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OPINIONS ON ETHICS

BY THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION

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OPINION NO. 1

May 28, 1958

1. Service on the Board of Trustees of a corporation engaged in a private business venture by a Judge of a court of record violates the Canons of Judicial Ethics of the American and Colorado Bar Associations Nos. 24 and 25.

2. A Judge should not be identified with a private business venture under circumstances that will give reasonable ground for the suspicion that the power or prestige of his office is being utilized to persuade or coerce others to patronize such private business venture.

The following statement and inquiry were presented by a member of the Association:

FACTS

A corporation is organized under the laws of a state as a non-profit organization. The certificate of incorporation states the purposes of the corporation to be:

> "The particular business and objects for which our said Corporation is formed and incorporated shall be: to establish, maintain, and operate a Non-Profit Medical Service Plan whereby medical and surgical care may be obtained at the expense of the Corporation by residents of the State of_____ who are subscribers to the Plan under a contract entitling the subscriber to such medical and surgical care as may be provided thereby and as may be procured from doctors of medicine duly

licensed to practice by the State of.....and registered with the Corporation to render such services; to arrange with such doctors of medicine for the rendering of such service to the subscribers to the Plan; to promote the general and social welfare of subscribers to the Plan; and to do all things necessary, proper or convenient for the purpose of promoting, establishing, and operating said Non-Profit Medical Service Plan."

The corporation is now engaged in operating such non-profit medical service plan. It has a board of trustees, consisting of 19 trustees. Neither the officers nor trustees of the corporation receive any compensation for their services.

Two members of the board of trustees of the corporation are judges of courts of record.

Subscribers to the plan make payments to the plan on the basis of rate schedules.

The corporation, on its letterhead, sets forth the names of the trustees. Preceding the names of the two judges who serve as trustees is the word "Judge."

The corporation publishes an annual report which contains reproductions of photographs of the members of the board of trustees. The name of the trustee appears under his photograph. Preceding the names of the two judges is the word "Judge."

QUESTIONS

An inquirer desires the opinion of the committee as to whether, under the facts stated: (1) Service on the board of trustees by a judge of a court of record violates the Canons of Judicial Ethics of the American and Colorado Bar Associations; (2) The use of the names of the judges on the letterhead of the corporation and the use of the reproduced photographs and names of the judges in the annual report constitutes a violation of Canon 25 of the Canons of Judicial Ethics of the American Bar Association.

The committee's opinion was stated by Mr. Younge, Messrs. Chutkow, Phillips, Platt, Romer and Sears concurring.

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In this, an early opinion of the committee, we deem it desirable to define the functions of this committee.

First, it is not a function of this committee to investigate charges of a violation by a lawyer or a judge of the Canons of Professional Ethics or the Canons of Judicial Ethics of the Colorado Bar Association and/or the American Bar Association, or to undertake to ascertain and state the facts with respect to such alleged violation or to determine whether the lawyer or the judge has been guilty of a violation of the Canons of Professional Ethics or the Canons of Judicial Ethics.

Rather, it is the function of this committee to answer inquiries on the basis of an impersonal and hypothetical statement of facts and the assumptions contained therein presented by the inquirer as to whether the conduct set forth in such statement of facts would or would not constitute a violation of the Canons of Professional Ethics or the Canons of Judicial Ethics of the Colorado Bar Association and/or the American Bar Association.

1. Judicial Canon 24 states:

> "A judge should not accept inconsistent duties; * * * which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

The facts as stated concerning the particular corporation and the participation of judges therein discloses that this is a corporation which may be competitive to other corporations both of a profit and non-profit nature. The corporation may become involved in litigation which could come before the judges serving as directors or trustees.

Judicial Canon 25 specifically provides:

> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

The facts stated warrant a reasonable suspicion that the power and prestige of the office of the judges is being utilized by the corporation engaged in a private business venture to persuade others to patronize its services. A judge should avoid that possible suspicion.

2. The use of the names of the judges on the letterhead of the corporation and the use of the reproduced photographs and names of the judges in the annual report merely emphasize and make more obvious the fact that there is a violation of Canon 25 of the Canons of Judicial Ethics.

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OPINION No. 2

Filed June 24, 1958

1. A judge should not pursue a course of conduct with respect to a private business venture that would give ground for any reasonable inference that his name or the prestige of his office is being used to exert pressure on others to patronize such private business.

2. A judge should not be a member of a partnership engaged in a private business venture. He should not serve as an officer, director, or trustee of a corporation engaged in private business.

3. A judge may ordinarily serve on the governing body of an educational institution, a hospital, a charitable organization, a bar association, a social club, a boy's work club, and other like organizations.

4. A judge should not solicit contributions to charitable organizations or permit his name or the prestige of his office to be used to exert pressure on others to make contributions to charity.

5. A judge may make investments in stocks and bonds of private corporations as well as government and municipal securities. However, he should avoid investment in securities of corporations which are apt to be frequently involved in litigation before his court.

6. It is unprofessional for a lawyer to solicit professional employment by circulars, advertisements, or touters, or by personal communications or interviews not warranted by personal relations.

7. It is unprofessional for a lawyer to inspire, procure, or consent to publications which state that he is a lawyer and contain laudatory statements with respect to his professional ability, the clients he serves, or the importance or magnitude of his practice.

8. A lawyer may engage in private business, either individually or as a partner and may serve as an officer or director of a corporation engaged in private business, but he should see to it that any publication matter with respect to such business or corporation in which his name appears should not contain any laudatory statements with respect to his professional ability, the clients he serves, or the importance or magnitude of his practice.

9. A lawyer should not permit his name to appear on the letterhead of a corporation, of which he is general counsel, setting forth that fact where he is also engaged in general practice.

10. A lawyer may, with propriety, engage in public affairs, in community projects and activities. Canon 25 does not proscribe a lawyer from being a good citizen. When a lawyer has the opportunity to perform a service to the community which will place him in the public eye, he need not hesitate to seek or accept it, because, if successful, he will appear frequently in the newspapers.

The Executive Committee (the President) of the Colorado Bar Association has submitted the following questions to the committee and requested its opinion thereon:

1. To what extent may a judge with propriety engage in or be identified with a private business venture?

2. To what extent may a judge with propriety serve on a governing board of an educational institution, a hospital, a charitable organization, or other like organizations?

3. Should a judge solicit contributions to charitable organizations or permit his name or the prestige of his office to be used to persuade or coerce others to contribute to charitable organizations?

4. What are the limitations on personal investments by a judge?

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5. What constitutes direct or indirect advertising by a lawyer within the meaning of Canon 27 of the Canons of Professional Ethics?

The opinion of the committee was stated by Mr. Phillips, Messrs. Carrigan, Chutkow, Platt, Romer, Sears, Walrod, and Younge concurring, except that Mr. Platt dissents from Syllabus No. 9 and Opinion 285 of the Committee on Professional Ethics and Grievances of the American Bar Association.

Judicial Canon 25 of the American and Colorado Bar Associations reads:

> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

Judicial Canon 26 of the American and Colorado Bar Associations in part, reads:

> "A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties."

Judicial Canon 27 of the American and Colorado Bar Associations reads:

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> "While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him."

The first obligation of a judge is to discharge faithfully, impartially, and expeditiously to the best of his ability the duties of his office. A judge should not enter into private business ventures. He should not pursue a course of conduct with respect to a private business venture or enterprise that would give ground for any reasonable inference that his name or the prestige of his office is being used to exert pressure on others to patronize such private business venture or enterprise.

We are of the opinion that a judge should not be a member of a partnership engaged in a private business venture or enterprise and that he should not serve as an officer or director or trustee of a corporation engaged in private business. Should he do so, under normal practices the fact that he is a judge and an officer or director of the corporation so engaged will appear in monthly, quarterly, and annual reports and in other factual matters usually given publicity by such corporation and in which he will be normally designated as "Judge ....." Such a course of conduct by the judge would give ground for a reasonable inference that the power or prestige of his office or his name was being used to promote the private business interests of the corporation. A judge should avoid any conduct which would reasonably give rise to such an inference.

Moreover, a judge should not serve as an officer or member of the governing body of a corporation engaged in private business where in the normal course of events such corporation is apt to become involved in a case or controversy which will come before the judge for decision and the relation of the judge to the corporation would disqualify him from sitting in such case or controversy. Of course, it will not be possible for a judge to avoid every possible disqualification, but he should make a reasonable effort so to do.

However, we think the phrase "private business venture" as used in the Canon has particular significance. In a broad sense an educational institution, a hospital, and even a charitable organization, to some extent are engaged in business. The educational institution and the non-profit hospital charge for part of the services they render. The charitable institution invests its funds and buys and sells securities in the course of such investment. But, such institutions and organizations are primarily

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engaged in rendering a service to large segments of the public for which they receive either no compensation or less compensation than the cost of rendering the service. Subject to the limitation hereinafter indicated we do not think that service by a judge on a board of trustees of an educational institution, a hospital, or a charitable organization, falls within the ban of Judicial Canon 25. Neither do we think service by a judge on a board of governors of a bar association, or the governing body of a social club, a boy's work club, and other like organizations, the primary function of which is to serve the public or a segment thereof, and not to make a profit, falls within the ban of Judicial Canon 25.

While a judge may serve on a board of an institution, organization, or association like those referred to in the last preceding paragraph, if such service would so encroach upon his time as to prevent the prompt and efficient discharge of his judicial duties, which, of course, may be true of a judge in an unusually busy court, he should forego such outside activity.

Moreover, a judge should not directly engage in solicitations for charity and he should not permit his name to be used in connection with such solicitation in a manner that may reasonably give rise to the inference that his name or the prestige of his office is being used to exert pressure on others to make contributions for charity.

A precise line of demarcation cannot be drawn whereby it may be determined what activity or course of conduct falls within or does not fall within the ban of Judicial Canon 25. But, in the light of the language of the Canon and the views above expressed, we think a judge's sense of propriety will enable him to avoid activities or a course of conduct interdicted by such Canon.

What limitations are imposed on personal investments by a judge presents a difficult question. We think it generally conceded that prudent investment of funds today requires diversification and should include both stocks and bonds of private corporations. Investments limited to United States bonds and bonds of states and municipalities do not provide an adequate diversification. Accordingly, we are of the opinion that a judge may retain investments and make investments in stocks and bonds of private corporations. However, he should do so with discrimination. Many corporations will infrequently, if ever, become involved in

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litigation before the court of which he is a judge. Others, as for example corporations engaged in hazardous enterprises which frequently are subject to actions for damages by their employees, are apt to be frequently involved in litigation before the court. Investment in securities of the latter should be avoided.

Canon 27 of the Canons of Professional Ethics of the American and Colorado Bar Associations, in part, reads:

> "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 like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper."

The first sentence of the first paragraph of the Canon we think fully answers the inquiry so far as direct solicitation of professional employment is concerned.

A more difficult problem arises when we undertake to determine what indirect advertising for professional employment is inhibited by the Canon. The Canon condemns indirect advertisements for professional employment. It gives an example of what would constitute such indirect advertisement in the second sentence of the first paragraph of the Canon, but we do not think the examples given cover every form of indirect advertisement for professional employment forbidden by the Canon. In our opinion, the Canon prohibits the lawyer from inspiring, procuring, or consenting to publications which state that he is a lawyer and contain laudatory statements with respect to his professional ability, the clients he serves, or the importance or magnitude of his practice. A lawyer may with propriety engage in private business, either individually or as a partner, and may serve as an officer or a director of a corporation engaged in private business. But, he should see to it that any

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publication of matters with respect to such business or corporation in which his name appears should not contain any laudatory statements with respect to his professional ability, the clients he serves, or the importance or magnitude of his practice.

The publicizing of the fact that a lawyer is general counsel for a corporation or association and the limitations with respect thereto are answered in Opinion No. 285 of the Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association, wherein it is stated:

> "The Canon does not require a lawyer to condemn or prevent every allusion to him by satisfied clients where the purpose of the statement is not to advertise the lawyer but is obviously and primarily in the interest of the party making it, or of those to whom it is directed, even though some incidental advantage to the lawyer may possibly result. For example, this Committee held, in Opinion 100, that it was not improper for a bondholders' protective committee to specify the name of its counsel in its published notice directed to bondholders, where such information was inserted not with the object of advertising such counsel, but with the bona fide purpose of giving to the depositing bondholders the names of the counsel who would represent them. This, like the personality of the members of the committee, was a fact which it was evidently important that they should know in making up their minds whether or not to deposit their bonds. Laws regulating the issue of corporate securities normally require the submission of an opinion of counsel who pass on their legality, and permit reference to such counsel by name in prospectuses.
>
> "In other cases it may doubtless be considered as normal for a corporation or association to specify the name of its counsel, in order that the members or stockholders may be satisfied as to the competency of its legal department to advise it on corporate or association legal problems. Thus it would seem proper for a corporation in its annual report to stockholders to specify, along with the names of general officers of the corporation, those of its general counsel. On the other hand it would not appear to be proper for the corporation or association to specify

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such counsel's name on its letterhead, which would be directed, not to its stockholders, but to the general public. A lawyer engaged in general practice would, therefore, not normally be justified in acquiescing in the inclusion of his name as general counsel on the letterhead of a corporation or manufacturing association. In exceptional cases, where it is really important for the addressee to know who are counsel for the association, they can be advised thereof in the body of the letter. Of course, in case of counsel employed only by the corporation or association, no question of advertising would be presented.

"The case of the bulletins, issued periodically by a manufacturers' association is more difficult. It is doubtless in the proper interest of such an association to have its present and prospective members know who are its general counsel, in order to be assured protection against legal difficulties in which, by incompetent advice, the association, and perhaps they as members, might become involved. The names of counsel might, therefore, properly be specified along with those of the officers, committees, etc. in the annual report to the members, which does not, like the bulletins, contain discussions of legal problems on which it is important that the association shall not give the impression that it is advising the members for their individual guidance. See Opinion 273.

"Each case must turn on its own facts. In cases where there is any doubt, the question should be resolved against the propriety of such specification.

"We realize that it is quite common practice for manufacturers' associations so to specify the names of their general counsel, who are usually leading firms of the highest standing. We have no thought that any of them had any doubt of the propriety of permitting their names to be mentioned in this or any similar current case. The very fact, however, that a relaxation of the general rule in this case would affect only leading law firms is, we believe, a reason for caution in approving exceptions. The American Bar Association, and this Committee, are steadfast in the determination not to permit the deterioration of professional standards under the impact of current

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business competition. To maintain the cooperation of the membership at large in this objective, the leaders in the profession must always set the example."

It is common practice in the publication of corporate reports and other like matters for the corporation to set forth the names of its officers and directors and, with respect to directors, to indicate the business in which the director is engaged. We think there is no impropriety in including the name of a lawyer in such matter with the statement that he is a lawyer or a member of a firm of lawyers, but beyond that it should not go. In connection with Question No. 5, see Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association Nos. 8, 31, 35, 41, 42, 43, 140, 174, 184, and 284.

What we have said does not mean that a lawyer may not with propriety participate in public affairs or in community projects and activities. The prohibitions of the Canon do not ban the lawyer from being a good citizen.

In his work on Legal Ethics, Henry S. Drinker, Chairman of the Committee on Professional Ethics and Grievances of the American Bar Association, at page 218, said:

"One of the most frequent objections to Canon 27 is that it interferes only with the little fellows, precluding them from making themselves known to prospective clients by advertising and solicitation, while the big ones not only are constantly in the public eye, but by means of their membership in clubs and their prominent participation in Community Chests and in the management of hospitals, colleges, etc., are enabled to meet and become intimate with the leaders in business as potential clients.

"These criticisms ignore the distinction between giving the public the chance to see and judge of the lawyer's ability and personality, and the direct emphasis of his superiority as a lawyer.

"When a lawyer has the opportunity to perform a service to the community which will place him in the public eye, he need not hesitate to seek or accept it because if successful he will appear frequently in the newspapers, and will enlarge his circle

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of friends and acquaintances and thus attract new clients, some possibly who have theretofore employed another lawyer. Where publicity is the normal by-product of able and effective service, whether of a professional or non-professional character, this is a kind of 'advertisement' which is entirely right and proper. Clients naturally gravitate to a lawyer who has successfully represented their friends or who has obtained the confidence of the community by effective public service. What is wrong is for the lawyer to augment by artificial stimulus the publicity normally resulting from what he does, seeing to it that his successes are broadcast and magnified. While in hypothetical cases it may often seem difficult to draw the line between what is right and what is not, actually, a lawyer soundly brought up in the law, who wholeheartedly accepts his professional status, will rarely have any difficulty in realizing the difference between the normal by-product of efficient service and the unwholesome results of self-aggrandizement."

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