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ETHICAL ASPECTS OF "ADVERTISING" ACTIVITIES BY LAWYERS - A PANEL DISCUSSION

Members of Panel: John M. Allison of the Tampa Bar, Henry S. Drinker of the Philadelphia Bar, William A. McRae, Jr., of the Bartow Bar, Giles J. Patterson of the Jacksonville Bar, and Donald K. Carroll of the Jacksonville Bar, Moderator.

Questions raised from the floor are prefaced by "Q."

Mr. Carroll: To start the discussion of "Ethical Aspects of 'Advertising' Activities by Lawyers" we have asked Mr. Drinker to speak briefly on the background of this particular subject.

Mr. Drinker: There are really two questions—so-called ethical questions though they are actually questions of etiquette. They involve advertising and stealing one another's clients.

If it is lawful for the milkman to compete and to steal his rivals' customers, why is it unethical for the lawyers to do the same thing? The reason is historical. The idea is this. When the barristers first appeared, five or six hundred years ago, they were all sons of well-to-do parents and did not have to work for a living. They regarded the practice of law in the same way that they did a seat in Parliament. It was primarily a matter of public service. They looked down on trade and would not think of stealing one another's clients or of advertising. It was beneath their dignity. Now, why has that persisted to this day? I think the main reason is that lawyers are not like milkmen. The lawyer is one day on one side of a question and the next day on the other side. You cannot be on the terms that lawyers should be with one another if you are continually trying to steal another's client and if you are continually blowing your own professional horn.

I do not think it would pay the good lawyers to advertise. The ones who are prosperous and successful and can afford it will be a good deal better off to be dignified and refrain, because their substantial clients would not approve. Also, although advertising might increase litigation, this is against public policy.

Mr. Carroll: I suggest that the best way of handling this is to have some questions among the panel members and then questions from the audience.

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Q. Mr. Drinker, I do not agree altogether with your statement. Do you mean to say that you think the question of advertising professional qualifications is regulated or controlled simply by the rules and regulations of the English barristers?

Mr. Drinker: It originated there and was adopted here.

Q. Do you think that is the only reason for it?

Mr. Drinker: I think it is a good thing, because it keeps our bar on a more dignified basis and that is most desirable.

Q. I think that another reason that is tied in with the whole subject of loyalty and the lawyer's interest is that advertising involves a certain amount of puffing and is necessarily more or less commercial in its character.

Mr. Drinker: I agree with you. That is one of the reasons why it has persisted and why it is not ethical.

Q. Mr. Drinker, may I ask this question? Where does public relations end and advertising begin? There has been a concerted effort outside Florida, and I think some considered effort in Florida, to bring the lawyer to the attention of the public by having the banks, for example, run an ad picturing the lawyer as a grand character. Where do you draw the line?

Mr. Drinker: The particular lawyer or the legal profession?

Q. The legal profession.

Mr. Drinker: I think it is all right for bankers to call the attention of the public to the necessity of employing counsel. I think it is all right for a bar association to do that to a reasonable degree, so long as they do not advertise one particular lawyer and so long as they do not give legal advice. Judge Phillips wrote several opinions on this subject for our committee that are very good. One is Opinion 179, and if you read Chapter Eight in my book you can find the others. It is entirely legal and ethical under our profession for the author of a law book to advertise.

Mr. Carroll: Does Mr. Drinker want to ask any other members of the panel a question?

Mr. Drinker: I would like to know what you think about bar and lawyer advertising, Mr. McRae.

Mr. McRae: I am inclined to think that a useful service can be rendered by the proper kind of advertising. I think that, within the bounds that you have indicated, it is a good thing. I have had a little
disagreement with Mr. Patterson on this. Mr. Patterson, do you concur in what I have said?

Mr. Patterson: I do not think any good purpose is served by bar advertising.

Mr. Drinker: I honestly believe that the bar association made a concession in connection with bar advertising and also in connection with law lists. I think they were afraid they would lose all their members if they did not allow those two things. It certainly had something to do with it. The bar demanded something to keep down the practice of the drawing of wills by laymen and the making out of income tax returns by accountants—the lawyers had to get the bar before the public. They demanded that they be allowed to advertise to a certain extent, and the bar and the ethics committees went along with them. Judge Phillips wrote those opinions. I think those two concessions were all right.

Mr. Patterson: I think it cheapens the whole standards of the profession.

Mr. McRae: Does it not come down to this: If a lawyer takes a genuine and sincere interest in community affairs there is no reason why this fact should not be known by his neighbors. And if the fact is known it can be helpful to him as a lawyer.

Mr. Drinker: It is a question of good taste. Some lawyers would join a golf club just to be able to play with a banker and obtain him as a client. I do not think you could regulate that sort of thing by canons. A lawyer has a right to advertise himself by doing efficient public service. He has a right to be the chairman of the community fund and do a fine job. Although he knows that he does it for the purpose of attracting the public, it still is all right. That is one kind of advertising that is permissible. You have a right to advertise yourself by showing that you are a good citizen and a good lawyer. It is a question of degree.

Mr. McRae: Would you say that a lawyer may properly engage in community activities and affairs in order to highlight his availability as a lawyer?

Mr. Drinker: That is the tail wagging the dog. If the dog wags the tail it is all right. If the tail wags the dog it is not.

Mr. McRae: What I have in mind often happens to young lawyers when they begin practice—they join everything and frequently get their names in the paper. Would you condemn that sort of thing?

Mr. Drinker: No, I would not. They can get as far out in front as they wish if they do it in the legitimate way by doing good service.
But if they do it to get their names in the papers all the time it is wrong. It is a question of degree. A man has a right to get himself out in front in his community by efficient public service even though the by-product of that is to get him law practice.

Mr. McRae: In reading your recent book on legal ethics, Mr. Drinker, I was a little confused by a distinction that you made in regard to announcement cards. As I understand it, you were critical of announcement cards that point up specialties. I do not understand where you draw the line. We will say that one lawyer specializes in admiralty practice, and another specializes in the prosecution of damage claims. Can either one mention his specialty?

Mr. Drinker: Not on announcement cards; in fact, you cannot do it on anything.

Mr. McRae: Then you would condemn it in both cases?

Mr. Drinker: Certainly. The New York committee has conceded that the admiralty and the patent lawyers, because they say they are specialists, can state their specialty on their announcement cards. I do not agree with that. I am advocating that Canon 46 be amended to read that any lawyer who is prepared to assist other lawyers in connection with any special branch may send a dignified announcement to that effect. He may not say that he is good at it; they can find that out for themselves.

Q. Is that not what Allen Stevens advocated to the Alabama Bar Association in a proposal some years ago and about which they had such a row in the American Bar?

Mr. Drinker: Yes. I do not know what happened finally. I see no harm in that practice myself so long as the lawyer does not say that he is good at it. No lawyer hires another because the other lawyer says he is good. But it is a good thing for the younger members to be able to call the attention of the older members of the bar to the fact that they would like to help out on negligence or interstate commerce or the like. It does not hurt anyone.

Q. We know that a milkman sells a product; he sells himself and advertises it. We know that a lawyer sells only his skill and experience. When a bank advertises that it is skilled in investments it is selling a skill. Is there any special distinction between a bank advertising its skill as an investor and a lawyer advertising his skill as a lawyer?

Mr. Drinker: No ethical difference. There is a traditional difference in that the bar says that it is undignified and improper for a lawyer
to do it, and the lawyers adhere.

Q. Does a lawyer have to be more dignified than a bank?

Mr. Drinker: Yes, he certainly does. He must and he is.

Q. When banks run advertisements in the newspapers stating that a certain person is their lawyer, are they advertising him as a lawyer retained by the bank?

Mr. Drinker: Well, we have tried to stop them from doing that.

Q. I am speaking of general advertisements of directors and officers. What about the lawyers in those advertisements?

Mr. Drinker: We have tried to prevent banks from stating the names of their lawyers. In their stockholders' reports it is permissible to list the lawyer's name with the directors. If, however, a bank were to send out a circular saying, "We are to be especially trusted because so and so is our lawyer," we would write to the lawyer and request him to ask the bank to cease such activity.

Q. This question has been asked by a young attorney here who has been before the bar of justice and has been asked this, and he would like to have it answered. What about the telephone company calling an attorney and asking about using enlarged type in his telephone directory listing?

Mr. Drinker: The opinion of the committee in the American Bar, No. 284, condemns the use of specially large type in telephone books, and we have tried to stop it all over the country.

Mr. Allison: Mr. Drinker, has not a distinction been made between large type in the main directory and in the classified section?

Mr. Drinker: Yes; in one opinion we said that the listing might permissibly be in large type in the regular alphabetical list because that was not for the purpose of finding a lawyer but of locating one already chosen. We said that was not advertising, and I still am of that opinion. One of the things that pleased me more than anything else was the reaction of the bar when we released that opinion. You should have seen the number of lawyers, bar associations, and committees that wrote in saying not to break down this advertising rule. I thought that was a wonderful way to show that the bar did not stand for the relaxing of our standards. I thought it was splendid the way those protests came in. We had a meeting and said, "All right, we will go back to the other opinion out of deference to the bar all over the country." Not because we thought it was necessary, though. With our present rule as it is you cannot have either listing in large type.
Q. Mr. Drinker, does the element of protection of the public come into the condemnation of advertising? For instance, if I approached you to let me have your case, would I be as free to see to the proper administration of justice as if you had come to me?

Mr. Drinker: I think that enters into it. I do not think it is as important as some people think. Another factor that enters into it is that if one were allowed to advertise he would feel that he had to live up to the reputation that he professed to have, and he would be tempted to do things to produce results that he would not do if the client had come to him. I think, however, that the principal reason is historical.

Q. Mr. Drinker, in these days of high taxes a lot of people are running close to the rail. Some of us lawyers call ourselves tax experts.

Mr. Drinker: I have heard the name.

Q. As a tax expert a lawyer is invited to speak to the Rotary Club. Now is it ethical to speak on taxes? If it is not ethical, is it advertising?

Mr. Drinker: I think he could do it in a nice way if he had been asked by them, but if he goes to them it is improper.

Q. He might suggest that if they have tax problems he might iron them out.

Mr. Drinker: Well, I do not think it would be proper for him to go to an officer of the club and say, "I would be very pleased to give a lecture for those who have large taxes to pay." It is a question of degree.

Q. Mr. Allison, I am from St. Petersburg and would like to address this question to you. You know the problems of our community. What is your opinion about the situation in which a newspaper man calls an attorney and asks him details of some matter in litigation, and then a great deal is said about the matter and about the attorney in the newspapers?

Mr. Allison: I can simply give you my personal feeling about this. I have always felt that in any news account of litigation no attorney's name should be mentioned. In most of the instances in our part of the state they do not mention the name, and I think that if an attorney is consulted by a newspaper reporter he should specifically request that his name not be used. That is my feeling about it. I do not know whether Mr. Drinker would agree.

Mr. Drinker: I agree.

Mr. Allison: I do not see any objection, when publishing the bare
bones of news records, to listing the names of the filing attorneys in giving the cases filed that day. Frequently it is a service to all interested parties, and to me it does not constitute advertising. It is usually buried on the back pages and is of interest only to people who look for it. But other than that I do not think any lawyer’s name ought to be in there.

Mr. Drinker: We lawyers know perfectly well when a lawyer is advertising and when it is a legitimate by-product of his activity in his community. We never get fooled very long about anybody, do we?

Mr. Patterson: No. I agree with that.

Q. Would it be important enough to call a man before a grievance committee if you saw his name in the paper too often and tell him to hold his horses and tell the newspapers to tone it down?

Mr. Allison: I do not know. I am sure there is not a lawyer in this room who has been in practice over five years who has not been taken advantage of by some newspaper reporter. You remember the classic remark of Carter Glass, “You don’t get in squirting matches with a skunk.” You just have to take it and not misplace your confidence next time. I do not think a lawyer should be condemned for that sort of occurrence. If he is seeking publicity most of the newspapers will soon find it out and they will not solicit any comments from him.

Q. We have in this state an organization known as the Lawyers’ Title Guaranty Fund. I do not know whether you have heard of that.

Mr. Drinker: Yes, I have.

Q. The state ethics committee, of which I am a member, was asked recently to express an opinion as to whether the fact that a lawyer who is a member of that Fund can be carried on a letterhead or on cards and to what extent the advertising or notice to individuals can be given as to membership. What do you think should be the limit?

Mr. Drinker: Cody Fowler asked me about that a few years ago and I intended to take it up with our committee. But there was the same kind of thing in Arkansas or some other state, and we said that was advertising and wrong.

Q. Mr. Drinker, is it not correct that you are not supposed to put the idea of being a specialist over to a possible client but it is all right to let the other attorneys know that you can help them?

Mr. Drinker: The canon forbids it either way, but I would want
to allow the other lawyers to know about it. But not to represent
that he is any good, or that he has had special training or experience.

Q. Would there be a committee on specialization to qualify the
lawyers so that they might advertise as specialists?

Mr. Drinker: I am very skeptical of that. In the first place, how
would you qualify a fellow as a negligence lawyer? What determines
whether he ought to be able to advertise as a negligence lawyer?
Character, performance, verdicts, or what? I would not be able to
do it. Some of them you could be sure were qualified and some you
could be sure were not. From thirty to seventy per cent, however,
you would not know about.

Q. Mr. Drinker, is that the same basic reason why a lawyer who is
a certified public accountant does not indicate it on his letterheads?

Mr. Drinker: Yes, that is a specialty. The New York people let them
do it, and the California committee has amended their canon to allow
it. It is permitted in Cleveland. Our committee is powerless. How
are we going to stop it when three big states let them do it?

Mr. Allison: To draw a complete summary of what has been said
today, it would seem that it is all right to do certain things that might
be advertising just so you never mention quality!

Mr. Drinker: That is ingeniously cryptic.