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Opinions Nos. 30 - 33 Colorado Bar Association Ethics Committee Adopted June 6, 1964

BAR BRIEFS

OPINION NO. 30 COLORADO BAR ASSOCIATION ETHICS COMMITTEE ADOPTED JUNE 6, 1964

SYLLABUS

A lawyer may not use or allow the use of his professional stationery, or other stationery identifying him as a lawyer, in connection with any solicitation on behalf of a charitable or other organization.

FACTS

A lawyers solicits on behalf of a charitable or other organization. As a part of the program of the organization, the lawyer is given a list of names to contact in an attempt to raise money for the organization. The lawyer contacts those persons by mail, soliciting contributions and using his professional stationery or other stationery identifying him as a lawyer.

Is the lawyer in violation of the Canons of Professional Ethics in so doing?

OPINION

In the opinion of the Committee, the lawyer is in violation of Canon 27 (advertising).

The lawyer is in violation of Canon 27 if he uses or allows his professional letterhead, or other stationery identifying him as a lawyer, to be used in the solicitation of funds for a charitable organization or other organization; this is true, no matter what the purpose of the organization. It is improper for a lawyer to so identify himself, since the only apparent purpose of such identification would be to bring his name as a lawyer before the public, or a segment thereof (i.e., advertising). This being the basic reasoning of the Committee, it is not significant whether the lawyer is an officer or a member of the board of directors of the organization.

The Committee believes that a lawyer may not use his stationery for the purpose of writing circular letters. Use of a lawyer's stationery should be confined to correspondence with those with whom he has an established professional or personal relationship. However, even though the Committee believes this to be the better practice, it finds that if the lawyer in the above stated facts had contacted by mail only members of the Bar, such action would not necessarily be improper. The Committee believes that it would be in better taste if the lawyer were to use the stationery of the organization involved or his personal stationery without the designation "Attorney at Law" in making such solicitations even to members of the Bar, and in such a way so that he could not be identified as a lawyer by people who do not know him.

The Committee does not wish to be critical of members of the Bar who in the past inadvertently and without any intent to advertise have indulged in a questionable use of their professional stationery, or other stationery identifying them as lawyers.

OPINION NO. 31
COLORADO BAR ASSOCIATION
ETHICS COMMITTEE ADOPTED JUNE 6, 1964

STATEMENT OF PRINCIPLES
ON PUBLISHED COMMENT CONCERNING PENDING LITIGATION

Canon 20 of the Canons of Professional Ethics reads as follows:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

As good as this statement is, there is abundant evidence that it has not been effective. It has not prevented counsel from holding press conferences or issuing press releases relating to pending or prospective civil or criminal cases. Moreover, as the Canon was drafted before the advent of radio and television, it is limited to newspaper publications. It needs embellishment and implementation.

The very foundation of the administration of justice is that no litigant be deprived of a fair trial. Fair trial presupposes an impartial finder of facts whether judge or jury and for this reason the penalties for "jury tampering" or improperly influencing judges are severe. But bribery or improper approaches to members of a jury out of court are not the only means by which a jury may be improperly influenced. A jury can also be improperly influenced by what they are told in television or radio broadcasts or by what they read in newspapers. This improper influence at times affects civil as well as criminal trials.

No lawyer would be permitted to show a jury a newspaper account prejudicial to one of the parties, yet the same result can be accomplished by the publication in the press of, for example, alleged confessions or the supposed testimony of witnesses which has been excluded by the court.

It is clear that lawyers are responsible for many of the prejudicial statements that appear in the press and are seen or heard on radio and television. The legal profession should not criticize news media for reporting extrajudicial statements made by counsel—statements frequently made with no other purpose than that

they shall be publicized by the news media. We cannot hope to receive the cooperation of the press until we clean our own house.

Members of the bar have a duty to refrain from originating the same types of statements which should not be originated by the press, or otherwise be published. In criminal proceedings, such statements include among others the following:

- (1) Any criminal record of the accused.
- (2) Any alleged confession or admission of fact bearing upon the guilt of the accused.
- (3) Any statement of any public official as to the guilt of the accused.
- (4) Any statement of counsel's personal opinion as to the guilt or innocence of the accused.
- (5) Any statement that a witness will testify to certain facts.
- (6) Any comment upon evidence already introduced.
- (7) Any comment as to the credibility of any witness at the trial.
- (8) Any statement of matter which has been excluded from evidence by the court at the trial.

In relation to civil proceedings, such types of statements include among others the following:

- (1) Any statement of counsel's personal opinion as to the factual or legal merits of the claims of the plaintiff or defendant.
- (2) Any statement that a witness will testify to certain facts.
- (3) Any comment upon evidence already introduced.
- (4) Any comment as to the credibility of any witness at the trial.
- (5) Any statement of matter which has been excluded from evidence by the court at the trial.

We hope that this statement of principles on published comment concerning pending litigation will implement and make more understandable the substance of Canon 20.

Trials "are not like elections, to be won through the use of the meetinghall, the radio, and the newspaper." *Craig v. Harney*, 331 U.S. 367, 377. The judicial admonition to jurors to refrain from reading newspapers or listening to radio or television is often an idle gesture. It is only by self-restraint of the kind exemplified by the statements set forth above that meaning can be given to the

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constitutional safeguards for a fair trial of which we are so justifiably proud.

It is our hope that by putting our house in order we may set an example of the kind of restraint that should be exercised by the various news media.

OPINION NO. 32
ETHICS COMMITTEE OF THE
COLORADO BAR ASSOCIATION ADOPTED JUNE 6, 1964

SYLLABUS

1. When a member of the bar is a candidate for elective office his biography and qualifications may be advertised in newspapers and other advertising media. Such advertising must, however, relate solely to the office which he is seeking; he may not directly or indirectly use the election as a device for calling attention to his professional qualifications as a lawyer.

2. Other lawyers who are not themselves candidates may assist in advertising the qualifications of the candidate, but their names may not be published in newspapers or other advertising media. They may not use professional letterheads in soliciting votes or contributions, nor may they otherwise call attention to their own names or the fact that they are lawyers, except to those with whom they have an established professional or personal relationship.

FACTS

(a) A lawyer is a candidate for elective public office, which may be judicial or otherwise. Those managing his campaign desire to purchase newspaper space and television time to advertise his candidacy. The advertisements will include biographical data and a photograph, and will describe the candidate as a lawyer. May this advertising take place without violating Professional Canon 27?

(b) The campaign manager also desires to organize a committee of twenty leading lawyers for the election of the candidate. (i) He proposes to purchase newspaper advertising listing the twenty lawyers and stating that they endorse the candidate. He also proposes (ii) that each of the twenty lawyers should mail at least 100 letters on his own professional letterhead asking for financial support, and (iii) that a letterhead be printed which will be entitled "The Committee of Twenty Lawyers for the Election of _____." This letterhead will list each of the endorsing lawyers by name, identifying him as a lawyer, and it will be used in making 10,000 direct mail appeals for votes, each of which will be signed by a facsimile signature of one of the lawyers listed. May the twenty lawyers do this without violating Canon 27?

OPINION

(a) The committee is of the opinion that the candidate may advertise his own qualifications for the elective office, one of which is the fact that he is a lawyer.

(b) Each of the steps outlined in paragraph (b) above would necessarily have the effect of advertising the members of the committee, who are not themselves candidates. It is not necessary to create an exception to Canon 27 for this purpose and therefore the committee is of the opinion that each of these steps will violate the canon.

DISCUSSION

1. *Activities of the candidate*

A candidate for public office is free to advertise his own candidacy, without violating Canon 27, Mich. Op. 74 (1941), A.B.A. Informal Dec. 656 (1963), and these advertisements may state that he is a lawyer, since this is one of his qualifications for office. Similarly he may be identified in television programs as a lawyer. A.B.A. Informal Op. C-230 (b) (1961). Any elaboration of this theme, however, such as a discussion of cases he has handled, is forbidden since this has the effect of advertising not only his candidacy but his legal practice. A.B.A. Informal Op. 546 (1962); Drinker, *Legal Ethic* 248 (1953). For the same reason he may not send out campaign literature on a professional letterhead, Mich. Op. 89 (1945).

2. *Activities by other lawyers supporting the candidate*

An exception to Canon 27 is afforded to the candidate because the voters must be given full information in order to make an intelligent choice at the polls. The breath of the exception must, however, be limited to what is necessary for that purpose. Plainly there is no necessity that the committee of lawyers endorsing the candidate be advised, or that the voters be informed concerning

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their qualifications. There is no objection to an advertisement which is stated to have been purchased by "The Committee of Twenty Lawyers for the Election of X," so long as they are not named. There is likewise no objection to the name of a lawyer appearing in an advertisement listing persons endorsing the candidate so long as such persons are not identified as lawyers.

A committee member may solicit funds upon professional letterheads if the appeal is addressed only to those with whom he has an established professional or personal relationship. If there is to be a mailing to any larger group it is essential that the sender should not be identified in any way as a lawyer and that his professional letterhead should not be used. The "Committee of Lawyers" letterhead will inevitably be sent to some recipients who do not know that all of the twenty persons listed thereon are lawyers, and therefore the use of such letterheads will inevitably have the effect of advertising some of the lawyers listed.

The committee believes that the questions discussed herein are matters of first impression in Colorado and therefore no unfavorable inference should be drawn against any member of the profession who might have acted in a contrary manner during past elections.

OPINION NO. 33

ETHICS COMMITTEE OF THE

COLORADO BAR ASSOCIATION ADOPTED JUNE 6, 1964

SYLLABUS

1. Lawyers may contribute reasonable amounts to the campaign funds of candidates for judicial office, and may solicit contributions from others.

2. A candidate for judicial office may not receive and lawyers may not give any contribution which is excessive in amount or which might justify the inference that the contribution is a device or attempt to gain from a judge his special consideration or favor, in the receipt of appointments from the bench or otherwise.

3. Lawyers may circulate and sign petitions endorsing candidates for judicial office. However, the practice of asking brother lawyers to sign postcards or pamphlets soliciting votes for the candidates, when coupled with a request that such material then be returned to the campaign committee for mailing, violates Judicial Canon 30, even though the candidate may not at the time be a judge. Lawyers who participate in such a breach by the candidate are in violation of Professional Canon 32.

FACTS

A lawyer is a candidate for judicial office. His campaign manager, also a lawyer, desires to make gifts to the candidate's campaign fund, and to solicit others to do so. He also desires to

send postcards to other members of the bar imprinted with a message endorsing the candidate. The other members are instructed to address and sign the postcards and return them to the campaign manager for mailing. The committee has been asked whether either the candidate or his campaign manager is violating any of the canons of professional or judicial ethics.

OPINION

Lawyers have a particular obligation to assist in the selection of well-qualified judges, Professional Canon 2. This must, however, be done in a manner which cannot be construed as an attempt to exert personal influence on the court, Professional Canon 3.

Lawyers may contribute to the campaign funds of judges if the contributions are reasonable in amount and not tainted by any motive of influencing the judge in the administration of his office or in the appointment of receivers, referees, trustees, special masters, and the like. Since a judge may not receive gifts from lawyers, Judicial Canon 32, and they may not make such gifts, Professional Canon 3, such contributions must be given only to a campaign fund managed by others and not to the candidate himself. The committee must itself expend the moneys on his behalf, and no part of the fund may be paid over to the candidate by the committee. Otherwise, the committee serves merely as a conduit for transmitting funds from lawyers to judges.

Lawyers may solicit such contributions from other members of the bar and from the public at large, under the same limitations.

A lawyer may send postcards or pamphlets endorsing the candidacy to those with whom he has an established professional or personal relationship. Distribution to any larger group violates Professional Canon 27 (advertising) if the sender is identified as a lawyer. The campaign manager may not, however, request that the postcards or pamphlets be signed or addressed and then be returned to him for mailing. This practice creates an inference that the candidate or his manager is using the power and prestige of judicial office to promote the candidacy in violation of Judicial Canon 30. Under this canon, the candidate may not permit others to do acts which he himself is forbidden, and the action of the campaign manager is equally unethical, Professional Canon 32. The result is the same even though the candidate may not at the time be a judge. Lawyers should, however, have the moral stamina to resist such coercion.

Since a judge cannot use the power and prestige of his office to promote his own candidacy, he may not send out letters to members of the bar asking for endorsement of his candidacy, A.B.A. Op. 105 (1934); A.B.A. Op. 139 (1935), or solicit his own campaign funds, N.Y. County Op. 304 (1933).

"Ordinarily a judge should stand on his official record and leave the promotion of his candidacy to others."—
A.B.A. 139, (1935) *supra*.

Obviously the candidate and his supporters are under other inhibitions, particularly those imposed by Professional Canons 2, 3, 27 and 32, and by Judicial Canons 4, 12, 13, 14, 24, 26, 28, 30 and 32.

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