

1-1-1971

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Recommended Citation

J. Timothy Philibosian, Comment, *To Chasten or Cherish the Chaser: An Ethical Dilemma*, 11 SANTA CLARA LAWYER 427 (1971).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol11/iss2/13>

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TO CHASTEN OR CHERISH THE CHASER: AN ETHICAL DILEMMA

The ethical conduct of attorneys throughout the nation has been a constant and ever-present concern of the legal profession.¹ Consequently, attorneys have burdened themselves with perhaps the strictest codes of conduct of any profession. This is true at both national² and state³ levels with local control ensured by the establishment of grievance committees in local bar associations which carefully scrutinize the conduct of suspect lawyers.⁴ Despite these precautions many laymen regard the legal profession as a group of self-centered egoists primarily concerned with self-advancement and gain, often to the detriment of individual clients and society as a whole.⁵ Every lawyer is painfully aware that to some people the word "shyster" is synonymous with attorney.⁶

Perhaps the lawyers most commonly accused of participating in legal chicanery are those who specialize in personal injury litigation.⁷ Many colleagues, as well as laymen, are quick to label aggressive participants "ambulance chasers," and those saddled with this label have been repeatedly condemned by the legal community.⁸

The phrase "ambulance chasing" first appeared judicially in a

¹ "The lawyer is a member of an ancient and honorable profession. His reputation is his chief working capital. Like a woman's virtue, to question it is to do irreparable harm." *Herron v. State Bar*, 212 Cal. 196, 212, 298 P. 474, 480 (1931) (dissent). See also W. BOULTON, CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES (3d ed. 1961); J. CARLIN, LAWYER'S ETHICS (1966); ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970).

² ABA, CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA CODE].

³ As to the California State Bar's emphasis on the ethical conduct of its members, See *Guides to Professional Conduct for the New California Practitioner* (1961). The California Legislature has codified certain rules with respect to the conduct of attorneys: CAL. BUS. & PROF. CODE §§ 6000-154 (West 1962). In January, 1965, the California State Bar established a Committee on Professional Ethics. Its organization and powers of authority are set out in 41 CAL. S.B.J. 815 (1966).

⁴ See generally R. MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION 14 (1965) [hereinafter cited as MATHEWS].

⁵ See generally Winters, *What Can Be Done About Pettifoggery and Legal Delays?*, ANNALS, Jan., 1966, at 55.

⁶ See generally Anderson, "Ambulance Chasing," 20 COMMONWEAL 147 (1934).

⁷ For an interesting overview of the internal workings of a firm specializing in personal injury litigation, see Bowman, *An Inspection of a Personal Injury Law Firm*, 51 A.B.A.J. 929 (1965).

⁸ See generally *Honoroff v. State Bar*, 50 Cal. 2d 202, 323 P.2d 1003 (1958); *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 262, 98 S.W. 178 (1906); Annot., 67 A.L.R.2d 859 (1959); Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958).

1906 New York case⁹ where the practice was soundly condemned, the court even declaring it criminal. The term "ambulance chasing" is derived from the ". . . unseemly activity of overzealous undertakers in too promptly soliciting contracts in their line of business. . . ."¹⁰ As generally applied today the phrase designates the activities of those who acquaint themselves with the occurrence of accidents and approach injured persons with a view toward employment regarding litigation arising from the accident.¹¹ The phrase has been applied to an agent employed by a lawyer¹² as well as the lawyer himself,¹³ but this comment is restricted to the problems arising from the solicitation of personal injury litigation by the practicing attorney.¹⁴

The near unanimity of court decisions in denouncing the practice of "ambulance chasing" is striking. Such decisions may be based upon encouraging public confidence and personal integrity, obviating potential harm to the client, precluding division among members of the bar, or averting the general impairment of justice.¹⁵ However, they all reach the same conclusion: Such active solicitation of business by attorneys is condemned. The penalties imposed upon a guilty attorney are sometimes severe. In some jurisdictions statutes forbid soliciting by making any violation a misdemeanor.¹⁶ In all jurisdictions it is the inherent power of the court to punish those members of the bar who violate the general prohibitions against solicitation and unethical conduct.¹⁷

⁹ *In re Clark*, 184 N.Y. 222, 233, 77 N.E. 1, 5 (1906).

¹⁰ *Kelley v. Boyne*, 239 Mich. 204, 214 N.W. 316, 318 (1927).

¹¹ *Doughty v. Grills*, 37 Tenn. App. 63, 260 S.W.2d. 379, 387 (1952). For a detailed description of "ambulance chasing" see *In re Bar of City of New York*, 222 App. Div. 580, 581-2, 227 N.Y.S. 1, 3 (1928).

¹² See *In re Newell*, 174 App. Div. 94, 160 N.Y.S. 275, 278 (1916), in which the court states "ambulance chaser" is a proper name for anyone who solicits negligence cases for an attorney.

¹³ *State ex rel. Sorenson v. Goldman*, 127 Neb. 340, 255 N.W. 32 (1934).

¹⁴ The justification for distinguishing between the two types of soliciting is threefold:

1. Some courts have recognized a difference. *Chreste v. Commonwealth*, 171 Ky. 77, 186 S.W. 919, 926 (1916).
2. The California legislature has dealt specifically with solicitation for attorneys by lay agents. CAL. BUS. & PROF. CODE § 6076 (West 1962) (Rule 3).
3. The ABA CODE has dealt with each problem separately. See *Disciplinary Rule 2-103(A)* (*re* personal solicitation by attorneys) and *Disciplinary Rule 2-103(B)* (*re* compensating lay agents for referrals).

¹⁵ See *In re Katzka*, 225 App. Div. 250, 232 N.Y.S. 575, 578 (1929), wherein the court states: "This 'business of ambulance chasing' makes it generally impossible for an attorney to give honorable service to clients and courts." For another court's opinion of the evils involved, see *In re Bar of City of New York*, 222 App. Div. 580, 227 N.Y.S. 1 (1928).

¹⁶ CAL. BUS. & PROF. CODE § 6153 (West 1962); FLA. STAT. ANN. § 877.01 (West 1965); CONN. GEN. STAT. ANN. §§ 51-86, 51-87 (West 1960).

¹⁷ 7 AM. JUR. 2d *Attorneys at Law* § 15 (1963). 7 C.J.S. *Attorney and Client* § 18a (1937). CAL. BUS. & PROF. CODE §§ 6087, 6100 (West 1962).

STRICT ENFORCEMENT OF RULES LIMITING
SOLICITATION—SUPPORTING ARGUMENTS

Client solicitation by attorneys may detrimentally affect the profession in two distinct areas. These are: 1) Breach of the lawyer's duty to his client; and 2) Impairment of the administration of justice.¹⁸

Breach of the Lawyer's Duty to his Client

There are few who would dispute the contention that the interests of the client are the paramount concern of the attorney in litigating a case. Therefore, condemnation of "ambulance chasing" is based primarily on its detrimental effect upon the individual client. Critics point to contingent fee abuses as a prime example of this neglect of duty.¹⁹

In personal injury litigation it is the lawyer's obligation to obtain just compensation for his client's injuries. Yet an unscrupulous attorney who circumvents established rules of custom and practice might be tempted to proceed in the manner which will prove most financially rewarding to him. If a lawyer should obtain a large case load by soliciting, he may find it to his personal benefit to settle cases in the easiest possible manner. Thus, the client's well-being becomes a secondary factor in the mind of the unscrupulous attorney.

Active solicitation can quickly develop into a highly competitive system with large monetary rewards going to the victorious.²⁰ Implicit in this competition is the attempt to contact a potential client at the earliest possible moment. Overreaching,²¹ as this early solicitation is termed, may take place at a hospital or even at the scene of the accident itself.²² At such times the victim of an accident is rarely in a position to bargain with a high pressure salesman posing as an attorney. Forcing a contract upon such an emotionally and physically debilitated person is clearly incompatible with any code, written or unwritten, of professional standards.

¹⁸ See *Legal Ethics—Ambulance Chasing*, 30 N.Y.U.L. REV. 182 (1955); Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958).

¹⁹ *Gair v. Peck*, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 505 (1959) (dissent).

²⁰ An example of the competitive aspect of obtaining personal injury cases may be seen in Simpson, *State Bar Acts on Ambulance Chasers*, 9 L.A. BAR BULL. 249 (1934), where it is stated that one injured party reported that he had been solicited by no less than twenty-five groups.

²¹ "Overreaching" means to take unfair advantage of another in a transaction by cunning, cheating, or sharp practice. *In re Baruch's Will*, 205 Misc. 1122, 1124, 132 N.Y.S.2d 402, 405 (Sur. Ct. 1954).

²² *Mitton v. State Bar*, 49 Cal. 2d 686, 321 P.2d 13 (1958) (solicitation in hospital). See also *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S.W. 178 (1906) (lawyers approached widows of mine explosion victims).

Impairment of the Administration of Justice

While neglect of the attorney's duty to fairly represent his client may prove especially harmful to the affected party, the impairment of the administration of justice that occurs when solicitation of personal injury litigation goes unchecked affects society as a whole. Stirring up litigation solely for the purpose of adding to the income of a particular lawyer is reprehensible conduct.²³ The extra litigation that would follow in the absence of controls over soliciting would contribute heavily to the already congested court calendars,²⁴ creating a backlog of cases which would seriously impair judicial proceedings.

An additional evil that cannot be overlooked is the possibility of perjured and manufactured evidence. It has been suggested that the lawyers who ignore the ethical standards of their profession might also manufacture evidence to ensure a favorable verdict: "It is but a short step from exaggeration of injury to the manufacture of a claim"²⁵

A final argument against solicitation is that, left unchecked, soliciting attorneys will siphon off all the business in an area. This would tend to be self-expanding, especially where the soliciting is well-organized. Competition in such an area would be restricted to those with the strongest, most efficient organizations. The independent legal practitioner would find himself driven out of business by those who actively participate in solicitation. Thus, if solicitation of personal injury litigation were left unchecked, all of the aforementioned evils would abound in a self-perpetuating morass of legal chicanery, competition and excessive litigation.

Such are the arguments given by those who advocate strict regulation of direct solicitation by an attorney. While the great weight of legal authority draws upon these arguments to conclude that this practice is an evil which must be controlled or eliminated,²⁶ strict enforcement of rules against solicitation creates other evils which may be equally detrimental to the bar and the public.²⁷

²³ Furthermore, critics are quick to point out that it has never been a defense to a charge of barratry that the suit was well-founded. Annot., 139 A.L.R. 620, 622 (1942). In California the common law definition of barratry has been codified and made punishable as a misdemeanor. CAL. PEN. CODE § 158 (West 1970).

²⁴ For the problem in California, see 1970 JUDICIAL COUNCIL REPORT, at 77. See also Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970).

²⁵ 20 THE GREEN BAG 145 (1908).

²⁶ See note 8 *supra*.

²⁷ See Brennan, *The Bugaboo "Ambulance Chasing,"* 6 CAL. S.B.J. 37 (1931). This article encourages the direct solicitation of clients by attorneys, but drew sharp criticism in three later articles. The author of the final article declared that "the views expressed in that article are so very objectionable that I venture to add a third

STRICT ENFORCEMENT OF RULES LIMITING
SOLICITATION—HARMFUL EFFECTS*Effect upon Potential Clients*

In direct opposition to a basic argument against soliciting personal injury litigation, those who oppose strict enforcement believe solicitation is necessary to protect the client's interests. Those advocating this line of reasoning point out that the business so gained is beneficial to the injured, the sick, the poor, and the needy.²⁸ In the absence of litigation initiated by an attorney, the injured party might be forced to reach his own settlement. It is not unreasonable to assume that the layman would generally have a more difficult time obtaining adequate compensation for his injuries than would an attorney. Consequently, solicitation by the lawyer should help the injured party receive his just compensation.

While the American courts have gone far to provide an attorney for anyone accused of a crime, no such constitutional right is guaranteed to those in a civil action. Opponents of the sanctions against "ambulance chasing" are of the opinion that if the client cannot go to the attorney because of his injury, lack of education or poverty, then it is the duty of the attorney to approach him. Few would condemn as unethical an attorney's accepting a client who had been recommended to him by a mutual friend.²⁹ However, organizations formed to seek out needy parties and channel them to competent lawyers have been universally condemned.³⁰ Additionally, the lawyer who pursues such persons on his own is subject to public censure.³¹

Perhaps the greatest danger perpetuated by strictly enforcing the sanctions restricting solicitation is allowing unscrupulous claims agents to obtain premature and unreasonable releases.³² If the

protest against them." Hart, *Ambulance Chasing*, 6 CAL. S.B.J. 79 (1931). See also Crum, *Clean Up the Legal Profession*, 6 CAL. S.B.J. 54 (1931); Berry, *The Bugaboo*, "Ambulance Chasing," 6 CAL. S.B.J. 66 (1931).

²⁸ MATHEWS, *supra* note 4, at 16.

²⁹ "The friends, acquaintances and associates of an attorney have the unquestioned right to sound his praises and divert to him such clients as they can persuade in a legitimate way to engage his services." *Chreste v. Commonwealth*, 171 Ky. 77, 98, 186 S.W. 919, 926 (1916).

³⁰ Such an organization is not to be confused with a lawyer referral service which does no more than refer to attorneys clients who state they have a need. See note 50 *infra*. See also *Hilderbrand v. State Bar*, 36 Cal. 2d 504, 225 P.2d 508 (1950); *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936); *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); *People ex rel. Chicago Bar Association v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935).

³¹ In *Chreste v. Commonwealth*, 171 Ky. 77, 186 S.W. 919, 926 (1916), the court states there is a manifest difference between securing clients on one's own and hiring agents to solicit business.

³² See generally *Bearor v. Kapple* 24 N.Y.S.2d 655 (Sup. Ct. 1940) (insurance

injured party is represented by counsel, the situation is similar to a criminal case wherein the attorney's first advice to his client is—"Don't say anything." In a personal injury situation, the attorney advises his client—"Don't sign anything." If a lawyer and a claims agent were both witnesses to an accident involving an injury to an unknown party, the claims agent could, under existing law, approach the injured party and settle his claim on the spot, whereas the attorney would be forced to stand idly by and hope the victim sought his counsel.³³ This situation constitutes an inequity the law should correct.

An additional element that may harm the case of the potential client is that the claims agent is informed of the accident soon after its occurrence. He can then approach the victim, check with witnesses, examine the scene of the accident or even fabricate a favorable case. Meanwhile, the victim may be incapacitated and unable to enlist the aid of an attorney. Even if the victim does not settle with the person who caused his injury or sign a release, it may be weeks or even months before he realizes that he needs an attorney. By this time witnesses may have moved or become biased by previous questions from the defendant, and much of the evidence may no longer be available. This places the plaintiff's case in a compromising position which could have been avoided had he been preparing his case from the day of the accident as had the defendant.

Thus, the strict enforcement of rules against soliciting may detrimentally affect the welfare of a potential litigant. However, the inequities of strict enforcement may go beyond the realm of the individual litigant to actually affect the members of the bar.

Effect upon Members of the Bar

A sound, workable system for administering justice is only possible where all members of the bar are entitled to the same rights. Arbitrary discrimination against certain legal practitioners is sure to create disharmony which is difficult to justify. None would dispute that lawyers may use different methods, and that some

adjuster called upon victim same day as accident and told him to sign release or go to jail); *Thorne v. Columbia Cab Corp.*, 167 Misc. 72, 3 N.Y.S.2d 537 (N.Y. City Ct. 1938) (insurance adjuster entered hospital to get seriously injured victim to sign release for \$35 while victim was in such condition as not to realize the significance of the transaction). See also *In re Cohn*, 10 Ill. 2d 186, 139 N.E.2d 301 (1957) (specially concurring opinion). The court said: "Nevertheless, solicitation of personal injury cases is the natural reflex or defensive response to the unfair methods of claim adjusters, just as naturally as the human organism elaborates its own antibodies to combat disease." *Id.* at 306.

³³ This is because the claims agent is not subject to the same codes of ethics and disciplinary rules as the attorney. See notes 2 and 3 *supra*.

lawyers have deservedly acquired fine reputations, but there is no place in an efficient organization for selective and arbitrary rules which discriminate against a particular segment of that organization.

Every lawyer solicits. The young practitioner would probably starve if he did not. Some lawyers may join clubs to make business contacts. Some may take advantage of church membership to increase business. A clever lawyer may offer free advice to potential clients in the hope of being retained in a more lucrative matter. Lawyers are businessmen out to procure all the business they can handle. Thus, an enterprising attorney might offer a corporate executive tickets for the World Series. Or he might attempt placing himself in a bank president's golf foursome so that he may casually mention an "interesting" tax case while he and his partner are strolling from tee to green. Such obvious examples of solicitation are rarely subject to censure. Yet an attorney faces disbarment if he tells an illiterate that his injuries are worth more than the pittance offered him by the claims adjuster. The various codes of ethics and professional responsibility are not worded specifically to restrict only personal injury solicitation, yet such is their practical effect.³⁴

Another consideration is that these sanctions may unfairly prevent a young lawyer from advertising or otherwise trying to obtain business. One of the arguments supporting the restrictions is that solicitation would result in all the business in any given area going to the firm with the best organized system of soliciting. Yet without solicitation the most established and familiar firms get the majority of the business, and these are not necessarily the most competent. It has even been suggested that rules of ethics forbidding advertisement and solicitation are formulated and kept alive by established lawyers who no longer need to rely on such activities.³⁵ If this is true, the harmful effects are obvious and the need for improvement is clear.

CURRENT TRENDS IN PERSONAL INJURY LITIGATION

The problem propounded by the foregoing discussion is: How can the bar prohibit attorneys from demeaning the profession by

³⁴ This line of reasoning has been suggested because personal injury attorneys are condemned much more harshly for their soliciting than others. See MATHEWS, *supra* note 4, at 15.

³⁵ "Does it not seem, everything considered, that these rules of professional conduct were enacted by the big law firm and big interests in their own interests, and to the disadvantage of the poor and independent lawyer?" Brennan, *The Bugaboo "Ambulance Chasing,"* 6 CAL. S.B.J. 37, 40 (1931).

active solicitation yet adequately protect the public from abuses in personal injury settlements?

California has taken some action by passing legislation forbidding solicitation by attorneys and enforcing this prohibition by imposition of the criminal sanction.³⁶ California has also attempted to deal with the problem by rendering void any retainers or contracts obtained by an attorney's agents.³⁷ Thus, in California and other jurisdictions which have adopted similar statutes, a soliciting attorney may not only be the holder of a worthless contract, but he may also find himself criminally liable for his actions.

The various statutes, state rules, and the American Bar Association's Code of Professional Responsibility are also intended to alleviate the problems involved in settling personal injury claims.³⁸ These canons are enforced by the inherent power of the courts over those who practice before them.³⁹ The practitioner found guilty of soliciting may be censured,⁴⁰ suspended,⁴¹ or disbarred,⁴² depending upon the gravity of his offense. Since an attorney is licensed as an officer of the court according to the rules and principles of his particular state bar, he is subject to its legal and ethical standards.⁴³ Any violation of these standards may precipitate an action against him by the court. The justification for leaving this power in the courts is evidenced by Justice Cardozo's statement: "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."⁴⁴

Unfortunately, these and other proposed solutions⁴⁵ deal solely with the ethical conduct of attorneys. In order to deal effectively with the problem, it is necessary to do more than merely punish an attorney for his direct soliciting. The incentive must be taken out of "ambulance chasing," and the client, as well as members of the legal profession, must be fully protected. If this can be done, difficulties would be diminished and cases of overreaching and other abuses could be more effectively handled. This may not be as difficult as it

³⁶ See note 16 *supra*.

³⁷ CAL. BUS. & PROF. CODE § 6154 (West 1962).

³⁸ ABA CODE, *Ethical Consideration 2-9, Disciplinary Rule 2-103(A)*. *Guides to Professional Conduct for the New California Practitioner* (1961), Chap. One (1). CAL. BUS. & PROF. CODE § 6076 (Rules 2 and 3) (West 1962).

³⁹ See note 17 *supra*.

⁴⁰ *In re Cohn*, 10 Ill. 2d 186, 139 N.E.2d 301 (1957).

⁴¹ *Mitton v. State Bar*, 49 Cal. 2d 686, 321 P.2d 13 (1958).

⁴² *In re Welch*, 156 App. Div. 470, 141 N.Y.S. 381 (1913).

⁴³ See *Librarian v. State Bar*, 21 Cal. 2d 862, 865, 136 P.2d 321, 323 (1943). An attorney is an officer of the court and must answer for any delinquencies. Brennan, *The Bugaboo "Ambulance Chasing"*, 6 CAL. S.B.J. 37 (1931).

⁴⁴ *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 480, 162 N.E. 487, 493 (1928).

⁴⁵ See note 18 *supra*.

would first appear. To effect a solution, the entire problem must be dealt with, not just an isolated part. As long as injured parties are prey to unscrupulous settlement tactics, it is reasonable to assume that attorneys will continue flaunting the rules to help those victims obtain their adequate rewards.

PROPOSED SOLUTIONS

Judicial Supervision

Judicial supervision of fees, releases, and settlements would appear to be a very desirable check upon abuses in personal injury litigation. In this manner the court could examine all the circumstances surrounding a particular case. The court could review the amount of the fee and how it was obtained, determine whether or not the actions of the claims agent were justified, and check to see if there is any evidence of unconscionable contracts or unjust settlements. This would also permit the court to scrutinize the work of those attorneys and insurance companies who handle a great proportion of the personal injury work in an area, ensuring their tactics are legally and ethically acceptable. While judicial supervision would necessarily increase the work load of the court,⁴⁶ the disadvantage would hopefully be outweighed by the fact that any unfair tactics employed by either the claims representatives or the attorneys would surely surface in the course of timely judicial surveillance.

Advertising and Referral Through Local Bar Associations

It seems only logical that if the bar refuses to allow attorneys to solicit business on their own, then it should take upon itself this responsibility.⁴⁷ This should not be an attempt to drum up business, but should be a concentrated effort to educate the public as to its rights involving personal injury settlements.⁴⁸ Education has long

⁴⁶ To reduce this burden, limits could be placed upon fees, releases and settlements which necessitate judicial supervision. For example fees and settlements obtained in excess of \$500 could be made subject to review, as could releases signed when the injured party has been hospitalized. The parties would file with the court a statement of the facts and the amount of settlement and fees, with all concerned parties attesting the document. The court, solely at its discretion, could demand further investigation.

⁴⁷ "It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity." ABA OPINION 320 (1968). ABA OPINION 423 (1970) states that it is proper for a bar association to warn the public against settling personal injury claims without the assistance of an attorney.

⁴⁸ "Over a period of years institutional advertising of programs for the benefit

been recognized as an integral part of the duties of the bar and it has been considered effective in promoting the public interest.⁴⁹ By this method the public may more readily recognize its legal alternatives and, in applicable cases, the need for competent counsel.⁵⁰

The local bar association could then assist the public in finding such attorneys by establishing a referral service which would direct a person in need to a capable attorney.⁵¹ Any lawyer interested in handling such litigation could place his name with the referral service which would then fairly distribute the requests it receives.

Such activities by local bar associations would go far toward eliminating the problem of soliciting personal injury litigation and protecting the accident victim. Advertising by the bar would explain the problem and educate the public as to the proper course of conduct. A referral service of all competent lawyers interested in handling personal injury litigation would assist the public in contacting and retaining an attorney should the need arise. Furthermore, this same referral system would tend to impartially parcel out the cases so that no attorney would be forced to advertise or unethically solicit business on his own.

Statutes to Curb Abuses

As has been mentioned, California has enacted certain statutes to curb abuses in personal injury litigation.⁵² While these initial gestures may be laudable, much more is needed. The California legislature should direct itself toward legislation which not only prohibits the lawyer from soliciting, but also restricts the claims representative from obtaining an unjust settlement or release.⁵³

of the public have been approved by this and other Ethics Committees as well as by the courts. . . ." ABA OPINION 307 (1962). As to how far the bar may go in its advertising, see J. Blakslee, *Notes on Ethics*, 53 A.B.A.J. 747 (1967).

⁴⁹ "Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service. . . ." ABA OPINION 179 (1938).

⁵⁰ "The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." ABA CODE, *Ethical Consideration* 2-1.

⁵¹ Such lists are generally recognized as proper. ABA CODE, *Disciplinary Rule* 2-103(D)(3). ABA OPINION 227 (1941).

⁵² See notes 16 and 37 *supra*.

⁵³ Legislation which would require placing a bold face clause on any settlement or release agreement recommending that the injured party confer with an attorney before settling his claim would be insufficient. This would undoubtedly prove in-

Such dual-purpose legislation would act directly to protect the injured party, and would indirectly tend to eliminate "ambulance chasing" as the practice would no longer be either necessary or profitable.

New York has adopted such a statute.⁵⁴ In essence it provides that it is unlawful for any person to enter a hospital to obtain a settlement or release for personal injuries within 15 days after the injuries were sustained, unless the injured party has given at least 5 days prior written notice of his willingness to participate in such settlement or release. New York has made violation of this statute a misdemeanor.⁵⁵ The New York courts have noted that this statute was enacted in order to protect the injured party from being victimized, harassed and exploited by unscrupulous claims agents.⁵⁶

While the New York statute is an admirable start, it does not go far enough. It protects the injured party from the claims adjusters but does not protect him from over-zealous attorneys. By also excluding lawyers from contacting accident victims, the statute would greatly retard active solicitation by attorneys.

The New York statute has proven to be too confining in its limitation of the protected areas to hospitals. There is some confusion in New York courts as to whether or not a house constitutes an area which is protected by the statute.⁵⁷ The statute should apply whenever confinement under a doctor's orders is reasonably warranted, regardless of the place of confinement. This latter provision would protect someone approached either before medical help was obtained or when it could not be afforded.

Finally, more strength could be given to the statute by making any releases, settlements, or contracts for employment obtained in violation of the statute voidable at the option of either the injured

effective in reducing abuses, for the injured party is often in no condition to realize the significance of his act much less read a contract. See note 32 *supra*.

⁵⁴ "It shall be unlawful for any person to enter a hospital for the purpose of negotiating a settlement or obtaining a general release or statement, written or oral, from any person confined in said hospital or sanitarium as a patient, with reference to any personal injuries for which said person is confined in said hospital or sanitarium within fifteen days after the injuries were sustained, unless at least five days prior to the obtaining or procuring of such general release or statement such injured party has signified in writing his willingness that such general release or statement be given. This section shall not apply to a person entering a hospital for the purpose of visiting a person therein confined, as his attorney or on behalf of his attorney." N.Y. JUDICIARY LAW § 480 (McKinney 1968).

⁵⁵ N.Y. JUDICIARY LAW § 485 (McKinney 1968).

⁵⁶ *Bearor v. Kapple*, 24 N.Y.S.2d 655, 658 (Sup. Ct. 1940).

⁵⁷ "A sick person in his home is just as much a sick person if confined in a hospital or sanitarium." *Id.* at 658. For opposite conclusion, see *Meehan v. McCloy et al.*, 266 App. Div. 706, 40 N.Y.S.2d 207 (1943).

party or the court, where justice would so dictate.⁵⁸ This provision, like criminal punishment, would work as an added deterrent to such inequitable conduct.⁵⁹ Few claims adjusters or attorneys would risk criminal liability merely to obtain what could become a worthless scrap of paper. Claims adjusters and attorneys could eliminate any uncertainty as to the validity of a signed document or fear of personal criminal liability merely by complying with the statute's reasonable provisions.

Proposed Statute

Thus, the proposed California statute would use the New York statute as its model, but introduce modifications to clarify the law and fill certain voids which appear in the New York law. The text of the complete statute would read as follows:

1. It shall be unlawful for any person to negotiate a settlement or obtain a release, statement, or retainer, written or oral, from any person confined as a patient under orders from a doctor or in such condition as to warrant confinement were medical care available, with reference to any personal injury for which said person is confined within 15 days after the injuries were sustained, unless at least 5 days prior to the obtaining or procuring of such settlement, release, statement, or retainer such injured party has signified in writing his willingness that such settlement, release, statement or retainer be given.

2. Any violation of Section 1 shall make any settlement, release, or retainer voidable at the option of either the injured party or the court, where justice would so dictate, and any statement obtained in violation of the above shall be inadmissible in any court of law where justice would so dictate.

3. Any violation of Section 1 shall be punishable as a misdemeanor.

CONCLUSION

While solicitation of personal injury litigation by attorneys is an evil the bar should control, strict enforcement of the sanctions against soliciting may cause corresponding problems. The bar must recognize its responsibility to protect the members of the public from abuse in all fields of law, including the area of personal injury

⁵⁸ This would permit the court to hold the settlement, release or retainer invalid when the injured party could not do so himself, for reasons such as death, mental incapability, lingering coma, etc.

⁵⁹ The New York courts have consistently held that violation of the statute does not make the release void. *See Moses v. Carver*, 164 Misc. 204, 298 N.Y.S.2d 378 (Sup. Ct. 1937); *Albarello v. Meier*, 5 Misc. 2d 193, 159 N.Y.S.2d 761 (N.Y. City Ct. 1957).

litigation. While the bar should continue enforcing its codes of professional responsibility, it could make great strides toward curbing solicitation by attorneys and abuses in personal injury litigation by encouraging judicial surveillance of personal injury settlements, initiating relevant advertising, establishing the formation of personal injury lawyer referral services, and promoting the adoption of a statute to protect the public such as has been proposed. These steps would not only enhance the integrity of the legal profession, but eliminate many of the inequities in the problem area of personal injury litigation.

J. Timothy Philibosian