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Ethics - Client-Attorney Personal Relationship Test

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ETHICS

Client-Attorney Personal Relationship Test

The Supreme Court of the United States, in *National Association for the Advancement of Colored People* v. *Button*,[1] recently reversed both the Virginia Supreme Court of Appeal's ruling[2] on a conviction of the N.A.A.C.P. and the court's upholding of the constitutionality of a Virginia act[3] making illegal the improper solicitation of legal business, or the receiving of compensation from any person so soliciting, where such person has no pecuniary right or liability in the suit for which the attorney was solicited. It is submitted that the Supreme Court of the United States correctly reversed the decision on the constitutionality of the Virginia act, but erroneously dismissed the conviction as stated under the indictment.

In a series of suits preceding the Virginia Supreme Court of Appeal's decision in *N.A.A.C.P.* v. *Harrison*,[4] three chapters of the Acts of the Assembly, Extra Session, 1956, had been held unconstitutional. The N.A.A.C.P. appealed rulings adverse to them on §§ 54-74 and 54-79 of the Virginia Code as amended by chapter 33 of the Acts of the Assembly, Extra Session, 1956, and §§ 18-349.31 to 18-349.37 inclusive of the Virginia Code as amended by chapter 36, and in *N.A.A.C.P.* v. *Harrison* the Virginia Court upheld §§ 54-74, 54-78, 54-79 as amended while it declared §§ 18-349.31 to 18-349.37 inclusive as amended (which made it illegal for non-relatives to advise persons to instigate suits) to be a violation of the First Amendment of State and Federal Constitution.[5]

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[1] 83 S.Ct. 328 (1963).

[2] N.A.A.C.P. v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960).

[3] Chapter 33, Acts of Assembly, Extra Session, 1956, amending §§ 54-74, 54-78, 54-79, Code of 1950 (1958 Rep. Vol.).

[4] N.A.A.C.P. v. Patty, 159 F.Supp. 503 (E.D. Va., 1958), struck down chapters 31, 32, and 35. On appeal in N.A.A.C.P. v. Harrison, 360 U.S. 167, (1959), reversed and remanded N.A.A.C.P. v. Patty for an authoritative interpretation of these statutes by the Virginia courts. The Circuit Court of the City of Richmond in N.A.A.C.P. v. Harrison, Chancery causes No. B-2879 and No. B-2880, August 31, 1962, upheld the rulings of unconstitutionality for chapters 31, 32, and 35, but ruled chapters 33 and 36 valid.

[5] 202 Va. 142, 164-165, 116 S.E.2d 55, 72 (1960).

It is necessary to study the logic of the Virginia Court's decision in *N.A.A.C.P.* v. *Harrison* in order to understand the error it made that left the Supreme Court of the United States in *N.A.A.C.P.* v. *Button* no choice but to reverse the holding of the constitutionality of §§ 54-74, 54-78, 54-79.

The Virginia Code, §§ 54-74, 54-78, 54-79, independent of the Virginia court's interpretation, in essence modifies canons 35 and 47 of the professional ethics of the American Bar Association,[6] which prohibits the solicitation of litigation by intermediaries and prohibits lawyers from receiving compensation from any such intermediary not a party to the case. On the other hand, §§ 18-349.31 to 18-349.37 inclusive, which did violate the freedom of speech clause, was dismissed with this comment: "A state may forbid one to practice law without a license, but it cannot prevent an unlicensed person from making a speech before an assembly, telling them of their rights and urging them to assert same."[7]

The Virginia court concluded rightly that as the two laws stood, §§ 54-74, 54-78, 54-79 were constitutional, and that §§ 18-349.31 to 18-349.37 inclusive were unconstitutional. Yet in apparent disregard of the above quoted decision on §§ 18-349.31 to 18-349.37 inclusive, the court went on to conclude:

> Therefore,
>
> (a) the appellants and those associated with them may not be prohibited from acquainting persons with

[6] Canon 35 provides: Intermediaries.—The professional services of a lawyer should not be controlled or exploited by any law agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

Canon 47 states: Aiding the Unauthorized Practice of Law.—No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any law agency, personal or corporate.

[7] 202 Va. 142, 163, 116 S.E.2d 55, 71 (1960).

> what they believe to be their legal rights and advising them to assert their rights by commencing or further prosecuting a suit against the Commonwealth of Virginia, . . . *but in so advising persons to commence or further prosecute such suits the appellants, or those associated with them, shall not solicit legal business*[8] *for their attorneys or any particular attorneys;* . . . (emphasis added)

The italicized portion of the court's decision affirms nothing found in §§ 54-74, 54-78, or 54-79, but rather broadly construes these sections as legalizing the indictment of persons for the crime of recommending lawyers. "Improper" solicitation (the language of the statute) must therefore be interpreted as the recommendation of a lawyer, and this is indeed an extremely vague and general denial of freedom of speech. If strictly abided by, it would undoubtedly deny to many a lawyer his prospective clients, simply because his successful clients could only recommend him under possible criminal penalties. This editorialized *non-sequitur* by the Virginia court should have been omitted, and its omission would have logically removed the United States Supreme Court's ground for reversal.

> We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys . . . for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers . . . would understandably hesitate to do what the decree purports to allow, namely, acquaint "persons with what they believe to be their legal rights and *** (advise) them to assert their rights by commencing or further prosecuting a suit ***." For if the lawyers . . . also appeared in or had any connection with any litigation they would plainly risk (if lawyers) disbarment proceedings and, lawyers and non-

[8] 202 Va. 142, 165, 116 S.E.2d 55, 72 (1960).

lawyers alike, criminal prosecution for the offense of "solicitation", to which the Virginia court gave so broad and uncertain a meaning.[9]

This conclusion of the Supreme Court contains no error in logic, based as it is upon the Virginia court's error. As will be demonstrated in support of the next contention, the Virginia court should have interpreted the statute less in terms of solicitation and more in terms of maintenance, the receiving of funds from solicitors. This is the area of the statute that the federal court does not discuss, and it is the failure to recognize this area of N.A.A.C.P. activities which violate the common law precepts of maintenance which caused the Supreme Court of the United States to err in dismissing the conviction of the N.A.A.C.P.

The N.A.A.C.P., despite the unconstitutionality of §§54-74, 54-78 and 54-79, nevertheless violated two canons of legal ethics and the long-standing common law offense of maintenance as widely understood in the United States in general and Virginia in particular. To understand specifically the offense involved it is necessary to understand its background.

The bulk of the English statute on maintenance dates between 1275 and 1540.[10] American courts have uniformly held these acts to be declaratory of pre-existing common law,[11] including the exceptions in favor of giving support to needy relatives in order that they may press suits.[12] Virginia in its present constitution, accepts as the common law of the Commonwealth the common law of England as of 1607, in so far as it was not repugnant to the Constitution and Bill of Rights and was not altered by the General Assembly.[13] This clause has been interpreted as "reasonable and substantial compliance with the common law, rather than a literal one. ."[14] The force of this continuing substantial compliance with

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[9] N.A.A.C.P. v. Harrison, 83 S.Ct. 328, 338-339 (1963).

[10] *E. g.*, 3 Edw. 1, c. 25 (1275); 32 Hen. 8, c. 9 (1540).

[11] 5 R.C.L. Champerty and Maintenance § 4 (1929).

[12] Halsbury, Laws of England, 52 (1907).

[13] Va. Code Ann. § 1-10 (1950).

[14] Foster v. Commonwealth, 96 Va. 306, 310, 31 S.E. 503, 505 (1898).

common law is readily apparent in Wiseman v. Commonwealth,[15] where the court in the area related to maintenance, stated that where a statute codifies part of a violation of the common law (embracing in this particular case), violations of common law embracery outside the statute are indictable and punishable with what is the common law on this subject as it has developed from the common law of England as of 1607.[16] In this case, where the indictment alleged circumstances violating the common law, but omitted the violation of the statute, the court ruled the indictment sound in as much as the statute did not abrogate the common law.[17] This raises the query: Why should an indictment be quashed when it alleges circumstances violating both the common law of maintenance and the violation of a statute which codifies part of the common law, but in so doing adds extraneous material and hence is unconstitutional? Obviously, in such circumstances, the cause should be remanded with directions to continue the case on the common law, since this was in no way affected by the unconstitutionality of the statute.

This common law ground for the conviction of maintenance today, in Virginia and elsewhere has apparently changed character rather uniformly as the evils it was designed to cure have altered with the changes in our judicial processes.[18] No longer do the courts look askance upon a third party donating funds to press a suit to which they are not a part; but they are unanimous, it appears, in standing behind the canons of legal ethics in preventing the third party from maintaining that suit by interjecting himself between the attorney and his client and by so doing control the attorney's purse strings. The Virginia Court, in *Richmond Association of Credit Men* v. *Bar Association*,[19] adopted the position taken earlier in New York in *In re Co-operative Law Co.*:[20]

> The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves

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[15] 143 Va. 631, 130 S.E. 249 (1925).
[16] *Supra*, note 15.
[17] *Supra*, note 15.
[18] 5 R.C.L. Champerty and Maintenance § 5 (1929).
[19] 167 Va. 327, 189 S.E. 153 (1937).
[20] 198 N.Y. 479, 92 N.E. 15 (1910).

> the highest trust and confidence. It cannot be delegated without consent, and cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he (the attorney) would be subject to the direction of the corporation and not the direction of the client.[21]

The Michigan court in 1933 stated, "As long as the attorney owes, or deems he owes, to the middleman, any duty connected with the plaintiff's case, so that he cannot extend undivided allegiance to the client, he remains the agent of the middleman."[22] In law suits under the Federal Employers' Liability Act, California, Illinois, and Tennessee have each maintained that a union could not hire a lawyer to prosecute suits for members of the union because of the intermediary nature of the union.[23] The federal court, while holding it was not reversible error, proclaimed such a railway union activity a "violation of well recognized ethical and professional standards of long duration and virtually universal observance."[24]

In *N.A.A.C.P.* v. *Harrison*, the Virginia court went into lengthy discussion of the Commonwealth's evidence in support of its allegations about N.A.A.C.P. activities. The N.A.A.C.P. lawyers receive from the N.A.A.C.P. Defense Fund $60.00 per day for their services in cases which the N.A.A.C.P. has provided lawyers, "as long as such attorneys adhere strictly to N.A.A.C.P. policies."[25] Many litigants had no personal contact with their attorneys,[26] some did not even know their lawyers' names.[27] Granted the legal right to aid the downtrodden, the legal means must not be disregarded. The N.A.A.C.P. has, it appears, effectively destroyed the attorney-

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21 198 N.Y. 479, 92 N.E. 15, 16 (1910).

22 Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97 (1933).

23 In re Brotherhood of Railroad Trainmen, 13 Ill.2d 396, 150 N.E.2d 163 (1958); Hildebrand v. State Bar of California, 36 Calif.2d 504, 225 P.2d 508 (1950); Doughty v. Gills, 37 Tenn.Ap. 63, 260 S.W.2d 379 (1952).

24 Atchison, Topeka and Santa Fe Railway Co. v. Jackson, 235 F.2d 390, 393 (10th Cir. 1956).

25 N.A.A.C.P. v. Harrison, 202 Va. 142, 149, 116 S.E.2d 55, 62 (1960).

26 Ibid.

27 *Id.* at 63.

client relationship in these cases, in a way it could not if the attorneys followed not N.A.A.C.P. policy, but the will of their clients. The attorneys follow the N.A.A.C.P. policies because that is their job, the N.A.A.C.P. and not the client is their employer.

The N.A.A.C.P. could, as a legal aid society, give prospective litigants funds to press suits, and recommend lawyers (the illegal Virginia statute notwithstanding), but the N.A.A.C.P. should not be allowed to continue violation of attorney-client relationship. Funds given to the needy to support litigation may be made upon only one contingency, that an attorney's aid be sought, if it is abundantly clear that the attorney need not be one of those recommended. Afterwards, if the attorney convinces the client not to press the suit (because he feels that it may result, however unjustly, in the closing of all public schools), the N.A.A.C.P. funds so expended to support litigation by indigents has been well spent, and the N.A.A.C.P. has no complaint, simply because the client, after being advised by a lawyer, decided not to instigate litigation.

This distinction, between legally giving a client funds with which to hire an attorney of his choice, and illegally offering him an attorney's service, is essentially a distinction of who is to control the attorney, and to be legal and just, the control of the attorney (including the purse strings) must always reside in the hands of the client. As the N.A.A.C.P. has violated this longstanding legal principle of ethical conduct and of common law, there is no reason for the dismissal of the conviction. Granted the correctness of the federal court's ruling on the unconstitutionality of §§ 54-74, 54-78, and 54-79 of the Virginia Code, the United States Supreme Court, to serve the law, should not have dismissed the suit, but should have remanded the case to be retried on indictment based on the violation of the common law when the statute was deemed without force.

A. J. C.