Michigan Law Review

Volume 62 | Issue 6

1964

Canon of Professional Ethics-Cooperation in Preparation of News Articles as Advertising in Violation of Canon 27

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CANONS OF PROFESSIONAL ETHICS—COOPERATION IN PREPARATION OF NEWS ARTICLES AS ADVERTISING IN VIOLATION OF CANON 27—Two recent decisions were the first to construe the prohibition against indirect advertising embodied in Canon 27 of the Canons of Professional Ethics.[1] Although the facts and issues involved were substantially alike, the holdings were divergent.

At the request of a local Miami newspaper, respondent submitted to an interview which formed the basis of a full page article in the "Sunday Supplement."[2] The article see forth a complimentary biography of respondent and described the internal workings of his firm. Respondent was found guilty of violating Canon 27[3] by the Grievance Committee of the Florida State Bar Association. The recommendation was modified from private to public reprimand by the Board of Governors. On review, *held*, recommendation quashed and complaint dismissed, one judge concurring spe-

1 Canon 27 is identical in both jurisdictions. See notes 3, 5 *infra*. Its material passage is as follows: "*Advertising, Direct or Indirect*—It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisement for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper." AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS 19 (1957).

2 Miami News, Dec. 13, 1959.

3 Fla. Code of Ethics, Rule B(1), 31 FLA. STAT. ANN. § 21, n.27 (Supp. 1962).

cially, one judge dissenting. Furnishing information at the instigation of a newspaper for a newsworthy article not offensively self-laudatory is not indirect advertising in violation of Canon 27. *State ex rel. Florida Bar v. Nichols*, 151 So. 2d 257 (Fla. 1963).

A national magazine contacted respondents regarding a proposed article on the practice of corporate law in New York City. Respondents submitted to interviews and posed for photographs. The article,[4] published after approval by respondents, described the complexity of corporate law by reference to the firm's activities. The referee found respondents guilty of professional misconduct and of violating Canons 27 and 29.[5] On a motion to confirm, *held*, confirmed and respondents censured, one judge dissenting. Compliance with requests for assistance in the preparation of an objectionably laudatory magazine article and approval of the publication thereof is indirect advertising in violation of Canons 27 and 29 and thus professional misconduct.[6] *In re Connelly*, 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963).

Canon 27 is designed to prohibit attorneys from having contact with the public which might tend to promote their professional employment.[7] It is not limited to direct paid advertising and "ambulance chasing," but expressly extends to "indirect advertisement . . . such as furnishing or inspiring newspaper comments. . . ."[8] The numerous cases interpreting Canon 27[9] have nearly all involved situations in which the attorney himself instigated the prohibited activity. Those few cases which have dealt with uninstigated advertising have usually involved certain organizations which provide legal services for their members. For example, railroad unions have undertaken to refer injured railroadmen to particular lawyers, and this practice has been unanimously condemned under the Canons.[10] Similar uninstigated advertising incident to the legal aid programs of automobile clubs[11] and seamen's associations[12] has also met with disapproval. An ex-

4 Life, March 9, 1962, p. 80. *Life* responded to the decision reported herein with a critical editorial. Life, May 31, 1963, p. 4. In rebuttal, see 49 A.B.A.J. 752 (1963).

5 N.Y. Canons of Professional Ethics, N.Y. JUDICIARY LAW § 315 (Supp. 1963).

6 The term "professional misconduct" of attorneys includes violations of the Canons of Ethics. N.Y. JUDICIARY LAW § 90 provides sanctions for such misconduct.

7 For the history and policies underlying Canon 27, see generally DRINKER, LEGAL ETHICS 210-15 (1953); Comment, 25 U. CHI. L. REV. 674 (1958).

8 See note 1 *supra*.

9 See generally Annot. 39 A.L.R.2d 1055 (1955); Annot., 73 A.L.R. 401 (1931).

10 See *In re* O'Neill, 5 F. Supp. 465 (S.D.N.Y. 1933); Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); *In re* Fisch, 269 App. Div. 74, 54 N.Y.S.2d 126 (1945). *But see* Ryan v. Pennsylvania R.R., 268 Ill. App. 364 (1932), where the court upheld an attorney's lien on a judgment recovered by a referral plan client.

11 See People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); In the Matter of Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936); Weihofen, *Practice of Law by Motor Clubs—Useful But Forbidden*, 3 U. CHI. L. REV. 296 (1936).

12 See *In re* Axtell, 229 App. Div. 323, 242 N.Y.S. 18 (1930), *aff'd as to guilt*, 257 N.Y. 210, 177 N.E. 423 (1931), *modified as to discipline*, 235 App. Div. 350, 257 N.Y.S. 470 (1932).

ception to this general condemnation of referral programs, however, was established by the Supreme Court's recent decision disapproving the application of Canon 27 to promotion by the NAACP of civil rights suits.[13] The Court distinguished between advertising which promotes litigation of constitutional rights and advertising which promotes "use of the legal process for purely private gain. . . ."[14] A similar exception is implicit in Canon 35; although it prohibits using an organization as an intermediary between an attorney and his client, it makes an exception for charitable societies rendering aid to indigents and thus condones some referral plans.[15] It should be noted, however, that the uninstigated advertising in both the condemned plans and the approved exceptions is direct advertising; its main purpose and natural tendency is to place potential clients in contact with attorneys. It seems clear that the presence or absence of instigation by the attorney fails to provide a useful criterion for determining whether a particular kind of direct advertising is condemned by Canon 27. The impropriety of direct advertising, and the financial harm it causes fellow attorneys, is the same whether the publisher comes to the attorney or the attorney goes to the publisher. Furthermore, if uninstigated direct advertising were permitted, its present minor frequency would probably increase sharply.

The principal cases, on the other hand, involved indirect advertising, in that any benefit accruing to the attorneys was incidental to the nature and primary purpose of the publications. In the realm of indirect unpaid advertising a distinction based on instigation might provide a sensible basis for permitting the publication of some tasteful and informative articles. The terminology of Canon 27 supports such a construction,[16] and the frequency of unpaid articles is not likely to be great in any event. The infrequency and the indirect nature of the advertising in these articles minimize their harmful effect on other attorneys, and the instances that do occur will generally indicate particular newsworthiness or well-merited praise.[17] This distinction based on instigation was given some weight in

13 NAACP v. Button, 371 U.S. 415 (1963).

14 *Id.* at 443. See also cases cited, *id.* at 440 n.19; ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 308 (1957), Opinion No. 148 (1935) (permitting advertising which promoted litigation of the constitutionality of the National Labor Relations Act).

15 ABA, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS 33 (1957). Opinions of the American Bar Association Ethics Committee indicate, however, that advertising for such lawyer referral services must be carried on through a bar association. *Compare* ABA, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS (1957) Opinion No. 191 (1939), at p. 377, *with id.*, Opinion No. 205 (1940), at p. 416. See also *id.*, Opinion No. 291 (1956), at p. 624.

16 See note 1 *supra*. The canon refers to "furnishing or inspiring," and "procuring." The words "inspiring" and "procuring" clearly seem to demand an element of instigation. The context of "furnishing"—"furnishing or inspiring newspaper comments"—clearly conjoins it with terms demanding an element of instigation; this would indicate that it was most likely designed to prevent an attorney from sending a fully prepared manuscript to a publisher on his own. It must be conceded, however, that the sentence of Canon 27 which deals with indirect advertising is confusing and grammatically unclear, making it capable of varying interpretations.

17 In this connection it is interesting to note that prior to 1940, Canon 27 began:

Nichols, where it was emphasized that "the newspapers voluntarily solicited the material for the article as a news story only; respondent solicited nothing. . . ."[18] However, this distinction was apparently rejected in *Connelly*, that court choosing to stress that respondents had furnished the material and cooperated throughout in the preparation of the article.[19] In any event, it seems clear that the cases which refuse to recognize the instigation distinction when direct advertising is involved are not persuasive authority for a similar refusal when dealing with indirect advertising.[20]

Although previous case law is not very helpful in resolving the problem of the principal cases, a number of opinions by the grievance and ethics committees of various bar associations are more in point. Their technical status as authority is unclear,[21] but they are generally cited at length in attorney misconduct cases, and were relied on heavily in both principal cases. Opinions are reported only sporadically, and, to prevent identification of, or embarrassment to, the parties involved, the facts giving rise to them are not reported. These opinions nonetheless embody the careful deliberations of prominent lawyers in close contact with the customary practices and realistic needs of the profession.

In 1932 the American Bar Association's Committee on Professional Ethics responded to the following hypothetical situation: without any instigation by the attorney in question, the local newspaper repeatedly published a notice of his arrival in town accompanied by the statement that he was "one of the leading trial lawyers in the state." Expressing doubt that such a situation could actually arise, the Committee held that such conduct would be laudatory indirect advertising in violation of Canon 27.[22] The Committee stated it to be the duty of the lawyer when he was first made aware of the publication to "request and require" its discontinuance. The same duty would arise if the lawyer learned of the article prior to initial publication.[23] The further determination of the Committee, that the

"the most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust." See DRINKER, *op. cit. supra* note 7, at 215.

18 State *ex rel.* Florida Bar v. Nichols, 151 So. 2d 257, 260 (Fla. 1963).

19 *In re* Connelly, 18 App. Div. 2d 466, 470-71, 240 N.Y.S.2d 126, 130-31 (1963).

20 These two variables, instigation by the attorney and directness of the benefit accruing from publication, allow a breakdown of all advertising into four categories: instigated-direct, instigated-indirect, uninstigated-direct, and uninstigated-indirect. It is suggested that, judged by frequency of occurrence and degree of detrimental effect, the above categories are arranged in descending order of objectionability, and that the principal cases fall within the fourth category.

21 The Opinions of the American Bar Ass'n Committee are said to be "highly persuasive" but not binding on state and local committees. DRINKER, *op. cit. supra* note 7, at 32.

22 ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 157 (1957), Opinion No. 62 (1932).

23 See also Opinion No. 79, reported in Appendix A of DRINKER, *op. cit. supra* note 7 as "Decisions by the ABA Ethics Committee Hitherto Unreported." This opinion held that a law firm "may not acquiesce in the publication by a magazine of a laudatory history of the firm."

publication in issue would be impermissibly laudatory, is also relevant. The articles in the principal cases, both of which contained extensive biographies and praised the attorneys in several specific respects, seem more delinquent on this account than the rather mild statement in the foregoing hypothetical case.

Two possibilities of avoiding the sanctions of Canon 27 when they would otherwise apply are set out in *Opinion 806* of the Committee on Professional Ethics of the Association of the Bar of the City of New York.[24] This opinion was relied on in the *Connelly* case[25] and cited by the dissent in *Nichols*.[26] The opinion held that a lawyer may not encourage or collaborate in the preparation of laudatory newspaper and magazine statements; however, in light of the substantial public interest in legitimately newsworthy activities of a lawyer, he may answer questions and volunteer data if he insists that the article be in good taste.[27] Thus, a finding of newsworthiness and good taste will excuse encouraging or collaborating in a publication even though such action is otherwise objectionable under Canon 27. Determining what is newsworthy or in good taste is, of course, a question which depends upon the facts and circumstances of a given case, and upon the personal judgment of the particular court or ethics committee. Due to the lack of precision in the standards that must be applied, as well as the uniqueness of each situation, it is difficult to say that the principal cases, or any other cases which might arise involving the same problem, are inconsistent with one another. In addition, although questions of newsworthiness and objectionable laudation are subject to review by grievance committees and courts, such review comes only after the harm has been done, and there is thus an understandable reluctance to impose harsh penalties for mere mistakes of judgment. Such reluctance played a key role in the *Nichols* case.[28] Moreover, even though an attorney may try in good faith to comply with Canon 27, his personal and financial involvement will usually prevent him from making an objective and intelligent judgment.[29] Therefore, the result of relying solely on review that follows publication is a leniency of enforcement which benefits the aggressive attorney with the lowest standard of good taste at the expense of his more timid or conscientious colleagues. Consequently, providing only for review

24 THE WILLIAM NELSON CROMWELL FOUNDATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 543 (1956), Opinion No. 806 (1955).

25 18 App. Div. 2d 466, 478, 240 N.Y.S.2d 126, 138 (1963).

26 151 So. 2d 257, 266-67 (1963).

27 *Accord*, DRINKER, *op. cit. supra* note 7, at 260: "In the ultimate analysis the question, like many of those involving legal ethics, is one of good faith and good taste."

28 See 151 So. 2d 257, 261-62 (Fla. 1963).

29 *But see* DRINKER, *op. cit. supra* note 7, at 218-19: "[A]ctually, a lawyer soundly brought up in the law, who wholeheartedly accepts his professional status, will rarely have any difficulty in realizing the difference between the normal by-product of efficient service and the unwholesome results of self-aggrandizement." 63 COLUM. L. REV. 1341 (1963).

following publication can not be deemed a satisfactory method of applying a canon of ethics.

Existing bar association ethics committees, however, provide ready-made machinery for solving this dilemma. Requiring that all articles be edited and approved by such committees before they are published would permit a more exacting application of the standards of newsworthiness, good taste, and objectionable laudation. Indeed, as a result of having to apply these standards constantly, the committees would in time establish fairly definite and precise meanings for these presently amorphous concepts. In order to comply with such a plan of pre-publication editing, an attorney would have to obtain contractual editing rights prior to submitting to an interview or furnishing information for an article. Compliance with this proposed procedure, however, would relieve an attorney of responsibility even though the publisher later refused to comply with the Committee's recommendations.[30] An attorney engaged in particularly newsworthy activities, where even slight procedural delay would be detrimental,[31] could be exempted from the requirement of obtaining pre-publication approval in carefully delimited subject areas if the committee were satisfied that his judgment could be trusted.[32] Such attorneys could, of course, be proceeded against later if they violated Canon 27 and the terms of such prior approval.

The purpose of this proposed plan of pre-publication editing is to provide greater contact between attorneys and the general public, rather than to bury what little exists under administrative red tape. The continued poor public image of both lawyers and the practice of law[33] is a direct result of the restricted means of communication presently available, and it evidences a pressing need for improvement. The unsolicited publication of articles describing newsworthy activities and careers of members of the bar is a far more effective means of improving this public image than are spot advertisements by trust companies and bar associations.[34] Overly zealous condemnation of indirect uninstigated advertising may deprive the public of the opportunity to understand and evaluate our legal system. It

30 Specific enforcement of such an editing contract might encounter first amendment objections. However, prohibiting future cooperation with breaching publishers would provide an effective non-judicial sanction.

31 The activity of the New York attorney who negotiated the release of Cuban invasion prisoners in early 1963 would be an example of the situation envisioned here.

32 This exemption is necessary because two-and-one-half months is the average time presently required by the American Bar Association Ethics Committee to process and respond to inquiries. The average for state and local committees is perhaps somewhat less due to the proximity of committee members. Procedural improvements could probably be made, but present procedures would be satisfactory for articles, like those involved in both principal cases, which are of a casual rather than an urgent nature.

33 See Eldred, *Public Relations for Lawyers*, 22 KY. S.B.J. 170 (1958); Hamley, *Public Relations and the Individual Lawyer*, 41 J. AM. JUD. SOC'Y 70 (1957).

34 Bar association advertising has met with increasing approval in recent years. *Compare* ABA, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS (1957), Opinion No. 121 (1934), at p. 252, *with id.*, Opinion No. 227 (1941), at p. 454. See also *id.*, Opinion No. 179 (1938), at p. 355; *id.*, Opinion No. 260 (1944), at p. 537.

seems essential, therefore, that some procedure be set up which would prevent objectionable indirect advertising, and yet encourage and facilitate the publication of informative articles of genuine public interest. Present methods and practices under Canon 27 have proved themselves too restrictive.

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