-at-law may allow a non-attorney to conduct a business in his office and to advertise such business, such as the preparation of simple tax returns, which in itself is not the practice of law and does not require the attention of the attorney.¹⁴ In such a situation, the client has the right to expect the attorney's advice on the law there involved. If the matter goes unnoticed by the attorney, as a routine tax return not worthy of his attention, the client's rights may well be adversely affected, and the lawyer may have quite unintentionally violated the ethical spirit underlying the profession.¹⁵ This example illustrates the ethical pitfalls inherent in non-legal services conducted in the attorney's office but performed by laymen. It is obvious, of course, that there can be intentional violation by using such a business association as a "feeder" to supply legal business to the attorney that may arise in the pursuance of the non-legal business. Therefore, the courts have discountenanced such "feeder" services as tax consultants, collection agents, stock brokers, estate planning services, mortgage services, and insurance adjusters bureaus. These services are viewed as channels through which other legal business will flow with no ethical safeguards against intentional or unintentional harm. The lawyer and his office cannot render two distinct services at once and not violate his professional ethics. Nor can such services be advertised in good conscience with no expectation of such advertising being an indirect solicitation on his behalf for his professional employment.

The courts have reserved to themselves the right to define what is and what is not the practice of law¹⁶ and to control any

¹² *Ibid.*

¹³ The Committee on Professional Ethics and Grievances of the American Bar Association has noted that although a layman can lawfully render a service, such as preparing a tax return, it does not necessarily mean that it would not be a professional service when rendered by a lawyer. On the contrary, lawyers are frequently called upon to render such service for the very reason that it can be better rendered by a lawyer. Opinion No. 57 of the Committee on Professional Ethics and Grievances of the American Bar Association (March 19, 1932).

¹⁴ *State of Wisconsin v. L. A. Willenson*, 20 Wis. 2d 519, 123 N. W. 2d 452 (1963).

¹⁵ *Chicago Bar Association v. Friedlander*, 24 Ill. App. 2d 130, 164 N. E. 2d 517 (1960). The courts are not going to define practice of law any more than they will in any mixed question of law and fact.

¹⁶ *Op. cit. supra* n. 4, at 19.

such practices, whether they are maintained by members of the bar or by laymen and business organizations. If the duties and rights of the practice of law were not so jealously guarded, it would be common to find laymen performing legal services with impunity and soliciting business to their gain and to the loss of the profession. The result, if the process were not halted, might be that the majority of attorneys would be forced to abandon the independent practice of law for employment with one of the many quasi-legal services and forms of business.

How, and in what way, can the line be drawn between the ethical and the unethical acquisition of clients? In 1908, the Committee on Professional Ethics of the American Bar Association, under the title of Canons of Professional Ethics, codified the historic rules against solicitation. The nineteenth century saw the relaxation of restraints on solicitation. The enforcement of these Canons of the American Bar Association is illustrated in the interpretive opinions enumerated in the American Bar Association reports and generally followed by the several state and local bar associations. A glance at a few of these "do not" opinions of the Bar will suffice to indicate the general tone that they set for the profession to follow.

An attorney may not advertise, whether it be in newspapers, on radio, TV, or in magazines.¹⁷ He is not permitted to use large signs, whether electrical or not, to solicit business or to indicate the presence of his office.¹⁸ A small sign, which is permitted only at his place of business, may show simply that he is an "Attorney" or "Lawyer" and give his name unostentatiously.¹⁹ The sign may not declare his specialty²⁰ in the law, such as personal injury. Nor may it set out a connection with any service or business with which he may be associated, such as real estate brokerage; or show that he acts in a dual capacity, as for example, an attorney and a certified public accountant.²¹ In short, the lawyer may not, in any way, advertise or solicit legal business, either directly as an attorney, or indirectly by association with any other business or service.²²

¹⁷ A. B. A. unpublished Decision #132, N. Y. City Opinion 3.

¹⁸ *Ibid.*

¹⁹ N. Y. City Opinion 963; N. Y. County Opinion 375; Canon 46.

²⁰ *In re Gibbs*, 35 Ariz. 346, 278 P. 371 (1929); *In re Thibodeau*, 295 Mass. 374, 3 N. E. 2d 749, 106 A. L. R. 542 (1936).

²¹ *Ibid.*

²² Michigan Opinion 28.

The practicing attorney is not allowed to seek out a client even though he has knowledge of or knows how he may be professionally helpful to the particular legal problem of the person involved. He must instead wait for the client to seek him. He may not go out and obtain business or even solicit business of his own friends. Indeed, it may not be wholly ethical to mention the simple fact that he is a lawyer when engaging in social conversation. He may, when first admitted to the Bar, send a dignified announcement to those with whom he has already gained a personal relationship, but not a general circular to the public at large.²³ He may also send notice of a change in address, or change in firm, but only under the same conditions.²⁴ He may give out a professional card, but with no more information than his name, business or home address and the words "Attorney" or "Counselor of Law."²⁵ The prohibitions of the Code are set out in specifics such as those above, while what is permissive is defined only as a matter of good faith and taste.

In general, the true test of solicitation is intent. Recommendations and referrals by close personal friends or relatives to a lawyer will not involve the attorney in a breach of ethics as long as he doesn't solicit the help. However, if he paid the contact or suggested that he solicit for him, even if a relative, such conduct is unethical. If legal services are offered gratuitously to an organization with the expectation of clients being referred to him, such agreement is unethical.²⁶ Damage done to the standing of the profession because of unethical solicitation is immeasurable, and it is most evident in the sense with which the public applies the term "ambulance chasing."

The courts have the right to discipline attorneys on the theory that the practice of law is a privilege and not a right, and it is the court's solemn duty to protect that privilege from those who would abuse it. We now have legislation by which the court can enforce, by penal statute, the ethics of the profession. The passage of two sections of the Ohio Revised Code,²⁷ for example, joined Ohio to the majority of states with "anti-solicitation"

²³ Drinker, *Legal Ethics*, 232 (1953).

²⁴ A. B. A. Opinion 251.

²⁵ *Ibid.*

²⁶ A. B. A. Opinion 169 at 342.

²⁷ Ohio Rev. Code, Secs. 4705.08, 4705.99B (1961). See Warren, *Solicitation of Legal Services a Crime*, 22 Ohio St. L. J. 691 (1961).

bills.²⁸ While such statutes at first appear to burden the lawyer, nevertheless they may well strengthen the profession.

A chain of significant rulings concerning third-party solicitation and advertising may have halted entirely the twentieth century trend toward stricter rules on solicitation. The now approved use of legal aid departments because of the cases of the *Brotherhood of Railroad Trainmen* and the *National Association for the Advancement of Colored People* has raised problems which may significantly limit the power of the state courts to control the employment and use of counsel.^{28a} Various bar associations many times in the past have brought charges against the attorneys and unions involved in mutual benefit arrangements on the grounds of violation of the canons of ethics. This procedure was at first successful in curbing such practices. For instance, it was held in *Columbus Bar Association v. Potts*²⁹ that an attorney, who allowed his name to be used at Transport Worker Union meetings as an attorney who would represent the individual members in F. E. L. A. cases in which they were involved, and who also allowed his name to be sent in written publications to members and posted on the union bulletin board, violated Canons 27,³⁰ 28,³¹ 34,³² 35,³³ and 47,³⁴ and the offender was subject to indefinite suspension. It was similarly held recently in *Cleveland Bar Association v. Fleck*.³⁵ There the attorney entered into a contract with a labor union whereby he agreed to represent the individual union members before the Industrial Commission of Ohio in Workmen's Compensation cases, and appeared at union meetings for solicitation purposes. The court held that the attorney was breeding litigation and he was suspended indefinitely.

²⁸ See, for example, re Committee on Rule 28 of Cleveland Bar Assoc., 15 Ohio L. Abs. 106 (Ohio App. 1933); *Doughty et al v. Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379 (1952).

^{28a} See, Markus, Group Representation by Attorneys as Misconduct, 14 Clev-Mar. L. R. 1 (1965); and see, Oleck, Non-Profit Corps., Orgns. & Assns. (2d ed., 1965).

²⁹ *Columbus Bar Association v. Potts*, 175 Ohio St. 101, 23 Ohio Op. 2d 392, 191 N. E. 2d 728 (1963).

³⁰ *Op. cit. supra* n. 4 at 19 (Advertising, Direct or Indirect).

³¹ *Id.* at 25 (Stirring up Litigation, Directly or Through Agents).

³² *Id.* at 31 (Division of Fees).

³³ *Id.* at 33 (Intermediaries).

³⁴ *Id.* at 43 (Approved Law Lists).

³⁵ *Cleveland Bar Association v. Fleck*, 172 Ohio St. 467, 178 N. E. 2d 782 (1961).

In *In re Brotherhood of Railroad Trainmen*,³⁶ the Illinois Supreme Court faced a more complex problem of solicitation. In this case, the union had set up a legal aid department consisting of regional districts throughout the country, with each district represented by a regional counsel who was also engaged in private practice. These counsel handled all claims arising out of railroad accidents involving members of the union in their area. All investigative work was done by union employees and was paid for by the regional counsel. The union investigators, in turn, carried blank copies of contracts which they induced the claimants to sign, employing the regional counsel's firm to handle the litigation. The fee charged by the firm was a fixed percentage for every suit. The court, after saying that a union has the right to investigate claims for its members and recommend *generally* attorneys whom it feels are qualified, held that the conduct of the regional counsel resulted in solicitation and fee splitting and, therefore, was both illegal and unprofessional. The relationship of the attorney and client, the court continued, must remain an individual and personal one.

While the preceding representative cases appeared to show a firm stand in this area of ethical jurisprudence, an omen of change was visible as far back as 1950 in a dissenting opinion by Justice Carter of the California Supreme Court.³⁷ This remarkable dissent³⁸ laid the groundwork for a United States Supreme Court decision in 1964. In it, Justice Carter labeled condemnation (by the majority) of such legal aid departments as "a misguided venture in the field of legal ethics."³⁹ He asserted that the Brotherhood's arrangement, with its "regional counsel," was not unlike the employment of attorneys by other organizations such as merchants' associations where, during the course of such employment, such attorneys handle cases for individual members of such organizations. The essential difference between "runners" and such a plan is that the legal aid department does not exist to solicit clients for the attorneys associated with the plan.⁴⁰

³⁶ 13 Ill. 2d 391, 150 N. E. 2d 163 (1958).

³⁷ *Hildebrand v. State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508 (1950).

³⁸ *Id.*, 225 P. 2d at 514.

³⁹ *Id.* at 518.

⁴⁰ *N. A. A. C. P. v. Harrison*, 202 Va. 142, 116 S. E. 2d 55, 65 (1960).

The United States Supreme Court, in *Brotherhood of Railroad Trainmen v. Virginia ex rel., Virginia State Bar*,⁴¹ adopted the *Hildebrand* dissent for its own. There, under the same facts as the preceding *Brotherhood* cases, the Virginia State Bar Association enjoined the *Brotherhood of Railroad Trainmen*, an investigator employed by the *Brotherhood*, and its regional counsel in Virginia from collaborating to solicit legal business. The union ultimately appealed to the United States Supreme Court on the grounds that the state had denied it its constitutional rights as guaranteed by the First and Fourteenth Amendments to the Constitution. The majority opinion of the Court sustained this contention and held that although a state had the right to regulate the practice of law within its borders, it could not do so at the expense of the individual's constitutional rights to freedom of speech and assembly. The Court further stated that railroad workers, as authorized by Congressional legislation⁴² had the right to assemble and give advice to one another, and it necessarily followed that legal advice was included in that right. That the union membership under the direction of its president chose one attorney in each region to consult with and be represented by, was both completely reasonable and logical. Any attorney, therefore, the Court concluded, who accepted employment under this plan was likewise protected from state interference.

The serious consequences for the practice of law resulting from this opinion are best summed up in Mr. Justice Clark's dissenting opinion, where he said: "By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise."⁴³ Probably most attorneys will feel that, if bar regulation cannot be extended to counsel for organizations which have an independent existence and purpose of their own, it will be a little easier now to show that certain "feeder" businesses are sufficiently independent or self-sustaining.

The National Association for the Advancement of Colored People brought to the Supreme Court of the United States another occasion of the use of a legal aid department for the fur-

⁴¹ *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 84 S. Ct. 1113, 377 U. S. 1, 12 L. Ed. 2d 89 (1964).

⁴² Safety Appliance Act, 45 U. S. C., Sec. 1-43; Federal Employees Liability Act, 45 U. S. C., Sec. 51-60.

⁴³ *Brotherhood of Railroad Trainmen v. Virginia*, *supra* n. 41 at 12 L. Ed. 2d 95.

therance of the objectives of the association.⁴⁴ The N. A. A. C. P. employed trial counsel directly and paid all costs of litigation out of its own funds. These facts violated a chapter⁴⁵ of the Virginia Acts of Assembly which defines champerty, barratry and maintenance. The Court found that the Virginia statute violated the First Amendment protection of the exercise of constitutional rights, which includes vigorous advocacy of rights. It also noted that the N. A. A. C. P. exists as a means of obtaining political and lawful objectives and not to resolve private differences. The Court also observed that protection of such group advocacy was constitutionally guaranteed, and held that where such group activity is in conflict with state statutes and court control of professional ethics, the constitutional rights must prevail.

Conclusion

Solicitation by and for attorneys has been and will continue to be a difficult problem. The bar and bench no doubt will continue strict watch over unprofessional efforts to gain clients, such as "feeder" operations and "ambulance chasing." On the other hand, the bar could very well take more positive action to make more generally known its members and their services locally, such as through the law directories mentioned above. This could help, especially in giving the younger attorney a more solid position in the community.

In view of the recent United States Supreme Court decisions discussed above, the bar must just as importantly continue to concern itself with the possibility of violation of the Canons of Ethics by organizations and non-profit associations which merge their litigable interests with the practice of law. There is ample room here for unethical practice which amounts to solicitation as prohibited by the Canons of Ethics. Such organizations can supply the attorney with a fertile field for clients, and can actively recommend (even insist upon) his abilities without hiring him on its payroll nor restricting his other practice. They can charge as they will for their services to him, such as investigative work, and, in effect at least, split

⁴⁴ N. A. A. C. P. v. Button, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

⁴⁵ Chapter 33 of the Virginia Acts of Assembly, 1956 Extra Session. In N. A. A. C. P. v. Button, *supra*, n. 44, the Supreme Court said that advising another that his legal rights have been infringed and referring him to a particular attorney for assistance and thereafter rendering legal assistance to the person thus referred, could not be justified under the state's interest in regulating barratry, champerty and maintenance and would unconstitutionally restrict the N. A. A. C. P.'s freedom of expression and association.

or share the attorney's fee. The Supreme Court, in the *N. A. A. C. P.* and *Brotherhood of Railroad Trainmen* cases did not give constitutional protection to the attorneys involved in such plans, but only to the rights of the associations to further their interests by combining for litigation purposes. Nevertheless, the effect of the decisions may well be to take away some of the regulation that the bar hitherto has exercised over its members.