

**31****PUBLICATIONS, PENDING LITIGATION**

Adopted June 6, 1964

***Statement of Principles on Published Comment Concerning Pending Litigation***

Canon 20 of the Canons of Professional Ethics reads as follows:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

As good as this statement is, there is abundant evidence that it has not been effective. It has not prevented counsel from holding press conferences or issuing press releases relating to pending or prospective civil or criminal cases. Moreover, as the Canon was drafted before the advent of radio and television, it is limited to newspaper publications. It needs embellishment and implementation.

The very foundation of the administration of justice is that no litigant be deprived of a fair trial. Fair trial presupposes an impartial finder of facts whether judge or jury and for this reason the penalties for “jury tampering” or improperly influencing judges are severe. But bribery or improper approaches to members of a jury out of court are not the only means by which a jury may be improperly influenced. A jury can also be improperly influenced by what they are told in television or radio broadcasts or by what they read in newspapers. This improper influence at times affects civil as well as criminal trials.

No lawyer would be permitted to show a jury a newspaper account prejudicial to one of the parties, yet the same result can be accomplished by the publication in the press of, for example, alleged confessions or the supposed testimony of witnesses which has been excluded by the court.

It is clear that lawyers are responsible for many of the prejudicial statements that appear in the press and are seen or heard on radio and television. The legal profession should not criticize news media for reporting extrajudicial statements made by counsel – statements frequently made with no other purpose than that they shall be publicized by the news media. We cannot hope to receive the cooperation of the press until we clean our own house.

Members of the Bar have a duty to refrain from originating the same types of statements which should not be originated by the press, or otherwise be published. In criminal proceedings, such statements include among others the following:

- (1) Any criminal record of the accused.
- (2) Any alleged confession or admission of fact bearing upon the guilt of the accused.
- (3) Any statement of any public official as to the guilt of the accused.
- (4) Any statement of counsel’s personal opinion as to the guilt or innocence of the accused.
- (5) Any statement that a witness will testify to certain facts.
- (6) Any comment upon evidence already introduced.
- (7) Any comment as to the credibility of any witness at the trial.
- (8) Any statement of matter which has been excluded from evidence by the court at the trial.

In relation to civil proceedings, such types of statements include among others the following:

- (1) Any statement of counsel’s personal opinion as to the factual or legal merits of the claims of the plaintiff or defendant.
- (2) Any statement that a witness will testify to certain facts.
- (3) Any comment upon evidence already introduced.
- (4) Any comment as to the credibility of any witness at the trial.
- (5) Any statement of matter which has been excluded from evidence by the court at the trial.

We hope that this statement of principles on published comment concerning pending litigation will implement and make more understandable the substance of Canon 20.

Trials “are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper.” *Craig v. Harney*, 331 U.S. 367, 377. The judicial admonition to jurors to refrain from reading newspapers or listening to radio or television is often an idle gesture. It is only by self-restraint of the kind exemplified by the statements set forth above that meaning can be given to the constitutional safeguards for a fair trial of which we are so justifiably proud.

It is our hope that by putting our house in order we may set an example of the kind of restraint that should be exercised by the various news media.