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NOTES

Ethical Problems and Considerations Arising From the Legal Profession's Duty to Assist Laymen to Recognize Legal Problems

CANON 2 OF THE AMERICAN BAR ASSOCIATION'S *Code of Professional Responsibility* states: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."¹ However, does this duty to make legal counsel available include a duty to help the layman recognize what his problems are? If so, then how may an attorney ethically discharge this duty, and what will be the ramifications when an attorney attempts to discharge it?

Many attorneys as well as laymen may be surprised to know that an attorney is ethically bound to assist laymen to recognize their legal problems. An immense problem in our legal system today is that people just do not know that they have legal problems. Some are rudely awakened when informed that they are a party defendant to a lawsuit. Others when presented with a legal problem of less glaring dimensions never become aware that a problem existed. These poor souls take their unexercised rights and privileges to their graves, to be buried and forgotten.

Professor Cheatham succinctly stated the situation:

Law is not self-applying; men must apply and utilize it in concrete cases. But the ordinary man is incapable. He cannot know the principles of law or the rules guiding the machinery of law administration;²

It would be absurd to limit the attorney's role to prosecution or defense of claims presented by the client. Traditionally, the attorney is called upon by the client to assist in solving a problem because he knows "The Law." Common sense tells us that for one to suspect that a legal problem exists, he must have at least some basic knowledge of law. Therefore the attorney, by virtue of his knowledge of the laws as well as the functioning of the legal system, should at least logically be bound to help the legally ignorant layman recognize his legal problems.

Ethical Consideration 2-1 of the *Code Of Professional Responsibility* supports this conclusion. It states that one of the important functions of the legal system is to educate laymen to recognize their

¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS (1970).

² Chatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT.L.REV. 405, 406 (1953).

problems.³ Ethical Consideration 2-2 of the *Code of Professional Responsibility* pursues this line of reasoning in stating:

The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed.⁴

While neither the *Code Of Professional Responsibility* nor its predecessor, the American Bar Association *Canons Of Professional Ethics* attempts to outline what minimum contribution the individual attorney must make in this area, the ethical duty of each and every attorney to aid the layman to recognize his legal problems exists by virtue of his being a member of the legal profession. The American Bar Association has suggested how this duty to assist laymen to recognize legal problems may be discharged:

Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.⁵

In summary, there in fact does exist a duty of the attorney, as a member of the legal profession, to assist the layman in recognizing his legal problems. Although the American Bar Association suggests several ways to discharge this duty, no rigid minimal requirements are presented for the individual in discharging the duty.

The question then arises as to what limitations are to be placed on the attorney who seeks to fulfill his duty to the layman. The ethical problems encountered in this area fall within four broad categories. The attorney, regardless of how good his intentions are, may, in his efforts to aid his fellow man (1) solicit for professional employment; (2) stir up litigation; (3) allow his professional services to be exploited by an intermediary; or (4) aid the unauthorized practice of law.

Solicitation, Publicity, and Advertising

Solicitation of professional services is one of the most frequently-occurring unethical practices, especially among attorneys specializing in personal injury cases. The courts will not tolerate solicitation by attorneys as it is considered degrading to the legal profession. A

³ ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1.

⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-2.

⁵ *Id.*

young attorney in Florida was called to a hospital to see several victims of an automobile accident. Upon arrival the attorney discovered that the victims had left; however, he noticed that three other victims were then present. The attorney introduced himself and proceeded to execute retainer contracts with these individuals. Disbarment proceedings were held, whereby the defendant was found to have solicited professional employment. The Court held that the attorney's action merited public reprimand.⁶ Similarly, a South Carolina court recommended public reprimand for an attorney whom it found had solicited professional employment from accident victims at an automobile repair shop.⁷

Virtually any advertising by an attorney is considered unethical, as it constitutes a solicitation for employment. The problem of advertising by attorneys is treated in the *ABA Canons Of Professional Ethics*. Canon 27 states:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements 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 life self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; . . .⁸

The prohibition against advertising by members of the legal profession creates a direct conflict with the attorney's duty to assist laymen to recognize their legal problems. On one hand we tell the attorney that his position makes him ethically bound to call the layman's attention to legal problems which may exist, then on the other hand we admonish the attorney that such efforts may constitute advertising for the purpose of soliciting professional employment, which is strictly forbidden. The *Code of Professional Responsibility* treats the advertising problem in equally strong language in Disciplinary Rule 2-101 which says:

(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use, of any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication

⁶ Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967).

⁷ *In re Crosby*, 256 S.C. 325, 182 S.E.2d 289 (1971).

⁸ ABA CANONS OF PROFESSIONAL ETHICS, NO. 27.

by means of television, radio, motion picture, newspaper, magazine, or book. (B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR 2-103⁹

The courts have entertained disbarment proceedings against attorneys where advertising is alleged. The case of *In re Anonymous*,¹⁰ dealt with two attorneys who had a storefront law office in New York. Across the length of the store was a three foot high sign stating that there were law offices within. Defendants' names appeared in large gold letters thereon. In addition, one of the defendants had a two foot square sign giving the name and address of the firm on the fire escape of his residence building. The Court found that these signs constituted advertising by the defendants and that any advertising by attorneys was improper under Canon 27. In *In re Newman*,¹¹ the defendant had placed advertisements in a local newspaper stating he was a white lawyer endorsed by the colored community. The advertisements also stated defendant's specialties of practice and gave his phone number and address. A longer advertisement of the same order was paid for by the defendant and placed in the program of a Negro Civic League Banquet. The Court found that although not criminal, defendant's advertisements constituted a solicitation under Canon 27 and ordered that defendant be suspended from practice for one year.

While an attorney may have no intention whatsoever of attracting clients when he attempts in good faith to inform people of possible legal problems, the solicitation may in fact occur nonetheless. If the attorney's efforts involve any means of public communication, the mere mentioning of his name constitutes advertising, and is improper. It seems quite natural that a layman, upon realizing the possibility that he may have legal problems, would turn to the attorney who enlightened him, especially if the layman does not have an attorney of his own.

Bar Association Advertising

Through a series of opinions, the American Bar Association has attempted to establish the propriety of bar association advertisement in worthy programs and messages. In *Formal Opinion 121*,¹² the

⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101.

¹⁰ 32 App. Div. 2d 37, 299 N.Y.S.2d 240 (1969).

¹¹ 169 App. Div. 638, 155 N.Y.S. 428 (1915).

¹² ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 121 (1934).

American Bar Association held that a local bar association may purchase advertising space in a local newspaper for the purpose of informing the public how and when to consult an attorney, provided that such advertising is dignified in tone, does not contain pictures, and does not mention the name of any individual lawyer."¹³ This ruling was in response to a request by a local bar association to state the propriety of inserting a series of advertisements in local papers in the form of educational articles dealing with such topics as drawing of wills, and handling accident cases. The ABA stated that "The articles in purpose and effect should be for the intelligent guidance of the public and should be free from the suspicion that selfish motives are the dominant purpose."¹⁴

In *Formal Opinion 179*,¹⁵ the American Bar Association opened up a new area in which attorneys, under the auspices of a local bar association, could help laymen to recognize their legal problems. The opinion stated that:

A local bar association may sponsor a radio broadcast which dramatizes the need for competent legal advice in drafting wills provided that (1) no reference to individual lawyers is made, (2) the motivation is to benefit the lay public rather than to increase professional employment, and (3) the manner in which it is presented is in keeping with the dignity and traditions of the profession.¹⁶

In distinguishing bar association advertising from that which is banned by Canon 27, the ABA stated:

We recognize a distinction between teaching the lay public the importance of securing legal services preventive in character and the solicitation of professional employment by or for a particular lawyer. The former tends to promote the public interest and enhance the public estimation of the profession. The latter is calculated to injure the public and degrade the profession. . . .

Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service. It may tend to decrease rather than increase the sum total of remuneration received by lawyers, but because of the trouble, disappointments, controversy, and litigation it will prevent, it will

¹³ *Id.* at 376-377.

¹⁴ *Id.* at 377.

¹⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 179 (1938).

¹⁶ *Id.* at 449-451.

enhance the public esteem of the legal profession and create a better relation between the profession and the general public.¹⁷

A Florida court decision has given support to the ABA position on bar association advertising. In *Jacksonville Bar Association v. Wilson*,¹⁸ a local bar association was charged with unethical conduct in advertising its lawyer reference service in a local newspaper. The Court took the position that the root of abuses in advertising is competition. The bar association advertising was not competitive, however, because it was promoting an association of lawyers who were working jointly to lower the barrier between the legal profession and the public. Thus the advertising by the defendant was not unethical and the suit was dismissed. This opinion was consistent with ABA *Formal Opinion 121*¹⁹ in that its purpose was to inform the public how to consult an attorney. It was also consistent with ABA *Formal Opinion 179*²⁰ in that no reference to individual lawyers was made, the motivation was to benefit the lay public, and the manner in which it was presented was in keeping with the dignity and traditions of the profession.

Advertising by Other Organizations

The American Bar Association has resisted extending the privilege of advertising to non-bar organizations of attorneys, especially where names of individual attorneys are disclosed. In *Formal Opinion 191*,²¹ the ABA held that it was an improper solicitation of professional employment for a group of attorneys to place advertisements in local newspapers, in welfare and charitable organization offices, and in circulars, stating designated hours when these individuals would be available for brief consultation concerning troublesome matters such as tenancies, leases, etc. Such advertising by groups of individuals would go beyond the guidelines established in *Formal Opinion 179*²² in that reference to individual attorneys would be made. This type of advertising is also competitive and therefore would not fall under the immunity established in *Jacksonville Bar Association v. Wilson*.²³

The question then arises as to how free the local bar associations are, to advertise. When consulted as to the propriety of a bar

¹⁷ *Id.* at 450-451.

¹⁸ 102 So.2d 292 (Fla. 1958).

¹⁹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 121 (1934).

²⁰ ABA COMM. OF PROFESSIONAL ETHICS, OPINIONS, NO. 179 (1938).

²¹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 191 (1939).

²² ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 179 (1938).

²³ 102 So.2d 292 (Fla. 1958).

association advertisement concerning the advantages of employing lawyers, the ABA stated:

The question of the propriety of advertising by the bar as a whole should be judged by whether the benefit to the public in learning of the advantages of employing lawyers was sufficient to justify the exception to Canon 27.²⁴

Circulars, Pamphlets, and Brochures

A common way to run afoul of the Canon 27 prohibition on solicitation of professional employment by advertising is to disseminate circulars, pamphlets, or brochures. Unfortunately, these devices have vast potential for educating and enlightening the public on legal problems and technicalities. According to Canon 27, the only time it is ethical to disseminate circulars, pamphlets, or brochures is when such action is "warranted by personal relations." Other than with relatives and close friends, personal relations are nonexistent at the client level. Even to this limited audience, the attorney is limited as to the content of information which he may disseminate through the media of circulars, pamphlets, or brochures.

The American Bar Association set down general guidelines in *Formal Opinion 213*.²⁵ A firm of patent lawyers had been publishing and circulating a printed bulletin, captioned with the letterhead of the firm but entitled "Law News Bulletin," purporting to summarize the significant features of current legislation, administrative rulings, and important court decisions in the patent field. They requested the opinion of the ABA as to the propriety of sending such bulletins to their clients, and concerns and individuals who were not clients. In response, the ABA stated:

It certainly is not improper for a lawyer to advise his regular clients of new statutes, court decisions, and administrative rulings, which may affect the client's interests, provided the communication is strictly limited to such information.²⁶

This ruling was qualified to the extent that "Any such communication should be restricted to clients by whom the lawyer is regularly and customarily retained in matters of such a nature that the communication is relevant."²⁷

A Kansas court treated this problem in the case of *In re Ratner*.²⁸ Newsletters by means of which the defendants were alleged to have

²⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 631 (1963).

²⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 213 (1941).

²⁶ *Id.* at 501.

²⁷ *Id.*

²⁸ 194 Kan. 362, 399 P.2d 865 (1965).

advertised in violation of Canon 27 were sent to officers of union clients represented by their firm. They contained no reference to any cases handled by defendants. Their contents were confined to rulings of boards, commissions, and courts on problems of interest to union labor, together with proposed and completed legislation and other items which might affect the unions and their members. The Court found that there was no offense to Canon 27 by the defendants' conduct. This case is reconcilable with *Formal Opinion 213*²⁹ since the newsletters were strictly limited to information which may have affected the client's interests, and since they were sent only to clients by whom the attorneys were regularly retained in matters pertaining to the newsletters.

A popular topic of circulars and pamphlets is wills. Problems relating to wills are universal, and tend to come up at various times during a person's life, such as when one marries, divorces, bears children, buys property, or insurance, or the like. In *Formal Opinion 210*,³⁰ the ABA was questioned as to whether it was proper for a lawyer who drew up a will to call to the attention of the testator from time to time, the importance of going over his will. The opinion pointed out that ". . . many events transpire between the date of making the will and the death of the testator. The legal significance of such occurrences are often of serious consequences, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest."³¹ The opinion went on to say that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty, to advise his client's testamentary purpose as expressed in the will.³² The ABA suggested that ". . . notices might be sent to the client for whom a lawyer has drawn a will, suggesting that it might be wise for the client to re-examine his will to determine whether or not there has been any change in his situation requiring a modification of his will."³³

One attorney outlined the law of descent as stated in his local probate code and had it printed up in brochure form. When inquired as to the propriety of leaving copies of the pamphlet available in the attorney's reception room for persons who might like to take one, the ABA stated that there was no objection to an attorney's giving the described pamphlet to a client who has consulted him about the matters dealt with in the pamphlet. It would be an improper

²⁹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 213 (1941).

³⁰ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 210 (1941).

³¹ *Id.* at 498.

³² *Id.*

³³ *Id.* at 498-99.

solicitation of business, however, to give the pamphlet to someone who had come to see him about legal matters entirely unrelated to the subject matter of the pamphlet.³⁴

*Informal Decision 631*³⁵ dealt with a law office which had been displaying small pamphlets which clients were permitted to read or take from a shelf. The pamphlets described the need for a will, why a purchaser of real property should have the abstract of title examined, why it is advisable to consult an attorney for the preparation of a lease, and other similar points. When the propriety of this practice was questioned, the ABA stated that such "educating" would be better handled through bar association advertisement. It further stated:

... if a lawyer obtained reprints of such bar association advertisements and placed them in a rack for his clients, this activity would seem permissible. However, the use of such pamphlets must come within the restrictions placed upon bar associations in the distribution of informative literature about lawyers published by them. The pamphlets should in no way refer to any specific lawyer or any law firm.³⁶

Pamphlets, circulars, and newsletters constitute advertising regardless of whether they are given away by the attorney, sent through the mail, or displayed in the attorney's office. As such, *In re Ratner*³⁷ dictates that this literature be made available *only* to those clients who consult the attorney on the matters discussed within the literature. An attorney displaying pamphlets in his office for all to take is exceeding the limitation allowed in *In re Ratner*³⁸ and *Formal Opinion 213*,³⁹ in that this form of personal communication is not warranted by personal relationship. The displaying of bar association advertisements in an attorney's office is proper because it falls within the purview of ethical advertising by bar associations.⁴⁰

The Annual Legal Checkup

A number of attorneys have suggested the "Annual Legal Checkup" as a simple way to both help the layman recognize his legal problems and to solve them at a minimal cost. The annual legal checkup is a professional service offered by an attorney in which an attempt is made to evaluate the legal status of a client's affairs at periodic in-

³⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 503 (1962).

³⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 631 (1963).

³⁶ *Id.* at 632.

³⁷ 194 Kan. 362, 399 P.2d 865 (1965).

³⁸ *Id.*

³⁹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 121 (1934).

⁴⁰ See *Jacksonville Bar Ass'n v. Wilson*, 102 So.2d 292 (Fla. 1958); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 179 (1938).

tervals so as to detect and hopefully correct any legal problem which may exist. Basically, the service amount to a thorough analysis of the client's personal and business affairs. Upon completion of the examination, the attorney submits a written opinion of the client's standing from a legal viewpoint and makes recommendations as to what may be done to remedy any potential problem the attorney may uncover. One attorney compared the annual legal checkup to the service rendered by a physician to his patient in making an annual physical examination.⁴¹

In addition to correcting potentially troublesome matters before they blossom into legal problems or even litigation, the annual legal checkup is a vehicle for educating the public in basic legal matters and showing the client how and why problems may arise. While an untrained layman cannot be expected to comprehend complex or obscure problems, it is not beyond most persons to know what general areas tend to give rise to legal problems and what endeavors warrant consultation with an attorney. In theory, the annual legal checkup is a most efficient method for an attorney to discharge his duty to assist laymen to recognize their legal problems on a personal level.

Unfortunately, promotion of an annual legal checkup plan presents ethical problems. Indiscriminate advertising by an attorney is a blatant violation of Canon 27, as it constitutes a public communication not warranted by personal relations.⁴² The ABA in *Informal Decision 171*⁴³ and *Formal Opinion 307*⁴⁴ stated that an attorney may do no more in acquiring clients in this respect than he may do as to other legal matters. Thus an attorney may only administer an annual legal checkup to those nonclients who voluntarily come to him and request one.

As to persons who are already clients, a different situation exists. The difference lies in the close relationship between the attorney and client, which implies that the attorney already has most of the client's information and that he merely wishes to review it for the benefit of the client. In *Informal Decision 171*⁴⁵ the ABA stated that there is no ethical impropriety in advising regular clients of the value of a legal checkup. There is no impropriety even where some of the questions relate to the client's company, which is represented by other counsel. *Informal Decision 171*⁴⁶ equates communications advising clients of the value of a legal checkup as that of "advising regular

⁴¹ Brenneman, *The Annual Legal Check-up*, 47 A.B.A.J. 689 (1961).

⁴² See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B).

⁴³ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. C-171 (1937).

⁴⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 307 (1962).

⁴⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. C-171 (1937).

⁴⁶ *Id.*

clients of new statutes, court decisions, and administrative rulings, which may affect the client's interests.⁴⁷ The latter activity is deemed proper by virtue of *In re Ratner*⁴⁸ and *Formal Opinion 213*⁴⁹.

The ABA in *Formal Opinion 307*⁵⁰ authorized a bar association sponsorship of an annual legal checkup program by way of dignified educational campaigns provided that the names of no individual lawyers were advertised and that the attorneys did not agree to abide by a fixed fee schedule. *Formal Opinion 307* also stated that where a bar association has embarked on a program of institutional advertising for an annual legal checkup and provides literature, such literature may be made available in lawyers' offices for persons to read and take.⁵¹ However, an attorney should not send such announcements to persons who are not his regular clients, nor should his name appear.⁵²

The impropriety of a fixed fee schedule exists because a legal checkup program is different from the consultation promised in lawyer referral plans where a defined service (a set period of time for consultation) justifies a set, but low, fee. In a legal checkup there is no defined service, and hence a lawyer cannot charge an advertised fixed maximum or minimum fee with no knowledge of the work involved. *Formal Opinion 307* states that such a course of action would not "uphold the honor and maintain the dignity of the profession" as is a lawyer's duty under Canon 29 (Canon 1 of the *Code Of Professional Responsibility*).⁵³ Advertising fixed fees for an annual legal checkup might encourage substandard services from inadequate fees. However, as in other cases, a client and a lawyer may agree in advance as to the fee to be charged for such a checkup.⁵⁴

*Informal Decision 878*⁵⁵ stated that a fixed fee may be advertised for a limited period of consultation pertaining to a standard questionnaire so long as it is made clear that the consultation itself is not a legal checkup. In this situation, the lawyer would "... examine the questionnaire and determine what areas of further study are necessary, and recommend what study might be helpful."⁵⁶ The *In-*

⁴⁷ *Id.*

⁴⁸ 194 Kan. 362, 399 P.2d 865 (1965).

⁴⁹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 213 (1941).

⁵⁰ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 207 (1962).

⁵¹ See also ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 631 (1963).

⁵² See also ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 213 (1941).

⁵³ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 307 at 674 (1962); see also ABA CODE OF PROFESSIONAL RESPONSIBILITY, NO. 1.

⁵⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 207 (1962).

⁵⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 878 (1965).

⁵⁶ *Id.*

formal Decision equated this procedure with that used by "... lawyer reference services to encourage persons to consult lawyers with an agreed maximum charge for the first limited period of time."⁵⁷

The State Bar of Michigan formally adopted an annual legal checkup program in 1956. Their program is geared toward four broad areas: (1) personal affairs, (2) estate and probate matters, (3) real estate, and (4) business affairs. In connection with their program, the Michigan Bar has put out the *Lawyers Handbook* which provides a basic outline for reviewing a client's affairs, and lists questions inquiring into all phases of a client's legal status. Those connected with the program feel that it acts as an effective means of preventive law by analyzing and correcting a client's legal matters before adverse consequences arise and that it helps educate the public in being aware of potential as well as present legal problems.⁵⁸

Barratry

The problem of "stirring up litigation" is also perplexing to the attorney set on assisting the layman to recognize his legal problems. The ABA *Canons Of Professional Ethics* treats this problem in Canon 28, which states:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law.⁵⁹

Stirring up litigation is truly reprehensible conduct on the part of an attorney. The defendant in *In re Weitz*⁶⁰ was charged with soliciting claims and stirring up litigation. The defendant and his partner through various means, instituted and were retained in over three thousand negligence cases in a six year period. The Court found that the defendant and his partner had violated Canon 28 by stirring up litigation directly and through agents. On the basis of these findings, defendant was disbarred.

At the common law, barratry is the crime or offense "... of frequently stirring up suits and quarrels between individuals, either at law or otherwise."⁶¹ Barratry is a relatively rare crime because it involves more than merely advising another to bring a lawsuit. At California common law, a conviction for barratry required that there must be proof that the accused has excited suits or proceedings at

⁵⁷ *Id.*

⁵⁸ Brennehan, *The Annual Legal Check-up*, 47 A.B.A.J. 689 (1961).

⁵⁹ ABA CANONS OF PROFESSIONAL ETHICS, NO. 28.

⁶⁰ 11 App. Div. 2d 76, 202 N.Y.S. 2d 393 (1960).

⁶¹ *Scott v. State*, 53 Ga. App. 61, 64, 185 S.E. 131, 133 (1936).

law in at least three instances and with a corrupt or malicious intent to vex or annoy.⁶²

In *People v. Budner*,⁶³ a painter was charged with the crime of exciting groundless judicial proceedings in connection with numerous unsuccessful suits he instituted, in an effort to recover vacation pay benefits from a union pension fund. The defendant was found innocent where the Court held that barratry "... does not consist in promoting either private suits or public prosecution when the sole object is the attainment of public justice or private right, but in the prosecution of these remedies to mean and selfish purposes."⁶⁴ Under none of the preceding cases would an attorney be guilty of barratry where he in unselfish sincerity advised another to bring a lawsuit.

The question remains as to whether it is unethical for an attorney to volunteer advice to bring a lawsuit where it appears that the layman has a valid cause of action. The cases do not establish that this conduct is barratrous; however, Canon 28 points to the conclusion that it is unprofessional and therefore unethical. However, this same conclusion is not necessarily reached under the *Code of Professional Responsibility*.

The *Code of Professional Responsibility* takes the position that the ethical propriety in volunteering advice to a layman to seek legal services depends upon the circumstances. The *Code* recognizes that the giving of advice that one should take legal action may be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems if the advice is "... motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations."⁶⁵ However, if the giving of advice is motivated by the attorney's desire to be retained and compensated by the client, it is unethical, notwithstanding the possible existence of a legitimate claim, as the attorney has solicited professional employment.⁶⁶

The Supreme Court of the United States espoused this line of reasoning in a 1963 case, *NAACP v. Button*.⁶⁷ Here, action was commenced against the NAACP and its staff of attorneys pursuant to a statute banning the improper solicitation of any legal or professional business. Actions by the defendants led to numerous civil rights suits for the purpose of desegregating public schools. Litigation involving

⁶² *Lucas v. Pico*, 55 Cal. 126 (1880).

⁶³ 13 App. Div. 2d 253, 215 N.Y.S.2d 791 (1961).

⁶⁴ *Id.*; see also 9 C.J.S. *Barratry* §2 at 1547 (1938).

⁶⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-3.

⁶⁶ *Id.*

⁶⁷ 371 U.S. 415 (1963).

public school segregation would typically arise where a member of a local NAACP legal staff would appear at a meeting of parents and children to explain the significance of segregation and to outline the legal steps necessary to achieve desegregation. Forms would be passed out whereby those who signed authorized the staff attorneys to represent them in legal proceedings to achieve desegregation. The Court held that even though the Virginia law was enacted to regulate the illegal practices of barratry, maintenance, and champerty, that interest did not justify the prohibition of the actions of the NAACP and its staff of attorneys. The Court pointed out that the essential element in stirring up litigation is malicious intent. The opinion stated that the first amendment created the right to enforce constitutional rights through litigation, and in view of this right, the actions of the NAACP attorneys which led to the litigation could not be deemed malicious; *ergo*, the actions of the attorneys were in no way unethical.

Where an attorney has suggested the need of legal services to a layman, it is generally unethical for him to accept employment from that same layman. The rationale is that since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. Hence, if an attorney's livelihood comes from cases which he volunteered advice to bring, it would seem likely that he has stirred up litigation.⁶⁸

Exceptions to the Barratry Rule

The *Code Of Professional Responsibility*, in Disciplinary Rule 2-102, states that a lawyer giving unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting therefrom.⁶⁹ However, Disciplinary Rule 2-102 also lists several exceptions to this rule. Disciplinary Rule 2-102(1) states:

A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.⁷⁰

This exception to the rule prohibiting an attorney from accepting employment pursues the line of reasoning set forth in Canon 28 of the *ABA Canons Of Professional Ethics* and is more precise than the exceptions of "rare cases where ties of blood, relationship or trust" stated therein.

Disciplinary Rule 2-102(2) states:

A lawyer may accept employment that results from his par-

⁶⁸ See *In re Weitz*, 11 App. Div. 2d 76, 202 N.Y.S. 393 (1960).

⁶⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102 (A).

⁷⁰ *Id.*, DR 2-102 (A) (1).

ticipation in activities designed to educate laymen to recognize legal problems, . . . if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-101 (D) (1) through (5), to the extent and under the conditions prescribed therein.⁷¹

This exception to the rule prohibiting attorneys from accepting employment allows attorneys to participate in the educational activities of five types of institutions and also to accept any employment which may result therefrom. The institutions, as stated in Disciplinary Rule 2-101 are (1) Legal Aid or Public Defender offices, (2) the Military Legal Assistance office, (3) lawyer referral services, (4) the local bar association, and (5) certain non-profit organizations that recommend, furnish, or pay for legal services to its members or beneficiaries.⁷² To qualify under the exception, however, the legal aid or public defender offices must be operated or sponsored by a duly accredited law school, a bona fide non-profit community organization, a governmental agency, or a bar association representative of the general bar of the geographical area in which the association exists. Likewise, for non-profit organizations that recommend, furnish, or pay for legal services to its members or beneficiaries to qualify, there must be controlling constitutional interpretation allowing the rendition of such services. In addition, (1) the primary purposes of such organization must not include the rendition of legal services; (2) the recommending, furnishing, or paying for legal services to its members must be incidental and reasonably related to the primary purposes of such organization; (3) such organization must not derive financial benefit from the rendition of legal services by the lawyer; and (4) the member or beneficiary for whom the legal services are rendered, and not such organization, must be recognized as the client of the lawyer in the matter.⁷³ The NAACP qualified as such an organization in the case of *NAACP v. Button*.⁷⁴

The ABA *Code of Professional Responsibility*, Disciplinary Rule No. 2-102(A) (6), provides still another except to the regulations against publicity by an attorney. The rule permits a listing in one or more of the ABA-approved law lists, many of which are in fact distributed to laymen, with or without charge. The ABA Standing Committee on Law Lists has promulgated stringent rules and standards for the conduct of the approved lists, to insure compliance by those lists with the *Code of Professional Responsibility*. Rule 2-102(A) (6) establishes a conclusive presumption that a given law

⁷¹ *Id.*, DR 2-102 (A) (2).

⁷² *Id.*, DR 2-101 (D) (1).

⁷³ *Id.*, DR 2-102.

⁷⁴ 371 U.S. 415 (1963).

list is reputable, and that an attorney's listing therein is therefore ethical, if the list is issued a Certificate of Compliance by the standing committee.

The law lists fall into two classes: general and special. One general law list purports to list substantially all attorneys admitted to practice, and thus serves the public as a general reference work. Other general law lists are selective in their listings, but indicate no particular area of the law in which they are primarily interested. Special lists, on the other hand, concentrate their efforts in a particular field, such as commercial, insurance, patent, or negligence law. Presumably, these special lists serve the public by assisting in the selection of counsel who are competent and reliable in a field of the law in which it may be difficult for a layman to employ counsel by consulting a bar association, telephone directory, or general law list, since few attorneys in a geographical area would have the interest or the expertise to practice in that field.

The fourth and most liberal major exception to the rule prohibiting attorneys from promoting his employment is that:

Without affecting his right to accept employment, a lawyer may speak on legal topics to an audience so long as he does not emphasize his own professional experience or reputation and does not give individual advice.⁷⁵

This exception is an expansion of Canon 40 of the ABA *Canons Of Professional Ethics*. Under this exception, an attorney's statements and messages are not limited merely to relatives, close friends, and clients. Under this public speaking and writing privilege, the attorney can now discharge his duty to assist layment to recognize their legal problems on a vast scale through the use of the public media. Through the avenues of public speaking and writing, the attorney can convey his messages to virtually unlimited audiences.

At this point a caveat must be given: each of the various avenues of public communication an attorney may choose will create unique problems which should be noted. In *Informal Decision 503*,⁷⁶ the ethical considerations and problems of participation by lawyers in panel discussions was discussed. An attorney had stated that he was frequently called upon to make brief talks at meetings of clubs and organizations on legal subjects. At such meetings, small panels of lawyers, or lawyers mixed with other professionals such as doctors and accountants, were planned. Often these panels were followed by question periods where members of the audience would seek individual advice. The ABA stated that the attorney was contributing

⁷⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102 (4).

⁷⁶ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 503 (1962).

toward a socially desirable end in participating in panel discussions geared toward giving the law members of the audience a general view of the area of the law under discussion so as to make them better informed citizens and to enable them to know whether they needed to see a lawyer themselves.

The *Informal Decision* unequivocally stated, however, that a lawyer should *never* answer any question that undertakes to advise a particular member of the audience in regard to what he should personally do. The rendition of direct advice in this situation would constitute a solicitation of professional employment in violation of Canon 27 of the *ABA Canons Of Professional Ethics* (Disciplinary Rule 2-101 of the *Code of Professional Responsibility*). An attorney in this situation would be guilty of advertising through personal communications not warranted by personal relations. The ABA pointed out that the difference between a discussion of legal problems on a hypothetical basis and on a personal basis may at times be rather slight, and that a lawyer must not use the hypothetical approach simply as a means of advising a member of the audience on his own personal problems. The *Informal Decision* also noted that there was no ethical impropriety in the publication and public distribution of a transcript of the panel discussion, as long as the published material did not undertake to advise a particular person about his personal problem. Finally, the ABA stated that although it condoned the occasional participation of an attorney in panel discussions, any widespread participation of an attorney in panel discussions would constitute direct advertising in violation of Canon 27.⁷⁷

In *Informal Decision* 840,⁷⁸ the ABA discussed and, in conjunction with a local bar association, established rules to guide lawyers participating in legal seminars. The seven rules established were: (1) it is perfectly proper for a lawyer to participate in legitimate seminars on legal subjects as long as the seminars are run in a proper manner; (2) the seminar must have as its purpose the imparting of information to the participants; that is, its purpose must be educational in nature; it is improper for a lawyer to participate in a seminar the main purpose of which is to publicize, or make money for, its sponsors, the lawyer, or others; (3) the seminar must be sponsored by a bar association, school, or other responsible public or private organization not for profit; it is improper for a lawyer to participate in a seminar sponsored by an organization lacking in complete responsibility; (4) seminar participants may properly consist of lawyers or laymen or both; those attending the seminar may properly consist of lawyers or laymen or both; (5) a lawyer may properly be paid

⁷⁷ *Id.*

⁷⁸ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 840 (1965).

for his participation in the seminar; (6) the seminar announcement and other written materials may list the name of a lawyer participant with a short factual and dignified statement of his qualifications; (7) it is absolutely improper for an attorney to answer questions of laymen concerning their specific individual problems.⁷⁹ Some might posit a conflict between the second portion rule 2, stating that "It is improper for a lawyer to participate in a seminar the main purpose of which is to publicize, or make money for . . . the lawyer . . .," and rule 5 which states that "a lawyer may properly be paid for his participation in the seminar." As long as the seminar is run in a dignified manner and continues to be educational in nature, rather than taking on the characteristics of a purely commercial enterprise, the attorney cannot be condemned for accepting money for his participation in the seminar. In interpreting Canon 40 of the ABA *Canons Of Professional Ethics*, the ABA in *Formal Opinion 92*⁸⁰ held that it was proper for an attorney to sell articles of a general nature on legal subjects to periodicals of general circulation. Here the sale of the attorney's services to the seminar sponsors is analogous to the attorney in *Formal Opinion 92* selling his article to the periodical publishers.

Control by a Lay Intermediary

When an attorney becomes involved with the mass communication media such as newspapers, radio, and television, he is bound to encounter the third and fourth category of ethical problems in addition to the others already discussed. The third category, allowing professional services to be exploited by an intermediary, is dealt with in Canon 35 of the ABA *Canons Of Professional Ethics*. It states:

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

* * *

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an

⁷⁹ *Id.*

⁸⁰ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 92 (1933).

entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.⁸¹

The essence of Canon 35 is that it is unethical for an attorney to allow his services to be bought and subsequently exploited by another who uses such professional services for his own benefit or profit. An attorney using one of the public and semi-public media may find himself performing legal services for other parties who use this medium of communication. When this occurs, the attorney has allowed his professional services to be exploited by the medium and is therefore in violation of Canon 35. The *Code Of Professional Responsibility* treats the problem of intermediaries in Disciplinary Rule 6-108(B) which states:

A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.⁸²

The attorney using one of the public or semi-public media, who finds himself performing legal services for other parties using this medium of communication is also in violation of Disciplinary Rule 6-108(B), because his professional judgment has been directed by the intermediary who employs him.

Attorneys who violate the intermediary rule are subject to court disciplinary action. In *Columbus Bar Association v. Agee*,⁸³ the defendant had been engaged in handling workman's compensation cases through offices in two cities. Clients in these cities were engaged primarily through the aid of laymen who were well known in these communities. Parties coming to see these individuals would become clients of the defendant by signing retainer contracts with defendant's name thereon, without ever meeting him. The court found that in addition to soliciting employment, the defendant had allowed his services to be exploited by an intermediary. The court stated that the purpose of Canon 35 "... was to preserve the personal relationship that should exist between an attorney and client."⁸⁴ Defendant was suspended from practice indefinitely.

In *In re Tuthill*,⁸⁵ the defendant became involved with a New York corporation which was engaged in the business of searching surrogate court records for the purpose of procuring the names of intestate estates and notifying next of kin or legatees residing abroad,

⁸¹ ABA CANONS OF PROFESSIONAL ETHICS, NO. 35.

⁸² ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-108(B).

⁸³ 175 Ohio St. 443, 196 N.E.2d 98 (1964).

⁸⁴ *Id.* at 444, 196 N.E.2d at 99.

⁸⁵ 256 App. Div. 539, 10 N.Y.S.2d 643 (1939), *leave to appeal denied*, 256 App. Div. 1059, 11 N.Y.S.2d 842 (1939).

and procuring the powers of attorney to represent them in prosecuting their claims. Defendant was the counsel retained by the company to give legal advice in connection with the prosecution of the claims. The court found that in addition to aiding the unauthorized practice of law, defendant had allowed his professional services to be controlled and exploited by a lay agency which intervened between client and attorney. The court stated that this practice was unethical except where the lay agency is a charitable society rendering aid to indigents, and held that defendant should be disbarred.

The charitable society exception to the intermediary rule was dealt with in *Touchy v. Houston Legal Foundation*.⁸⁶ Defendant, a legal aid foundation, provided free legal services to all members of the public whom it felt qualified as being indigent. Defendant also maintained a lawyer referral service for applicants who did not qualify as indigent. A group of local attorneys sued the foundation, alleging that it was acting as an intermediary between clients and member attorneys in violation of the canons of ethics. The court held that the canon on intermediaries was qualified to the extent that charitable societies rendering aid to the indigent are not deemed to fall within it. Here defendant qualified under the charitable society exception, and thus the affiliated attorneys had not violated the canon on intermediaries.

The Court in *NAACP v. Button*⁸⁷ stated that the objection to the intervention of a lay intermediary who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship derives from the element of pecuniary gain. The actions by the staff attorneys who represented clients of the NAACP, including nonmembers as well as members, was not professionally reprehensible. One primary reason was that no money was at stake and hence there was no danger that the attorney would desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. In addition, there was no conflict of interest between the NAACP and the litigants it sponsored.

Unauthorized Practice of Law

The fourth category of ethical problems deals with aiding the unauthorized practice of law. Due to the magnitude of the interests involved, the practice of law is stringently regulated. In Ohio the practice of law is regulated by statute which states:

No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned,

⁸⁶ 417 S.W.2d 625 (Tex. Civ. App. 1967).

⁸⁷ 371 U.S. 415 (1963).

either by using or subscribing his own name, or the name of another person, unless he has been admitted to the bar by order of the Supreme Court in compliance with its prescribed and published rules.⁸⁸

Certain public media, especially newspapers, have worked in cooperation with attorneys in programs to educate the public in legal matters. In programs involving an exchange of legal questions and answers through the media, the question arises as to whether the medium is practicing law. The practicing of law is:

. . . the giving of advice or rendition of any sort of service by any person, firm, or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.⁸⁹

The key concept in point is the "giving of advice." In *Goodman v. Motorists Alliance of America, Inc.*,⁹⁰ the defendant was charged with the unauthorized practice of law. Defendant had been engaged in the issuing of automobile insurance contracts. One section of the policy dealt with the furnishing of legal services. In addition to promising the policyholders that it would prosecute or defend claim matters (which would be proper where the rights being prosecuted are mutual and consistent), defendant promised to "advise" policyholders as to rights or liabilities. Whenever a collision occurred, defendant would gather statements and information and then advise the policyholder as to whether it had a good claim against the other party or, conversely, whether the other party had a valid claim against the policyholder. The court held that the giving of advice as to whether a claim is good or not is giving of advice as to legal rights which is essentially the character of the service that attorneys perform.

The question of whether the exchange of legal questions and answers through a public medium constitutes the practice of law was answered in the case of *Rosenthal v. Shepard Broadcasting*.⁹¹ Defendant was a Massachusetts corporation which operated a broadcasting station. Defendant was charged with violating a Massachusetts statute which forbade a corporation to give legal advice in matters which did not relate to its lawful business. Defendant broadcasted two programs which were commercially sponsored. Both programs were similar in that anyone was invited to state his legal problems and the purpose was to furnish enlightenment under the

⁸⁸ OHIO REV. CODE §4705.01 (Page 1953).

⁸⁹ *People ex. rel. Illinois State Bar Ass'n v. Peoples Stock Yard State Bank*, 344 Ill. 462, 475, 176 N.E. 901, 907 (1931).

⁹⁰ 29 Ohio N.P. 31 (1928).

⁹¹ 299 Mass. 286 (1938).

local law. The answers were supplied by judges who in conjunction with the program conductors would decide which questions were to be presented. At each broadcast, the conductor would inform the listening public that the law varies in different jurisdictions and that there was no intention to offer legal advice as a substitute for that given by attorneys. The Court held that despite the disclaimer, the giving of such advice by the defendant constituted the practice of law. The opinion pointed out that the rendering of such advice not only violates the confidential relationship of an attorney and client, but is inconsistent with the traditional standards of the bar and courts. The judges who supplied the answers were not only aiding the unauthorized practice of law, but were allowing their services to be exploited by an intermediary (the radio station). Since the radio station was commercially sponsored and therefore received pecuniary gain from the programs, the judges could not claim exemption from the intermediary rule on the ground that the intermediary was a charitable organization.⁹²

The field of unauthorized practice is growing and has been described as a social and economic battlefield for legal service such as estate planning, real estate contracting, making wills and trust agreements, and handling federal income tax cases. While some lay agencies are in effect competing with the legal profession, lawyers can have reaped profits from working with and for such agencies by organizing the enterprise which solicits and conducts the business, working with an existing lay group through a "feeder" or "kick-back" system, becoming an employee of the organization, or by the attorney "lending" his name to the lay group for a fee.⁹³ The courts as well as the bar associations have taken action in these situations and have resorted to disciplinary measures of varying degrees.

Canon 47 of the *ABA Code Of Professional Ethics* deals with lawyers aiding the unauthorized practice of law. It states:

No lawyer shall permit his professional services, or his name to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.⁹⁴

The *Code Of Professional Responsibility* treats the problem in even more direct language by saying: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law."⁹⁵

⁹² See also *NAACP v. Button*, 371 U.S. 415 (1963); *Touchy v. Houston Legal Foundation*, 417 S.W.2d 625 (Tex. Civ. App. 1967).

⁹³ Cedarquist, *Lawyers Aiding Unauthorized Practice of Law*, 28 U.P. NEWS 348, 349 (1931).

⁹⁴ ABA CANONS OF PROFESSIONAL ETHICS, NO. 47.

⁹⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 3-101 (A).

In *re George H. Otterness*⁹⁶ was concerned with an attorney who became employed by a bank as a vice-president on a fixed salary basis. The arrangement was that the defendant was to practice law both for the bank and independently but that all fees which he earned were to be transferred to the bank which in return recorded them as income. The court held that the bank was engaged in the unauthorized practice of law, and defendant was censured for his participation therein.

The defendant in *Burton v. Lietz*,⁹⁷ was an attorney on retainer for a collection agency. The contract agreement between the agency and its clients was that the former was to collect delinquent accounts and where necessary institute litigation. The court held that for the collection agency to institute litigation on behalf of the client is engaging in the unauthorized practice of law and that the attorney must be barred from accepting fees for his services which aided the defendant's unauthorized practice of law.

The defendants in *In re Herbert J. Droker and Eugene J. Mulholland*,⁹⁸ were attorneys who also owned and managed an escrow company. As part of their escrow service, the defendants often prepared the legal documents. The escrow company carried on its business among real estate brokers by advertising. The court held that among other things, defendants were engaged in the unauthorized practice of law and had allowed their services to be exploited by a lay agency. Defendants were suspended from practice for one year. In view of this decision and the two preceding it, it becomes puzzling why the court in *Rosenthal v. Shepard Broadcasting*⁹⁹ did not deal with the ethical conduct of the judges who appeared in the broadcasts. The preceding opinions all point to the conclusion that an attorney appearing on such a broadcast in a similar manner would undoubtedly be guilty of aiding the unauthorized practice of law.

The Media: A Special Problem

The American Bar Association has published a considerable number of opinions dealing with attorneys and their involvement with the mass communication media. The situations giving rise to these opinions involve ethical considerations dealing with solicitation, stirring up litigation, and lay intermediaries, as well as aiding the unauthorized practice of law.

⁹⁶ 181 Minn. 254, 232 N.W. 318 (1930).

⁹⁷ 136 N.Y.S. 829 (1912).

⁹⁸ 59 Wash. 2d 707, 370 P.2d 242 (1962).

⁹⁹ 299 Mass. 286 (1938).

Several ABA opinions deal with attorneys' relations with newspapers. *Informal Decision 743*¹⁰⁰ was a reply to an inquiry as to the propriety of a lawyer's writing articles for publication in lay papers explaining holdings and any dissenting opinions in decisions handed down by the Supreme Court of the United States. The ABA stated that since no legal advice was being given, the articles were proper. Where the attorney avoids giving legal advice, it cannot be said that the newspaper is practicing law.¹⁰¹ The attorney was told to authorize the use of only his name, and that neither his office address nor his picture should be submitted, as these would constitute advertising for professional employment in violation of Canon 27. The lawyer was also warned that he should prevent publication of laudatory comments by the newspaper about him.¹⁰²

Letter-writing by attorneys to newspapers for publication is improper and constitutes a solicitation of professional services, according to *Informal Opinion 571 (a)*.¹⁰³ There it was held to be unethical for a lawyer who believed that everyone should have a will, to write a letter to the editor of a newspaper as a public service, urging the public to go to their lawyers and have their wills made after the same newspaper had published several articles on prominent people who had died without wills, or who had drawn up their own wills.

Many local bar associations have taken advantage of the ruling in *Jacksonville Bar Association v. Wilson*¹⁰⁴ by placing articles and notices of their own in the local newspapers. *Informal Opinion 969*¹⁰⁵ dealt with a proposed advertising campaign in which a bar association would inform the local community of an unusual local ordinance. The inquiring bar association was upset with the inequities resulting from the application of a local ordinance which provided that anyone filing a claim against the city for damages resulting from a defective street or sidewalk must prove, among other things, that the city had written notice of the defect prior to the time when the alleged damages were incurred. The bar association proposed an advertising campaign which would inform the community of the local law and the condition precedent which was negating many lawsuits, and would invite the community to forward information, in writing, either to the newspaper, or a community post office box, of any defect in a local street or sidewalk. The letters were to be filed with the local authorities

¹⁰⁰ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 743 (1964).

¹⁰¹ See *Rosenthal v. Sheppard Broadcasting*, 299 Mass. 286 (1938).

¹⁰² ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 743 (1964).

¹⁰³ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 571 (a) (1962).

¹⁰⁴ 102 So.2d 292 (Fla. 1958).

¹⁰⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 969 (1966).

and would constitute the prior written notice required by law. The ABA in approving the program stated that the campaign did not constitute "stirring up litigation" within the true meaning of Canon 28. The action by the bar association bore no evidence of malicious intent and was therefore consistent with the ruling in *NAACP v. Button*.¹⁰⁶

*Informal Decision C-463*¹⁰⁷ was a response to an inquiry concerning the propriety of a question-and-answer column appearing in a newspaper under the sponsorship of a state bar association. The column was to endeavor to set forth reasoned legal answers submitted to the newspaper's readers concerning legal problems of general interest to the public. The bar association was to safeguard the public's interest by screening the questions and answers so as to avoid misrepresentation, or situations indicative of unauthorized practice of the law.¹⁰⁸ The ABA stated that the proposed column *was* proper when engaged in under certain limitations. First, the column must be limited to articles of "a general nature on legal subjects." The ABA pointed out that Canon 40 forbids an attorney writing in a publication to give personal advice. Also by not giving personal advice, the attorney (or local bar association) is avoiding any attorney-client relationships which would raise questions as to the newspaper acting as an intermediary.¹⁰⁹ Another requirement is that the local bar association clearly indicate that it and not the publishing agency furnishes the information in the column. The rationale for this requirement is to eliminate any implication that the newspaper is engaging in unauthorized practice, or that it publishes the column except under the sponsorship of the bar association. Where all answers are stated as coming from the bar association, there can be no solicitation of professional services (Canon 27) as all participating lawyers remain anonymous. Finally, the ABA stated that there is no exploitation of the professional services of contributing lawyers (Canon 35) because (1) the bar association screens all questions and answers, (2) it is clearly stated that the newspaper publishes the column under the sponsorship of the bar association, and (3) all lawyers remain anonymous.¹¹⁰ This ABA ruling seems to have overcome all of the ethical problems from question-and-answer programs that were existing in the fact situation described in *Rosenthal v. Shepard Broadcasting*.¹¹¹

¹⁰⁶ 371 U.S. 415 (1963).

¹⁰⁷ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. C-463 (1961).

¹⁰⁸ See *Rosenthal v. Sheppard Broadcasting*, 299 Mass. 286 (1938).

¹⁰⁹ See ABA CANONS OF PROFESSIONAL ETHICS, NO. 35; *NAACP v. Button*, 371 U.S. 415 (1963).

¹¹⁰ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. C-463 (1961).

¹¹¹ 299 Mass. 286 (1938).

*Formal Opinion 273*¹¹² involves the unique situation where an attorney is employed by an association, club, or trade organization and writes for this organization's periodical. This practice is proper under Canon 35 to the extent that legal services are not rendered to the members in respect to their individual affairs. The question was posed as to the ethical propriety of lawyers' rendering opinions to a manufacturers' association for inclusion in bulletins issued to its members. The *Formal Opinion* held that it was proper for the general counsel of an association to render to it opinions concerning problems common to all members of the association even though the attorney knows and expects such opinions to be distributed to the members for their information through a periodic bulletin, so long as the attorney's name does not accompany the opinion. The ABA pursued the reasoning it stated in *Formal Opinion 168*¹¹³ by stating that the attorney, in rendering opinions as to problems common to all members of the association is not rendering legal services to the members of such an organization in respect to their individual affairs as prohibited by Canon 35. Here the attorney avoids solicitation problems by striking his name from the opinion as it appears in the periodical. *Formal Opinion 273* ducked the issue of unauthorized practice of law by the trade association in distributing the opinion to members. By publishing an opinion on a problem common to all members, the association is in a sense answering legal questions of a "general nature" as to the particular group. The cases dealing with the unauthorized practice of law were all similar in that there was an attorney-client relationship, of a sort, present. In the absence of any case law on the subject, it seems reasonable that the courts would not consider the publishing of such opinions by the trade association as constituting the unauthorized practice of law.¹¹⁴

With varying degrees of success, attorneys have worked with radio programming as a means of informing the public. The question of whether the attorney is advertising for professional employment is inevitable with this type of activity. The ABA attempted to establish guidelines in this area in *Formal Opinion 298*,¹¹⁵ which stated:

In the case of continuing education or public information programs, such as panel or interview type, sponsored or supported or assisted by bar associations, or affiliated groups, or those non-commercial programs of this type produced by television and broadcasting companies designed and used as

¹¹² ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 273 (1967).

¹¹³ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 168 (1937).

¹¹⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NOS. 273 (1967) and 168 (1937).

¹¹⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 298 (1961).

public information programs, lawyers and judges may properly appear and be identified as such, either generally, or individually, provided, always, that such programs conform to proper standards of the Bench and Bar.

*Informal Decision C-230 (g)*¹¹⁶ was written in response to an attorney who had inquired as to the propriety of his appearing on the television program "Meet the Press." "Meet the Press" was a public service program dealing with important and live questions of general public interest. Although non-commercial in nature, the program was commercially, and not bar association sponsored.¹¹⁷ The ABA stated that it would be proper for lawyers and judges to appear on the program and be identified as such notwithstanding the commercial sponsorship. The reason given was that the nature of the program and the nature of the appearance of the lawyer or judge on it is the important consideration, and whether or not it is commercially sponsored is secondary.¹¹⁸

Commercially-sponsored radio programs have been readily approved when supervised by a local bar association or affiliate. In *Informal Decision C-764*,¹¹⁹ an attorney referral service affiliated with a local bar association proposed a daily radio program of five minutes duration. The program was to be informative on legal problems and would also advertise the referral service.¹²⁰ The ABA, citing *Formal Opinion 298*,¹²¹ stated that commercial sponsorship of a bar program is not objectionable provided the program is not interspersed with commercial advertising, and provided there is merely an announcement at the beginning and end of the program that the program is sponsored by a reputable business.

The ABA has recently authorized commercially-sponsored radio programs produced by attorneys not in conjunction with local bar associations or affiliates. The attorneys in *Informal Opinion 1094*¹²² were asked to produce radio broadcasts featuring their legal analysis and critique of the law and legal process. The attorneys were to be free of editorial control and supervision, and were assured that the final work product would be theirs. The attorneys' firm name was not

¹¹⁶ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. C-230 (G) (1961).

¹¹⁷ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 298 (1961).

¹¹⁸ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NOS. C-230(G) (1961) and 298 (1961).

¹¹⁹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. C-764 (1964).

¹²⁰ See *Jacksonville Bar Ass'n v. Wilson*, 102 So.2d 292 (Fla. 1958).

¹²¹ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 298 (1961).

¹²² ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 1094 (1969).

to be disclosed or publicized and their own personal identification was to be limited to their individual names and designation as "Attorney at Law." The *Informal Opinion* stated that there was nothing unethical about the proposal but suggested that the attorneys consult with their local bar association in determining that the actual programs conformed to the proper standards of the bench and bar.

*Informal Opinion 1136*¹²³ approved of a proposal for a nationally broadcasted television series using five lawyers as recurring participants. The program was produced by a law professor on leave of absence from his school, without any bar association aid or supervision. The programs were to be sponsored by a foundation and a Congressionally-funded corporation. On the program the participants would not be introduced as lawyers nor would there be any reference to law firms or addresses. It was noted that public relations work in conjunction with the program would disclose where the advocates went to law school and that they were in fact lawyers. The editor of the broadcasts stated that the purpose of the broadcasts was to increase public understanding and involvement in public affairs. Finally, it was noted that the broadcasts involved no advertising or commercial consideration. In conclusion, the ABA found that there was no ethical impropriety in participation by lawyers in the proposed program.

*Informal Opinion 528*¹²⁴ is a sequel to the question-answer columns and programs situations which were previously discussed. The inquiring attorney was approached by a local radio station concerning a program of legal nature to run independently or in cooperation with the local bar association. The essence of the radio station's proposal was a quiz program where a lawyer or panel of lawyers would answer questions of a common nature mailed in by the public. The ABA approved of the proposal provided that the attorneys would not answer any question that undertook to advise a particular member of the audience in regard to what he should personally do. According to the *Informal Opinion*, the program subject to the stated limitation would not violate Canons 27 and 47. The quiz program, if run in conjunction with the local bar association, would not violate Canon 27 if the attorneys remained anonymous and the answers came from the bar association. However, the *Informal Decision* did not restrict the proposed radio quiz programs to bar association supervision. An attorney participating in a non-bar association-supervised program of this nature (especially where he is identified) would violate Canons 27, 35, and 47 according to the reasoning set forth in *Informal Decision C-463*.¹²⁵

¹²³ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1136 (1969).

¹²⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 528 (1962).

¹²⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. C-463 (1961).

Conclusion

The complexity of our legal system demands a duty on the part of the attorney to assist the layman to recognize legal problems. Since this duty is not recognized at law, it exists merely as a moral obligation of the attorney which arises from his social position. Even our professional regulations demand little of us as attorneys insofar as discharging our duty to educate our legally ignorant fellow human beings. The *ABA Canons Of Professional Ethics* do not even mention this obligation. The Disciplinary Rules of the *Code Of Professional Responsibility* fail to state any minimal requirements the attorney must meet in order to discharge the duty. It is only by searching through the Ethical Considerations of the *Code Of Professional Responsibility* that we find any mention of the attorney's duty to assist the layman recognize his legal problems.

The legal system not only does little to motivate the attorney to educate the layman, it actually discourages him from this endeavor due to the ethical restriction placed upon the attorney's actions. Depending upon the manner in which he chooses to express himself, the attorney in an honest effort to educate the layman may (1) solicit professional employment, (2) stir up litigation, (3) allow his professional services to be exploited by a lay intermediary, or (4) aid the unauthorized practice of law. All of these acts are considered highly unethical, and any attorney whose actions fall into one or more of these areas may be disbarred, or at least severely reprimanded.

Nonetheless, the attorney who takes the time to learn the ethical boundaries in which he may operate will discover that many avenues actually are open to him as a means of discharging his duty to the layman. Under certain circumstances the attorney in the course of discharging his duty may accept pecuniary compensation and may even accept professional employment which his efforts generate. However, the rewards the attorney may receive are generally outweighed by the sacrifices that must be made. Thus, any and all attorneys who recognize their moral obligation to the layman and take the time, energy, and risk to discharge it, should be highly commended.

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