

CHAPTER 11

TOUTING AND CANVASSING

Seeking for business may be direct or indirect. In this chapter we are concerned with more or less direct forms, where it is pretty clear to the person approached that he is being asked for work. We should first explain how the terms touting, canvassing and advertising are used. By touting we mean a direct approach seeking business from persons individually, as by a letter addressed to them by name. Canvassing is regarded as the circularising of prospective clients generally. Advertising means the seeking of business without direct contact with the prospective client, as by the use of mass media such as newspapers and television. It follows that touting may be done by letter, telephone call or personal visit. Canvassing will normally be done by use of printed circulars. Advertising will embrace virtually any other means of gaining publicity. It is immaterial whether the act is done by the professional man himself or someone else on his behalf.

The professional creed, as we have seen, is diametrically opposite to that of the advertising man who believes that "the public like to be asked for their custom and they naturally go to the people who invite them". (1) The professional view is invariably set out plainly in the code of conduct. A consulting engineer "shall not, either himself or through any person or firm, canvass, advertise for or solicit professional employment". (2) An architect "must not advertise for nor solicit business nor allow any member of his staff so to do". (3) A solicitor "shall not directly or indirectly apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly". (4)

The rule is of long standing in most professions. Sir Thomas Lund points out that before the rule governing solicitors was formally embodied in a statutory rule in 1936 there had been many decisions of the courts that a solicitor who touted for business was unfit to remain on the Roll, some of these being long before 1936. (5) The newer professions adopted it in their turn. As the R.I.C.S. said to the Monopolies Commission, the rule "is believed to be a fundamental rule of all the

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143 professions, and the profession of the land inherited it from the accepted practice and tradition of the older professions". (6) As we shall see, the surveyors did not however apply the rule to all aspects of their practice.

The rule does not only prohibit deliberate touting. As formulated by the Bar, for example, it expressly includes any act "which is calculated to suggest" that it is done for the purpose of touting. (7) The chartered accountants insist that the rule is not to be interpreted in a merely legalistic way: "A member is expected to carry out this principle in the spirit as well as the letter." (8) Members are supposed to use their own judgment in applying the rule, but in case of doubt are encouraged to apply for advice to their professional institute. Many professional bodies employ staff whose duties are concerned with little else than advising members on whether or not a proposed course of action would infringe the rule.

The rule is regarded by the professions as being for the benefit of the public. Thus the General Dental Council say that it is "contrary to the public interest and discreditable to the profession of dentistry for any registered dentist to advertise or canvass, whether directly or indirectly, for the purpose of obtaining patients or promoting his own professional advantage". (9) This is lent support by the way courts of law invariably uphold the rule when it comes before them. The rule is also backed by government departments. For example the Treasury impose, as one of the conditions under which approved auditors hold appointments

under the Friendly Societies Acts and the Industrial and Provident Societies Acts, the stipulation that an appointment will be terminated if the holder solicits audits by advertisement, circular or otherwise. (10) The Bar Council defend the practice whereby Counsel are briefed through negotiations carried on not by them personally but by their clerks, on the ground that this is a further assurance of the maintenance of the high standards on which the public depend. (11) As we shall see, it was by reference to the public interest that the surveyors declined to adopt in its full rigour the rule against touting.

The rule is by no means confined to the professions in Britain. An American writer on medical ethics, Dean Willard Sperry, cites the following statement issued by the American Medical Association: "Solicitation of patients by physicians as individuals, or collectively in groups by whatsoever names these be called, or by institutions or organisations, whether by circulars or advertisements, or by personal communications is unprofessional . . . It is equally unprofessional to procure patients

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PROFESSIONAL ETHICS by indirection through solicitors* or agents of any kind, or by indirect advertisement, or by furnishing or inspiring newspaper or magazine comments in which the physician has been or is concerned. All other like self-laudations defy the traditions and lower the tone of any profession and so are intolerable." (12) Approaches to Prospective Clients

Touting and canvassing are mainly thought of in terms of approaches to strangers who, it is hoped, will thereby be induced to become clients. It is possible, however, to seek a new assignment from an old client, or to attempt to persuade professional colleagues to farm out some of their own work. We deal with these two cases below.

We have said enough to show that direct approaches to strangers, asking them for work, are universally regarded as unprofessional, and little more needs to be added. Illustration is hardly necessary, but it may be of interest to give two straightforward examples from the legal field. Sir Thomas Lund tells us that it used to be very frequent for a solicitor retained to execute a conveyance on behalf of a vendor of land to write to the purchaser explaining the position and adding: "If you have no solicitor to act for you, I shall be very glad to do so." (13) This is now regarded as objectionable not merely as being a direct solicitation of business but as seeking to become the adviser of both parties to a transaction. The other instance was also formerly not uncommon. A solicitor in need of work would have an understanding with an official at the local gaol through which he would be notified of prisoners in need of legal advice. He would then ask for an interview with the prisoner on the ground that he had been instructed by friends of the prisoner to advise him. This was not only touting for business from a helpless and probably ignorant victim but also involved the further misconduct of lying to the prison authorities. (14)

Renegade professional men have often exploited the hapless position of people in trouble. Unscrupulous estate agents keep an eye on the deaths column of the local paper. They know that when a householder dies his house is often sold, and are quickly on the widow's doorstep, seeking instructions. A similar pest is the "ambulance chaser". Rarer than formerly but still extant he operates as follows. Through contacts with the police, firemen or ambulance workers, the so-called "claims

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The general reader may derive some amusement from the fact that in England a profession strongly opposed to touting for business should be known as "solicitors".

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selves, these touts need professional help in prosecuting the claim. Solicitors have since 1936 been forbidden by a special practice rule from lending their aid. (15)

Sir Thomas Lund recalls a case long before this rule was made. A man was knocked down by a motor-car and injured. The local police constable, who had an arrangement with a "claims assessor" under which he was paid IOs. for every name submitted, telephoned this tout before asking the hospital to send an ambulance. The first the injured man's wife knew of the accident was the arrival on the doorstep of the claims assessor, who succeeded in getting a retainer from the wife and still managed to arrive at the hospital before the victim himself. (16) The British Hospitals' Association, disquieted by such practices, were grateful for the new rule. (17)

It sometimes happens that a person needing professional advice issues a general invitation to firms who might be interested in acting for him. Many local authorities maintain a panel of private architects from which they select firms to carry out a specific project. The R.I.B.A. code expressly allows architects to respond to an advertisement inviting inclusion in the panel. (18)

The only other matter calling for comment at this point is the special rule under which the Royal Institute of Chartered Surveyors and kindred societies expressly permit touting in relation to sales and lettings (page 130). As we have seen, the rule is strictly limited. It does not permit touting by telephone call or personal visit, or canvassing. In effect therefore it only allows an approach to be made by individually-addressed letter to the prospective vendor or lessor of property, and such a letter must contain the "saving clause" stating that if another agent has already been retained instructions can only be received from, and as sub-agent to, that agent. (19)

This relaxation of the no-touting rule does not represent a falling away from previous practice but rather the inability of a relatively new profession to match in every respect the standards of the older professions. Although the R.I.C.S. was founded in 1868 it did not issue any general rules of conduct until sixty years had elapsed. By that time there was considerable pressure from members of the Institution for a code of conduct to be laid down, and a circular condemning the

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PROFESSIONAL ETHICS practice of touting was issued in 1908. Many members of the Institution however derived a large part of their income from estate agency, which was nevertheless a depressed market. Numbers of dwelling houses stood vacant, and competition between agents was intense. If the Institution had forbidden routing in this field it would undoubtedly have lost many if not all of its estate agency members. This was felt to be against the public interest, since it would have removed from the estate agency field the influence of the Institution and other bodies seeking to raise standards. (20) Approaches to Existing Clients

The rule against touting governs the approach to existing clients, in that it prohibits any outright request for work. Approaches to clients are however permitted where there is no suggestion that work is being sought. Clearly the relationship between a professional man and his clients requires that from time to time communications of a general nature should be sent to them. Here the chartered accountants' rule applies throughout the professions, and any communication "should be dignified in content, manner of presentation and form of production . . . flamboyance should be avoided as being inconsistent with the dignity and standing of the profession". (21)

Clients may be informed of changes in the name, address or other particulars of the firm. They may be sent leaflets or brochures describing the services of the profession in general or those of the firm in particular. Some nervousness is however betrayed lest they should fall into strangers' hands. With this in mind the chartered accountants require any brochure describing a firm's services to be printed without the firm's name and address. (22) A number of professional bodies have recently prepared leaflets suitable for distribution in this way and explaining the services available from members of the profession. A series published by the Law Society comprises various titles in the form of a question: Buying a House?, Paying your Tax?, Starting a Business?, Spending your Money? and so on. In each case the answer supplied is of course "See a

solicitor". Rather more personal questions are asked in the titles of similar leaflets published by the R.I.C.S.: Are You Structurally Sound? Are You Overrated? Are You Underdeveloped? Is It Worth It? The Institute of Chartered Accountants modestly contents itself with a booklet entitled See a Chartered Accountant.

Another type of circular often sent to existing clients relates to changes in law or practice which might affect the client's interests. The accountant or solicitor who sends round printed summaries of the latest Finance Act does his client a good turn. If the client is thereby

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147 jogged into thinking he needs more specific advice he knows where to turn for it, and there is no harm in that. In an ideal world a professional man who had advised a client on some matter would, where a later event such as an Act of Parliament rendered the advice in need of revision, notify the client accordingly. This would benefit both parties, but is seldom practicable. Another type of approach is where one client has money to invest and others may well be anxious to borrow. Indeed in such cases circulars need not be limited to existing clients. The Law Society has held it to be unobjectionable for a solicitor, when asked by a specific client, to circularise estate agents informing them that the client has a sum for investment in real estate. (23)

Somewhat more delicate is the question of when it is proper to remind a client that it is time he had another consultation. Only the dentists seem to permit this, perhaps because regular prophylactic treatment is most practicable in this field. The General Dental Council however sound a note of caution, and require such notification to be sent only with the previous agreement of the patient. (24) Doubtless this may be tacit. Approaches to Colleagues

The professions do not explicitly disallow touting which is confined within the bounds of the profession. In other words one member of a profession will not be disciplined for asking for work from other members. Exception might be taken to such touting if carried out on a large scale, as by circularising hundreds of members, (25) and there is always the likelihood that such approaches will be unsympathetically received. If handled properly however they can be useful, particularly where a firm offer specialist services beyond the scope of most practitioners. An example would be the offering of management consultancy services to an ordinary firm of accountants. Similarly the Institute of Chartered Accountants see no reason why pamphlets descriptive of the firm's services should not be sent to other firms of accountants. (26) Letter Headings

We have been briefly considering in this chapter approaches for business which are explicit in their intention. One final aspect of this which needs mention is the form of printed headings on letters, whether sent to clients or others. The contents of the letter may be quite harmless, but the form of letter heading may constitute a more or less obvious inducement to send work to the firm. Accordingly rules have been laid down. Obviously a professional firm would not consider L

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PROFESSIONAL ETHICS using the blatant kind of exhortation frequently found printed on commercial stationery. "Try I3loggs's tax avoidance technique" or "Have your next house designed by Snooks" are unlikely to be used, rules or no rules. The rules are there to deal with more subtle approaches. Merely to announce the name of the profession is held by some to smack of touting. A practising barrister may not use stationery giving his name followed by the words "Barrister-at-law". (27)* While the solicitors do not have this stern regulation, several old-established firms disdain to put on their note-paper the profession they follow. It is however a rule that a solicitor must not show that he is a member of a legal advice panel. (29)

Most professions discourage the use of a multitude of designatory letters or descriptions. The chartered accountants hold that members should be satisfied with the description "Chartered Accountant" and not add other phrases indicative of particular specialties; any addition to it, they feel, is apt to depreciate its character and value, and to draw special attention to details of qualifications and experience may appear to take a form of advertising. Other rules relate more to integrity than touting, for example the rule that if a professional man is a Justice of the Peace he should not add the initials J.P. to his name, since this would appear to be

using his office as a means of professional advancement. Again, mention should not be made of worthless degrees. Sir Thomas Lund gives an example: "If you have obtained, let us say, from a gentleman living at Chipping Norton in exchange for a £5 note a certificate that you are a Doctor of Philosophy of the University of Sidi Barrani, that degree is not suitable for inclusion." He adds that this may sound unlikely "but it has been done". (30) Another instance based on preserving integrity is that there should not be printed after the firm's address "and at Paris" or "Madrid", followed by an address in that city, unless there really is a genuine branch of the firm there and not merely a foreign correspondent or agent.

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Some of the rules are very odd; for instance that allowing one employee of a local authority (the Clerk) to put 'barrister-at-law' on his official stationery while forbidding another (the education officer) to do so. (28)