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CASE NOTES

ATTORNEY AND CLIENT—ADVANCEMENTS TO CLIENT NOT SOLICITATION WHERE ATTORNEY'S MOTIVE IS PROPER

Respondent, an attorney, was charged with improper conduct by the Board of Governors of the Illinois State Bar Association sitting as commissioners to the Supreme Court. The charges consisted of solicitation by advancements of funds to a client. The attorney, in defending, claimed that the advances made to one Harbin were not as a means of solicitation but were given to pay a local attorney in Kenosha, Wisconsin, to get Harbin out of jail where he was held on a robbery charge, and to help him at the time of his marriage when his car was taken from him for lack of payment. The attorney further pleaded that the advancements were made because Harbin was the only surviving witness in an automobile accident in which his other unsolicited client was involved. The Illinois Supreme Court held that such advancements did not warrant disbarment or suspension. The court concluded that the advancements were made not as a means of soliciting business, but because the client happened to be the sole eyewitness in an accident case in which another client was killed, and it was necessary to keep him available. Therefore, such advancement of funds are proper because of the attorney's good motives in helping the case of his unsolicited client. *In re Moore*, 8 Ill. 2d 373, 134 N.E. 2d 324 (1956).

This case presents two controversial issues confronting many practicing attorneys, namely: (1) whether it is proper for an attorney to advance funds to his client that are not directly connected with expenses of litigation; (2) whether an attorney, who has an unsolicited client, may solicit other clients having similar interests to protect, where his motive in so doing is to protect and enforce the rights of his unsolicited client.

In attempting to answer the above propositions, it is necessary to look at the *Canons of Ethics* as interpretated by the opinions of the Grievance Committee of the American Bar Association and decisions by the courts. On the subject of advancements to clients, *Canon No. 42* of the American Bar Association provides:

> EXPENSES.—A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

Canon 42 presents the problem of what constitutes *expenses* and under what circumstances an attorney may advance moneys as expenses of liti-

gation. In answering this question, the Committee on Professional Ethics and Grievances of the American Bar Association, in *Opinion 288*,[1] held that when an attorney pays substantial sums of money to a client covering subsistence for the client, such practice constitutes a clear violation of *Canon 42*. From *Opinion 288*, it appears that expenses mentioned in *Canon 42* to be lawfully incurred must be directly connected with the costs of litigating the case, such court costs and witness fees as distinguished from advances covering subsistence for the client and his family.[2] It is the latter type of expense that the committee opposed in *Opinion 288*. In addition, the committee held that if the practice of advancing funds to clients were published, such an act would result in an improper inducement to clients to employ an attorney in violation of *Canon 27*.

Illinois decisions have run contrary to the views expressed in *Opinion 288*. *People ex rel. Chicago Bar Ass'n v. McCallum*[3] held that advancements to needy clients for living expenses during the pendency of the suit is not against public policy or ground for disbarment. The Court in the *Moore* and the *McCallum* cases, in effect, held that under proper circumstances, advancements made to clients for subsistence are proper under *Canon 42*. However, as pointed out in *Opinion 288*, advancements in the form of subsistence are improper.

Cases dealing with advancements to clients are not the only instances where the court's interpretation of the Canons differs from the opinions of the American Bar Association's Grievance Committee. This divergence of interpretation can also be found in the area of solicitation. *Canons No. 27* and *28* condemn all solicitation for business, not warranted by personal relations, and term it *unprofessional*. Some difficulty may arise when attempting to define the term *personal relations*. Between attorney and client, the term means primarily professional and not social relations.[4] It includes former clients,[5] personal friends who have recommended the lawyer, and also relatives whom he discovered are entitled to a legacy. The mere fact of an occasional personal acquaintance with an individual does not justify solicitation of business from him. Problems revolving around the definition of personal relations arise, such as in the *Moore* case, when an attorney solicits an individual for the purpose of aiding the case of his unsolicited client.

In *Opinion 111* the committee was asked whether it was proper for an attorney to solicit other clients having similar interests of his unsolicited

[1] 41 A.B.A. Journal 33. (January, 1955) (italics added).

[2] Ibid.

[3] 341 Ill. 578, 143 N.E. 827 (1930).

[4] Decision 105 of the American Bar Association Ethics Committee (Unreported).

[5] Opinion 7, by the American Bar Association Opinions On Professional Ethics and Grievances (1925).

client, where his motive in so doing was to protect the rights of his unsolicited client. In answering this question the committee disregarded any proper motives by the attorney and strictly construed *Canons* 27 and *28* by ruling that no solicitation of others whatsoever is permissible unless warranted by personal relations.

The committee realized that in such cases, persons having problems similar to those of the unsolicited client should be notified. In such cases, while it would seem clearly proper for the lawyer to see to it that these similar interests are properly represented, they should be approached by the client and not by the lawyer, and be made to understand that they may be represented by a lawyer of their own choosing. The attorney may not advise these individuals in order to get their business.

The committee declined to follow the interpretation of what constitutes proper solicitation as stated in the case of *People ex rel. Chicago Bar Ass'n v. Ashon.*[6] In that case, the court by way of dicta, held that solicitation of business by an attorney in aid of the interest of his unsolicited client is not improper where the motive of the attorney is to protect the best interest of his client. In all the cases mentioned herein, proper motive of the attorney is the crucial element in determining whether the attorney's conduct is proper. Thus, solicitation by an attorney may be proper in instances where he was acting in the only way possible to secure his client's rights, and the solicitation was merely incidental to his main purpose.[7]

The ruling by the Committee in *Opinion 111* as compared to the decisions in the *McCallum* and *Moore* cases obviously reaches a different conclusion on the question of whether solicitation by an attorney for the benefit of his unsolicited client will be deemed proper. In the Illinois cases herein mentioned, solicitation of others for the benefit of a client may be permissible when the attorney's conduct and motives are above board; on the other hand, the Committee says no solicitation is proper unless warranted by personal relations.

The apparent conflict between the court decisions and the *Canons of Ethics* present the ultimate question of what force and effect the *Canons* have upon the lawyers. The courts differ as to the weight to be given to the *Canons of Ethics* adopted generally by the state bar associations. In a few jurisdictions, canons have been adopted by the legislature as law,[8] while the courts of another state, in citing *Canon* 27 as sole authority for

[6] 347 Ill. 570, 180 N.E. 440 (1932).

[7] People v. Edelson, 313 Ill. 601, 145 N.E. 246 (1924). An attorney, having been employed to collect a claim for a client, solicited two other claims for the purpose of having creditors sufficient in number to authorize the filing of a petition in bankruptcy. In a disbarment proceeding based on Canon 27, condemning unprofessional conduct, it was held that such conduct was a legal method of protecting the rights of his client.

[8] Wash. Laws 1921 c. 126, Section 15. See State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 Pac. 357 (1909).

a judgment of disbarment, would seem to give it at least the force of previous decisions holding the same way.[9] On the other hand, the value of the Canons has been held to be educational only, and of no necessary effect.[10]

Some authorities on the subject of legal ethics feel that the *Canons of Ethics* are legislative expressions of professional opinion.[11] The Canons, as a general rule, do not have the effect of a statute,[12] but are self imposed rules upon the lawyers. It was the lawyers who created the Canons and we find that it is the lawyers, acting through their respective bar associations, who recommend punishment for violators. In discussing the force and effect of the Canons generally, Henry S. Drinker, a leading authority on legal ethics, said, "The eagerness of the preponderance of lawyers to comply fully with the Canons is demonstrated by their frequent requests for advice from the various ethics committees and their hearty acceptance and observance thereof."[13]

Illinois and the majority of the Courts in the United States hold that although the Canons constitute a safe guide for professional conduct in the cases to which they apply, the power to discipline an attorney for impropriety is inherent in the court before which he has been admitted and exists independent of statute.[14]

We have seen from the decision in the *Moore* case and others recited herein, that although a lawyer may technically violate one or more of the Canons, the courts will give lip service to the Canons and then proceed to apply their own rule of law; or, disregard the interpretation of the Canons. One may logically question why the courts in such instances shy away from the Canons when a breach thereof is committed. The reason may be attributed to the fact that disbarment and suspension proceedings are considered to be extreme measures of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards.[15] Thus, the courts will be hesitant to disbar an attorney upon a technical breach of the Canons.

In situations such as the *Moore* case, the courts, in effect, will first look at the motive, conduct of the attorney, and other surrounding circum-

[9] In re Morrison, 43 S. Dak. 185, 178 N.W. 732 (1920).

[10] In re Clifton, 33 Idaho 614, 196 Pac. 670 (1921).

[11] Dissent in A.B.A. Opinion 37 (1912).

[12] People v. Gilmore, 345 Ill. 28, 177 N.E. 710 (1931).

[13] Drinker, Legal Ethics, c. viii (1953). The function of the Ethics Committee is the interpretation of the Canons. The Committee does not pass on questions of law, and will take no action while legal proceedings are pending.

[14] Phipps v. Wilson, 186 F. 2d 748 (C.A. 7th, 1951).

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

stances before examining the Canons. If the motives and conduct are warranted, and a violation of the Canons nevertheless exists, censure may be the proper punishment but not disbarment or suspension.

CONDITIONAL SALES—WAIVER OF DEFENSE CLAUSE VALID AS BETWEEN ASSIGNEE OF VENDOR AND VENDEE

Defendant signed and executed a conditional sales contract for the purpose and installation of an air conditioning unit. A clause in the conditional sales contract read: "This contract may be assigned and/or said note may be negotiated without notice to me and when assigned and/or negotiated shall be free from any defense, counter claim or cross complaint by me." The note was endorsed and the contract was assigned to the plaintiff. The payee of the note failed to deliver and install the unit sold. Plaintiff confessed judgment upon the note. Pleadings, alleging failure of consideration and that the plaintiff had knowledge that the note was given for the purchase and installation of the unit, were filed by defendant to vacate the judgment. The judgment was opened and defendant was allowed to defend. Upon motion of plaintiff, the trial court struck all of the pleadings of defendant and rendered judgment for the plaintiff. The Appellate Court of Illinois for the First District affirmed on the ground that the defense relied upon was barred by the waiver clause and that the Uniform Sales Act, sec. 71,[1] which provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale," permits such clause. *Commercial Credit Corp. v. Biagi,* 11 Ill. App. 2d 80, 136 N.E. 2d 580 (1956).

Since a conditional sales contract is normally held to be a non-negotiable instrument,[2] the rights of the assignee[3] are no greater than those of the assignor and are subject to all defenses that the buyer had against the seller at the time of the assignment.[4] But if the instrument sued on is negotiable and the plaintiff is a holder in due course, he will ordinarily be immune to many of the defenses which the chattel purchaser could assert against the seller.[5] For this reason, finance companies hope to impart limited elements of negotiability to conditional sales contracts by using such

[1] Ill. Rev. Stat. (1955) c. 121½.

[2] E.g., Security Finance Co. v. Comini, 119 Or. 460, 249 P. 83 (1921).

[3] Generally a financing institution.

[4] E.g., Doub v. Rawson, 142 Wash. 190, 252 P. 920 (1927).

[5] E.g., Commercial Credit Co. v. Seale, 30 Ala. App. 440, 8 So. 2d 199 (1942), cert. denied 242 Ala. 661, 8 So. 2d 202 (1942).