

SOLICITATION OF LEGAL SERVICES—A CRIME

E. TERRY WARREN*

The ethical practice of law was advanced by the 104th General Assembly's passage of Ohio Revised Code, section 4705.08 and the amendment of existing Revised Code, section 4705.99.¹ This bill, commonly known as the "Anti-Solicitation Bill," provides as follows:

Section 4705.08

No attorney or other person shall pay or receive any compensation or other consideration, or divide with or receive any portion of a fee, as an inducement or payment for solicitation or procurement of legal services consisting of prosecuting or defending a claim, cause of action, or criminal charge, whether such services are to be performed or such claim or cause of action is to be prosecuted or defended in this state or elsewhere. The provisions hereof shall not prohibit the division of fees between attorneys for services performed by them. Any agreement made or contract of employment obtained in violation of this section shall be void and unenforceable.

Section 4705.99(B)

Whoever violates section 4705.08 of the Revised Code shall be fined not less than one hundred nor more than one thousand dollars, or imprisoned not more than thirty days, or both.

The passage of this bill means that solicitation of legal services is a crime equally applicable to all members of the general public whether licensed to practice law or not. Its enforcement is made possible by procedures formerly not available to the courts, bar associations, and law enforcement officials. Enactment of the bill brings Ohio in line with the majority of states. The states which presently comprise the minority are Delaware, Florida,² Idaho, Kansas, Kentucky,³ Missouri,⁴ North Dakota, Oklahoma, South Dakota, and Vermont. Both Hawaii and Alaska had existing statutes upon their admission as states. Of the majority states, the statutes vary from a single section to an act containing five or more sections or provisions concerning various features of solicitation practices. In all instances,

* Member of Negligence Law Committee; Associated with the firm of Warren and Young, Ashtabula, Ohio; Member of the Ashtabula, Ohio State and American Bar Associations.

¹ Amended House Bill no. 321 was passed on June 7, 1961; approved by the Governor on June 19, 1961; and becomes effective on September 18, 1961.

² Statutes do prohibit the unauthorized practice of law and the solicitation of Workmen's Compensation claims. *Florida Statutes Annotated*, § 39.23 & § 440.34.

³ An anti-solicitation statute was passed by the Legislature but vetoed by the Governor in 1956.

⁴ *Missouri Supreme Court Rules* 4.27 & 4.28 prohibit the solicitation of legal services by attorneys.

except Louisiana, a violation constitutes a misdemeanor and is subject to a fine or jail term or both. Both of these enforcement provisions are present under the Ohio statute. Prior to the enactment of this legislation Ohio had no existing statutory law prohibiting the solicitation of legal services by attorneys or other members of the public. The only statute directly dealing with any phase of the problem was Ohio Revised Code section 2917.43:

No judge, clerk of courts, sheriff, coroner, constable, or attorney at law shall encourage, excite or stir up a suit, quarrel, or controversy between two or more persons with the intent to injure any such persons.

Whoever violates this section shall be fined not more than five hundred dollars.

This statute, providing a law against stirring up controversies by a certain few classes of people, is commonly known as a barratry statute and has its roots in English law. In Great Britain, and as a matter of history, the practice of law was not competitive except between opposing counsel in a given case. The barristers did not practice law for pecuniary gain and therefore there was no reason for competition with one another for clients. The practice was regarded as a profession, not as a trade, business or occupation. Thus, the general statutes against barratry,⁵ champerty⁶ and maintenance⁷ followed from this basic distinction and the condemnation of solicitation was the logical result. The barratry statutes have not been effective either in scope or enforcement because of inadequate coverage under the law and through the failure to prohibit the solicitation of an injured or damaged party who has a valid and meritorious claim.⁸

Recently implemented Supreme Court Rule XXVII does provide existing methods of disciplinary action against attorneys who practice solicitation. This rule, however, does not apply to attorneys who practice in Ohio courts by consent without being admitted to practice by the Ohio Supreme Court. It is apparent the practice of appearance by consent is growing, and previously there was no disciplinary proce-

⁵ Barratry: the offense of frequently exciting or stirring up quarrels and suits, either at law or otherwise. *Cyclopedic Law Dictionary*.

⁶ Champerty: a bargain with a pl. or def. in a suit for a portion of the land or other matter sued for in case of a successful termination of the suit which the champetor undertakes to carry on at his own expense. *Cyclopedic Law Dictionary*.

⁷ Maintenance: a malicious, or, at least, officious interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action without any authority of law. *Cyclopedic Law Dictionary*.

⁸ Luther, "Legal Ethics: The Problem of Solicitation," 44 American Bar Association Journal 554 (June, 1958).

dures available to control solicitation practices by this group of attorneys.

Under existing Rule XXVII any violation of the Canons of Professional Ethics constitutes a breach of Rule XXVII, and disciplinary action against member attorneys of the Ohio Bar can be taken. The solicitation of legal services by an attorney is explicitly defined as a breach of ethics under Canons of Professional Ethics (Canons twenty-seven and twenty-eight), and thus such practices are punishable by our courts under the existing rules, but not as a criminal matter. It is apparent that prior to the enactment of the present legislation Ohio had no prohibition applicable to the general public and attorneys not admitted to the Ohio Bar against soliciting legal services for themselves or others.

The unethical and injurious practice, made criminal by the above bill impairs the administration of justice in many ways. Some obvious results are the stirring up of vexatious or speculative litigation leading to corrupt practices and preventing the proper and efficient remedial processes of the law. The practice of fee splitting with laymen is commonly and frequently made a part of this scheme and accentuates the evil to a greater degree than does personal solicitation by an attorney. Other results are congested court dockets, perjury and manufacture of evidence, and the tendency of an unchecked practice to increase and perpetuate itself.

The American Bar Association several years ago created a committee known as the Special Committee On Investigation, Solicitation And Handling Of Personal Injury Claims. After three years of investigation this committee recommended that the proper method of curtailing solicitation was to strengthen the Canons of Ethics and to adopt, at state levels, statutes specifically prohibiting such activity. The form suggested by this committee was an act consisting of more definitive rules and procedures than that contained in the enacted Ohio statute.⁹ However, the Negligence Law Committee of the Ohio State Bar Association, which was responsible for the research, study, organization, and drafting of this bill, felt that a broader statute was necessary. The broad effectiveness of the bill leaves definitions, procedures, and enforcement to the discretion of the court which understandably has a sounder basis for adequately controlling each individual case as it is presented.

The purpose of the statute is to prevent the direct or indirect solicitation or procurement of legal services by attorneys and other persons. As noted above it has never been illegal for laymen to en-

⁹ Report to House of Delegates, American Bar Association, 1957.

gage in solicitation. Thus the courts and enforcement officials are now able to institute criminal proceedings against so called runners who operate to the detriment of the public and the legal profession. Incidents and stories of this practice are familiar and well publicized to the discredit of the bar. The statute as constituted does not single out any one element of the practice of law but encompasses the defense as well as prosecution of all matters, whether criminal or civil, and whether claims or causes of action. It is apparent that investigative facilities are now available under the statute which formerly were not. Since a criminal charge is involved it is permissible for grand juries, police, and other law enforcement departments to take an active part in stamping out the practice. Previously, the only investigative force was the organized bar and the courts acting through its various officers. One of the problems inherent in this new power is the ability of an unsatisfied client or other party to cause, without justifiable grounds, embarrassment and dismay to the attorney. The client who feels the best result was not obtained could swear out an affidavit against his attorney and bring into effect the new law coupled with its notoriety and consequent publicity. There are, of course, laws designed to cope with unjustified prosecution, but the remedy may in some instances be small recompense for the damage already accomplished. This, however, is another instance of the duty and responsibility attorneys must accept in furthering the ethical practice of law.

The General Assembly's passage of the Professional Association Act, Revised Code sections 1785.01 to 1785.08 inclusive, does not change the effectiveness of the anti-solicitation statute. Section 1785.04 of that newly enacted bill provides as follows:

Sections 1785.01 to 1785.08 inclusive, of the Revised Code do not modify any law applicable to the relationship between a person furnishing professional service and a person receiving such service, including liability arising out of such professional service.

Attorneys are still individually liable for all of their professional acts and these certainly encompass solicitation.

An important exception to the act is the division of fees between attorneys for services performed. It is imperative that each of the participating attorneys contribute services in connection with the matter in question. Then, when compensation is received, it can in no way be considered a breach of the statute. This well recognized procedure is not to be restricted in any way by the above statute.

The "Anti-Solicitation Bill" is not directed against the unauthorized practice of law. It is not a question of a layman performing a legal

service; it is a question of a layman and attorney joining together in the act of procurement of legal services. The bill likewise does not govern the situation wherein an unsuccessful solicitation is made but rejected. It is a continuing struggle; the bar must move forward in an effort to curtail this abuse of the public.