Tulsa Law Review

Volume 5 | Number 3

1968

Legal Ethics v. Constitutional Rights

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LEGAL ETHICS v. CONSTITUTIONAL RIGHTS

On December 5, 1967, the United States Supreme Court handed down the third in a series of landmark decisions which will undoubtedly cause a complete redrafting of legal canons of ethics pertaining to solicitation[1] and lay intermediaries.[2] In *United Mine Workers, District* 12 *v. Illinois State Bar Association*[3] the Court upheld the right of a labor union to employ a licensed attorney on a salary basis in order to represent its members in prosecuting workmen's compensation claims before the Illinois Industrial Commission. The trial court had enjoined the union from employing an attorney for this purpose and the Illinois Supreme Court affirmed. The subsequent decision of the United States Supreme Court upheld the contention of the United Mine Workers that enjoining such em-

[1] ABA CANONS OF PROFESSIONAL ETHICS No. 28. "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. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the professional devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred."

[2] ABA CANNONS OF PROFESSIONAL ETHICS, No. 35. "The professional services of a lawyer should not be controlled or ex-

ployment "abridged their freedom of speech, petition, and assembly under the First and Fourteenth Amendments."[4]

The first case leading toward the decision in the noted case was *NAACP v. Button*[5] in which the court considered a Virginia statute enacted in 1956 which made it a misdemeanor for any person or organization not having a pecuniary right or liability in a lawsuit to solicit legal business for itself or for any attorney.[6] The NAACP which was advising Negroes of their rights, encouraging them to commence desegregation litigation, and offering legal and financial assistance in connection therewith, brought action to enjoin the enforcement of the statute. The Virginia Supreme Court of Appeals held that the statute applied to the organization and that it could not solicit legal business for any attorney. The United States Supreme Court reversed, holding that the statute as construed and applied violated the first and fourteenth amendment rights of speech, petition and assembly.

The second case which set the stage for the decision in the principle case was *Brotherhood of Railroad Trainmen v.*

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

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

[3] 389 U.S. 217.

[4] *Id.*

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

[6] VA. CODE ANN. §§ 54-74, 78 to 79 (1958).

Virginia.[7] The Brotherhood was a fraternal and mutual benefit society with the goal to promote the welfare of trainmen and protect their families. The brotherhood provided legal assistance by, among other things, recommending a highly qualified attorney to members and their families. The state moved to enjoin this activity as a solicitation prohibited by statute.[8] The Virginia Supreme Court of Appeals upheld the state's position. The United States Supreme Court, citing *NAACP v. Button,* reversed stating that though the state has broad powers to regulate the practice of law within the state it cannot thereby infringe the Constitutional rights of speech, petition, and assembly of individuals.

These three cases were decided by the Supreme Court by using the "balancing test"[9], i.e. balancing one's first and fourteenth amendment rights of speech, assembly, and petition against the right of the state to regulate the practice of law. In regulating the practice of law many states have prohibited solicitation[10] and the use of lay intermediaries[11] by statutes[12]

[7] 377 U.S. 1 (1964).

[8] VA. CODE ANN. §§ 42-54 (1950). "The Commonwealth's attorney . . . may maintain a suit against any person, firm, partnership or association which has acted for another in the capacity of a runner or capper (agent for an attorney) or which has been stirring up litigation in such a way as to constitute maintenance. . . ."

[9] *See, e.g.,* Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); American Communications Ass'n. v. Douds, 339 U.S. 382 (1950); Prince v. Massachusetts, 321 U.S. 158 (1944).

[10] *See, e.g., In re* McDonald, 204 Minn. 61, 282 N.W. 677 (1938); *In re* Co-op. Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); Richmond Ass'n. of Credit Men, Inc. v. Bar Ass'n., 167 Va. 327, 189 S.E. 153 (1937).

[11] *See, e.g.,* Howe v. State Bar, 212 Cal. 222, 298 Pac. 25 (1931); *In re,* 269 App. Div. 74, 54 N.Y.S. 2d 126 (1945); *In re* Pace, 170 App. Div. 818, 156 N.Y.S. 641 (1915); Rhode Island Bar Ass'n. v. Automobile Serv. Ass'n., 55 R.I. 122, 179 A. 139 (1935).

[12] See notes 6, 8 *supra.*

and canons of professional ethics.[13] These regulations went unattacked for many years, but in 1953 Drinker in his *Legal Ethics*[14] started the assault by suggesting:

> "It is not believed that the Canon [ABA Canon 35 on intermediaries] will prevent the labor unions from finding a lawyer to advise their members. The whole modern tendancy is in favor of such arrangements, including particularly employer and co-operative health services, the principles of which, if applied to legal services, would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be the loss of income to the lawyers and concentration of service in the hands of fewer lawyers. These features do not commend the profession to the public."[15]

The first judicial attack was in the *Button case*[16] in 1963, but it was felt by some that the enjoining of the application of the anti-solicitation statute in that case was due to the strong political and racial overtones present.[17] The doubters were stilled when an anti-solicitation statute was made inapplicable to a fraternal society in the *Brotherhood* case, and a similar ethical canon was held not to control an attorney hired by a labor union in the principle case.[18]

The other side of the scales used in the "balancing test" has become heavily weighted in recent years. The first amendment freedoms of speech, petition, and assembly have been secured against violation by the states through the fourteenth amendment.[19] Consequently where individuals' rights outweigh the interest of the state in regulating, the state regula-

[13] See notes 1, 2 *Supra.*
[14] Drinker, *Legal Ethics* (1953).
[15] *Id.* at 167.
[16] See note 5, *Supra* and accompanying text.
[17] *See, e.g.,* Note *Soliciting Litigation as a Protected Activity,* 77 HARV L. REV. 122 (1963).
[18] _____U.S. at_____.
[19] Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama 310 U.S. 88 (1940).

tion is going to give way to Constitutionally protected rights. Of the three cases discussed here the following language from the *Brotherhood* case shows most clearly the theory of the court in saying that the scales have tipped in favor of individual rights:

> The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program.
>
> . . . (A)nd the right of workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.
>
> . . . Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries [citing *Gideon v. Wainwright* . . .], and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics.[20]

The above argument is the same as that used by the court in the principle case.

The decisions in UMWA, *District* 12 *v. Illinois State Bar Association* and the two earlier cases may cause great problems in determining who may solicit and by what means. In the future, it appears that the Court will have difficulty finding significant distinctions between associational rights of union members and those claimed by the members of other nonpecuniary associations such as automobile clubs[21] and as-

[20] 377 U.S. at 6-7.

[21] People *ex rel.* Chicago Bar Ass'n. v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935), *noted in* 3 U. CHI. L. REV. 296 (1936); People *ex rel* Chicago Bar Ass'n. v. Motorists' Ass'n., 354 Ill. 595, 188 N.E. 827 (1934); Rhode Island Bar Ass'n. v. Automobile Serv. Ass'n., 55 R.I. 122, 179 A. 139 (1935).

sociations of real estate taxpayers,[22] both of which have previously been prevented from maintaining legal aid plans by state decisions.

Other problems raised by the principle case are the possibility of fee splitting between attorney and union and the subjection of the attorney to control by the union by the continuing threat of withdrawal of union approval.

Obviously those who in the future draft statutes or canons pertaining to solicitation and lay intermediaries will have to take these and many other problems into consideration because to date the Supreme Court has failed to spell out how far its decisions will be applied and to whom they will be applicable.

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[22] People *ex rel.* Courtney v. Ass'n. of Real Estate Taxpayers 354 Ill. 102, 187 N.E. 823 (1933), *noted in* 2 U. CHI. L. REV. 119 (1934).