Florida Law Review

Volume 7 | Issue 4 Article 6

December 1954

Legal Ethics: Solicitation as Ground for Disbarment

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CASE COMMENT

LEGAL ETHICS: SOLICITATION AS GROUND FOR DISBARMENT

State ex rel. *Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954)*

Respondent attorney was found guilty of soliciting professional employment in violation of the Code of Ethics. The referee recommended that respondent be suspended from practice; the Board of Governors of The Florida Bar, on the record, recommended disbarment. The record and recommendations were certified to the Supreme Court. HELD, this violation of the canons, if not repeated, is not so flagrant as to justify disbarment. Justices Drew and Sebring dissented in favor of disbarment.

The rule against solicitation and advertising is codified principally in Canons 27 and 28 of the Canons of Professional Ethics of the American Bar Association, which are binding on the profession in Florida.[1] In determining appropriate discipline, a distinction must be drawn between these two. Canon 27 prohibits advertising, personal solicitation, and the procuring of business through touters – the activity involved in the instant case. Canon 28 condemns the more serious offense of stirring up litigation by solicitation or otherwise; a violation subjects the offender to disbarment.

The opinion adopted Henry S. Drinker's dichotomy of fact situations justifying discipline.[2] The first of these concerns cases in which the attorney's conduct evinces that he is morally unfit to serve his clients. Courts have been quick to impose disbarment for a breach of the fiduciary relationship.[3] Disbarment has been imposed for embezzlement,[4] offered disclosure of privileged and confidential communications,[5] misuse of trust,[6] and deceit of a client for gain.[7]

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[1]See 31 FLA. STAT. ANN. 413 (1950).

[2]DRINKER, LEGAL ETHICS 42 (1953).

[3]See Note, 9 A.L.R. 193 (1920).

[4]State *ex rel.* Florida Bar v. Jarvis, 74 So.2d 228 (Fla. 1954); Commonwealth v. Roe, 129 Ky. 650, 112 S.W. 683 (1908); see Note, 43 A.L.R. 54 (1926).

[5]*In re* Boone, 83 Fed. 944 (N.D. Cal. 1897); United States v. Costen, 38 Fed. 24 (D. Colo. 1889).

[6]*In re* Hoffecker, 60 Atl. 981 (Del. Ch. 1905).

[7]Lambdin v. State, 150 Fla. 814, 9 So.2d 192 (1942).

Mr. Drinker's second division consists of cases in which the attorney's conduct has been such that to allow him to remain as a member of the profession would cast a serious reflection on the dignity of the court and the reputation of the profession. The degree of the offense determines the discipline imposed. Thus, attorneys have been suspended for advertising,[8] prolonging litigation for personal enrichment,[9] overcharging a client,[10] and for minor crimes not involving a breach of trust or moral turpitude, including violation of a corporate securities act[11] and participation in an unlawful assembly.[12] On the other hand, courts have imposed *disbarment* for extreme contempt of court,[13] extortion,[14] failure to pay income tax,[15] participation in a lynching,[16] and presentation of false evidence.[17] The discipline imposed for solicitation usually has varied from censure[18] to suspension;[19] and disbarment has resulted only from flagrant violations tending to stir up litigation.[20] Ample authority exists for imposing disbarment or suspension for solicitation by a lay representative, the discipline varying with the extenuating factors of the case.[21]

A disciplinary action is a proceeding *sui generis;*[22] hence abstract rules of law cannot be strictly applied, and all facts in extenuation

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[8]People v. MacCabe, 18 Colo. 186, 32 Pac. 280 (1893); *In re* Pouker, 203 App. Div. 520, 197 N.Y. Supp. 190 (1st Dep't 1922).

[9]Richardson v. State, 141 Fla. 218, 192 So. 876 (1940).

[10]*In re* Goldstone, 214 Cal. 490, 6 P.2d 513 (1931); *see In re* Cary, 146 Minn. 80, 85, 177 N.W. 801, 804 (1920).

[11]*In re* Hatch, 10 Cal.2d 147, 73 P.2d 885 (1937).

[12]State *ex rel.* McLaughlin v. Graves, 73 Ore. 331, 144 Pac. 484 (1914).

[13]*In re* Isserman, 9 N.J. 269, 87 A.2d 903 (1952).

[14]*In re* Coffey, 123 Cal. 522, 56 Pac. 448 (1899); People *ex rel.* Healey v. MacCauley, 230 Ill. 208, 82 N.E. 612 (1907).

[15]Rheb v. Bar Ass'n of Baltimore, 186 Md. 200, 46 A.2d 289 (1946).

[16]*Ex parte* Wall, 107 U.S. 265 (1882).

[17]People *ex rel.* Attorney Gen. v. Beattie, 137 Ill. 553 (1891); *In re* Mendelsohn, 150 App. Div. 445, 135 N.Y. Supp. 438 (1st Dep't 1912).

[18]People *ex rel.* Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 173 N.E. 827 (1930); *In re* Greathouse, 189 Minn. 51, 248 N.W. 735 (1933).

[19]*In re* Katzka, 225 App. Div. 250, 232 N.Y. Supp. 575 (2d Dep't 1929); State v. Kiefer, 197 Wis. 524, 222 N.W. 795 (1929).

[20]Chrests v. Commonwealth, 171 Ky. 77, 186 S.W. 919 (1916); *In re* McDonald, 204 Minn. 61, 282 N.W. 677 (1938); *In re* Shay, 133 App. Div. 547, 118 N.Y. Supp. 146 (1st Dep't 1909).

[21]See Note, 73 A.L.R. 401 (1931).

[22]State v. Maxwell, 19 Fla. 31 (1882); *In re* McDonald, 204 Minn. 51, 282 N.W. 677 (1938); see 31 FLA. STAT. ANN. 364 (1950).

come properly within the purview of the court.[23] A lack of sensitivity to ethical precepts may properly be considered as a factor in mitigation.[24] In the instant case the Court considered some mitigating factors unrelated to the offense, including respondent's age, education, and physical condition.

The Court stated that the 1953 Legal Ethics Institute at the University of Florida conveyed a definite impression that legal ethics should receive more emphasis in most law school curricula. As the profession advances toward higher standards casualties are inevitable, but in disciplining the offenders disbarment should not be imposed if less severe discipline would effect the desired result.[25] The purpose of disbarment is not to punish the offender but to protect the public from unscrupulous practitioners.[26]

Discipline in an individual case is largely in the discretion of the Court, but it is vital that positive action be taken to discourage further breach of the canons. Despite the progress made in recent years, personal solicitation, including ambulance chasing, is still practiced to a lamentably wide extent.[27] The Florida Court has perhaps applied discipline in line with current authority and the individual factors of the case, but the decision is most important for its forward look and its emphasis on observance of the spirit rather than the letter of the canons.

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[23]Dorsey v. Kingsland, 173 F.2d 405 (App. D.C. 1949); *In re* Diesen, 173 Minn. 297, 215 N.W. 427 (1927).

[24]Smith v. State Bar of Cal., 211 Cal. 249, 294 Pac. 1057 (1930); People v. MacCabe, 18 Colo. 186, 32 Pac. 280 (1893); *In re* A. B. C., 7 N.J. 388, 81 A.2d 724 (1951); *In re* L. R., 7 N.J. 390, 81 A.2d 725 (1951).

[25]Synder's Case, 301 Pa. 276, 152 Atl. 33 (1930); *see* Bradley v. Fisher, 13 Wall. 335, 355 (U.S. 1871).

[26]*Ex parte* Wall, 107 U.S. 265 (1882); *In re* Power, 407 Ill. 525, 96 N.E.2d 460 (1950); *In re* Platz, 42 Utah 439, 132 Pac. 390 (1913).

[27]McCracken, *Report on Observance by the Bar of Professional Standards*, 37 VA. L. REV. 399 (1951).