STATE OF MINNESOTA
IN SUPREME COURT
46994

SUPREME COURT
FILED
AUG 14 1979
JOHN McCARTHY
CLERK

HEARING ON PROPOSED AMENDMENTS TO COURT RULES ON PROFESSIONAL RESPONSIBILITY.

O R D E R

IT IS HEREBY ORDERED that a hearing be held before this Court in the Supreme Court, State Capitol Building, Saint Paul, Minnesota, on Thursday, October 4, 1979, at 1:30 p. m. on the proposed amendments to the Court Rules on Professional Responsibility recommended by the Lawyers Professional Responsibility Board in its petition filed June 20, 1979, for amendment of Rules 19 and 21 and adoption of new Rule 24.

IT IS FURTHER ORDERED that true and correct copies of the proposed amendments be made available upon request to persons who have registered their names with the Clerk of this Court for the purpose of receiving such copies and who have paid $.60 which is the specified fee to defray the expense of providing the copies. The original petition may also be examined in the office of the Clerk of the Supreme Court during regular office hours.

IT IS FURTHER ORDERED, that advance notice of the hearing be given by publication of this Order once in the Supreme Court edition of FINANCE AND COMMERCE, ST. PAUL LEGAL LEDGER, BENCH AND BAR, and the HENNEPIN LAWYER.

IT IS FURTHER ORDERED, that interested persons show cause, if any they have, why the proposed amendments should or should not be adopted. All persons desiring to be heard shall file briefs or petitions setting forth their views and shall also notify the Clerk of the Supreme Court in writing on or before September 27, 1979, of their desire to be heard on the proposed amendments.

DATED: August 14, 1979.

BY THE COURT

Associate Justice

STATE OF MINNESOTA
IN SUPREME COURT
46994

HEARING ON AMENDMENTS
TO MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY

O R D E R

WHEREAS on April 14, 1978, this Court issued an order requesting interested parties to observe and monitor the application of an amendment to the Minnesota Code of Professional Responsibility dealing with the subject of lawyer advertising until April 16, 1979, after which a public hearing would be held regarding a permanent rule dealing with the subject.

WHEREAS, the Minnesota State Bar Association has now petitioned this Court to amend Canon 2 of the Minnesota Code of Professional Responsibility to conform to its report and recommendations approved on March 23, 1979, by its board of governors, and said petition was filed with this Court on May 8, 1979.

IT IS HEREBY ORDERED, that a hearing on the petition of the Minnesota State Bar Association to amend the Minnesota Code of Professional Responsibility respecting lawyer advertising be held before this Court in the Supreme Court, State Capitol Building, Saint Paul, Minnesota, on Thursday, October 4, 1979, at 1:30 p. m.

IT IS FURTHER ORDERED, that true and correct copies of the petition and proposed amendments be made available upon request to persons who have registered their names with the Clerk of the Supreme Court for the purpose of receiving such copies and who have paid a fee of $1.20 to defray the expense of providing the copies. The original petition may also be examined in the office of the Clerk of the Supreme Court during regular office hours.

IT IS FURTHER ORDERED, that advance notice of the hearing be given by publication of this order in the Supreme Court edition of FINANCE AND COMMERCE, ST. PAUL LEGAL LEDGER, BENCH AND BAR, and the HENNEPIN LAWYER.

IT IS FURTHER ORDERED, that interested persons show cause at the time and place above specified for the hearing, if any they have, why the proposed amendments should not be adopted. All persons desiring t be heard shall file a written statement setting forth their objections to the Petition and shall notify the Clerk of the Supreme Court, in writin on or before Thursday, September 27, 1979, of their desire to be heard on the proposed amendments.

DATED: August 14, 1979.

BY THE COURT

Associate Justice

(44)

STATE OF MINNESOTA

IN SUPREME COURT

NUMBER 46994

In the Matter of the Petition of
Minnesota State Bar Association,
a Minnesota Non-Profit corporation
for adoption of Amendment to Canon
2 of the Minnesota Code of Professional
Responsibility.

SUPPLEMENTAL STATEMENT
OF JOHN O. MURRIN

At the hearing held before the Court on October 4, 1979, on the Petition of MSBA to amend Canon 2 of the Minnesota Code of Professional Responsibility, a leave was granted by this Court to file with the Court a supplemental statement as to the legal issues raised, one of which was trade name use:

I.

The MSBA asks this Court to continue the prohibition against trade names for a period of one year to permit consideration of the use of trade names by lawyers. I submit the MSBA and others will be better able to evaluate the use of trade names by lawyers if trade names are provisionally permitted. For this reason I request the Court permit lawyers to use trade names for the next twelve months at which time all interested parties may present their findings and positions regarding the use of trade names.

II.

The use of trade names by lawyers would be subject to the same restrictions placed on other permissible legal advertising

and communications generally. The court can make the use of trade names by lawyers subject to the same kind of registration and filing requirements applicable to professional legal associations (See, 319 A.08, 319 A.21) by including a provision like the following in the new trade name rule:

1. Lawyers using trade names in conducting the practice of law must register that name with the Lawyers' Professional Responsibility Board and shall file annually on or before January 1, with the Board, a report containing the following information:

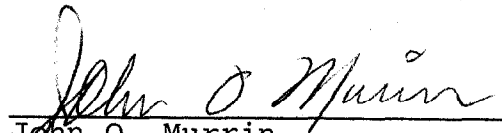
   (a.) The name and address of all lawyers rendering legal services in connection with the use of the trade name.

   (b.) A statement, under oath, whether or not persons rendering legal services in this state under a trade name designation are licensed by this state or otherwise authorized to render professional services, and

   (c.) Such additional information as the Board, by rule or regulation, prescribes as appropriate to assist it in identifying users of trade names and to determine whether the trade name users are complying with the provisions of the Code of Professional Responsibility.

   For filing the first of such reports a fee of $100.00 shall be submitted which shall be for the use of the Board, and for filing each successive report the fee shall be $25.00 which shall be for the use of the Board.

Respectfully submitted,



John O. Murrin
Murrin Metropolitan Legal Clinic
649 Grand Avenue
Saint Paul, MN 55105
(612) 224-1313

Enclosures to:
Minnesota Bar Association
Lawyers' Professional Responsibility Board
Mr. Paul Marino and Mr. Kenneth Kerwin of William Mitchell College of Law

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
300 MID-CONTINENT BUILDING
372 ST. PETER STREET
ST. PAUL, MINNESOTA 55102

MICHAEL J. HOOVER
ADMINISTRATIVE DIRECTOR

MARILYN B. KNUDSEN
ASSISTANT ADMINISTRATIVE DIRECTOR

RICHARD C. BAKER
STAFF ATTORNEY

612 - 296-3952

October 18, 1979

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: MSBA Petition on Lawyer's Advertising
Court File No. 46994

Dear Mr. McCarthy:

I enclose the original and ten copies of a Supplemental Statement, as permitted by the Court on October 4, 1979.

Very truly yours,

Michael J. Hoover

Michael J. Hoover
Administrative Director

MJH:ajs
Enclosures

cc: Mr. Kenneth F. Kirwin
Mr. John Murrin
Mr. Peter Schmitz
Mr. David Brink
Mr. Frank Claybourne
Mr. Gerald Magnuson

10-18 -- Copies given to Court

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 46994

- - - - - - - - - - - - - - - - - - - -

In the Matter of the Petition of Minnesota State Bar Association, a Minnesota Non-Profit corporation, for adoption of Amendment to Canon 2 of the Minnesota Code of Professional Responsibility.

SUPPLEMENTAL STATEMENT OF MICHAEL J. HOOVER

- - - - - - - - - - - - - - - - - - - -

The following is submitted in response to the Court's invitation to objectors to the Petition to file a supplemental statement on the issues raised at oral argument on October 4, 1979.

PROPOSED AMENDMENT TO DR 2-101(A)

In its April, 1978, Order, the Court directed that attorney advertising be monitored for a period of time, and that further amendments to the Code of Professional Responsibility would be considered based upon that experience. Petitioner has recommended the adoption of additional subsections to DR 2-101(A), as promulgated by the Court in 1978. The additional subsections would prohibit statements "laudatory, or comparative in nature", or "intended or likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions."

Neither the Petition, nor the oral arguments or Supplemental Statement submitted by Petitioner has cited any experience during the past year and one-half which necessitates the adoption of these additional provisions. In my opinion, the current rule is sufficient. Many of the statements sought to be prohibited by the Petitioner's proposed additions can already be prevented because such statements are also often false, fraudulent, deceptive

or misleading, in violation of the current rule. Those which are not, really involve questions of taste and dignity, rather than ethics.

Whatever the constitutional merits of the proposed additions, my experience in enforcement has not convinced me of the necessity for the additional provisions.

The statements made in this section are my personal views, and should not be construed by the Court as representing the views of the Lawyers Professional Responsibility Board.

DIRECT MAIL COMMUNICATION

Like those in the preceding section, my statements concerning direct mail communication represent my personal views, and should not be construed by the Court as representing the Lawyers Professional Responsibility Board's opinion.

The Supplemental Statement of Petitioner makes clear that it now concedes that certain forms of direct mail communication cannot be distinguished from advertisements and really constitute direct mail advertising. The illustration contained in Kentucky Bar Association v. Stuart, 568 S.W. 2d 933 (Ky. 1978) is a recurring example of advertising by mail. It would thus appear that Petitioner concedes that even if the current rule is not changed, there are certain kinds of direct mail communication which would not violate the Code of Professional Responsibility.

The real issue which must be decided is whether solicitation involves an in-person, face-to-face element as a necessary ingredient. If it does, then direct mail communication would not violate the prohibition against solicitation, but would, instead, like other written communications, be subject to the prohibitions against false, fraudulent, deceptive, or misleading statements.

In contending, as it does, that a lawyer may never suggest to a specific individual that the lawyer be retained for specific representation, I believe Petitioner goes too far. In

support of its contention, it cites a far-fetched, and I believe improbable, example. Even if such a letter were sent by one or a few lawyers, and even if there were several follow-ups to the communication, the "intrusion" or "invasion of privacy" would be minimal. Such a communication might well be in bad taste, but whether bad taste or minimal invasions of privacy justify a complete restriction on the ability to communicate by mail is questionable constitutionally.

A prophylactic rule, such as that proposed by Petitioner, would also restrict a lawyer from writing to a corporation or to a municipality suggesting retention by the corporate entity of the attorney as general counsel. Such a situation, it seems to me, does not involve the potential for overreaching which the hospital bedside solicitation in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S.Ct. 1912 (1978), involved. A letter can be thrown away. A person sitting at a bedside in a hospital cannot easily be dismissed. A letter can be considered when it is convenient for the recipient to do so. A person at a bedside in a hospital requires immediate attention. A letter will presumably evoke a response when it is convenient for the person receiving it to make one. A person at a bedside in a hospital may appear at a time when it is inconvenient for the conversant to discuss the matter or even at a time when the person is not competent to do so. The distinctions, it seems to me, could go on at length.

In my opinion, our attention should be directed to the content of communications by mail rather than to distinguishing between those which are permitted and those which are not permitted. If it is required that all direct mail communication refrain from using false, fraudulent, deceptive, or misleading statements or claims, the public interest, it seems to me, will

be adequately protected and may well be served by the dissemination of information concerning available legal services.

TRADE NAMES

Again, the comments under this section are my personal views.

I concur with Petitioner that the question of permitting trade names requires further study. It is my personal view that such trade names can and should be permitted. Nevertheless, I believe that the Petitioner's suggestion that there be further study is a proper one.

If trade names are permitted, the feared abuses could be prevented, I believe, by requiring some form of registration, similar to that required of professional corporations engaged in the practice of law.

DESCRIPTION OF PRACTICE

As I have previously advised the Court in my original statement and at the oral argument, the Lawyers Professional Responsibility Board opposes DR 2-105, as proposed by Petitioner.

It should be noted at the outset that proposals for amendments to the Code of Professional Responsibility involve proposed rules, the violation of which could result in the imposition of discipline upon a lawyer. I question whether there is any legitimate purpose in subjecting an attorney to discipline because he has used words to describe his practice which do not appear on the approved list.

Petitioner submits that the real purpose of the proposed DR 2-105 is to assist the public in finding an appropriate lawyer. Such a purpose may be laudable, but it is not a purpose which justifies the imposition of discipline upon a lawyer who chooses to describe his practice in language which is not approved by the Bar Association. The purpose of assisting the public in finding an appropriate lawyer can just as easily be served by Bar Association

action suggesting, but not coercing, the use of "standard" descriptions.

The Lawyers Professional Responsibility Board has, as I have previously indicated, registered its formal opposition to the proposed rule on the ground that it would be difficult, if not impossible, to enforce. To suggest, as Petitioner does, that the public and profession's interests are served by the inclusion in the Code of Professional Responsibility of a rule of questionable enforceability is unfortunate. Nothing will undermine the respect of the profession for the Code faster than the inclusion of rules of questionable enforceability, and nothing will undermine the respect of the public for the legal profession more than the specter of professionals who have open disdain for their code of ethics because of its inclusion of provisions of marginal enforceability.

Respectfully submitted,

MICHAEL J. HOOVER
Administrative Director
on Professional Conduct
Lawyers Professional Responsibility Board
300 Mid-Continent Building
372 St. Peter Street
St. Paul, Minnesota 55102
(612) 296-3952

Dated: October 18, 1979

(42)

STATE OF MINNESOTA

IN SUPREME COURT

NUMBER 46994

In the Matter of the Petition of
Minnesota State Bar Association,
a Minnesota Non-Profit corporation
for adoption of Amendment to
Canon 2 of the Minnesota Code
of Professional Responsibility.

MSBA SUPPLEMENTAL STATEMENT

At the hearing held before this Court on October 4, 1979 on the Petition of MSBA to amend Canon 2 of the Minnesota Code of Professional Responsibility, Petitioner asked for and was granted leave by this Court to file with the Court a supplemental statement as to the legal issues raised by the objectors to the Petition, Mr. Kirwin, Mr. Murrin and Mr. Hoover. The issues on which the MSBA feels additional comments are necessary are direct mail solicitation, trade name and description of practice.

DIRECT MAIL SOLICITATION

MSBA contends that a distinction should be made between direct mail solicitation and direct mail advertising. As to the latter, MSBA would not object to amendments to the Lawyer's Code of Professional Responsibility which would permit direct mail advertising. The distinction, MSBA contends, lies in the degree of specificity contained in the written communication. Advertising, as permitted by DR2-101 pursuant to the decision of the United States Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2nd, 810, 97 S. Ct. 2691 (1977), does not ask any particular person to do business with the lawyer making the statement. The very nature of advertising is that it is a public statement. MSBA takes the position that certain types of direct mail could not be constitutionally distinguished from other forms of "print media" advertising. It is contemplated that such direct mail

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advertising would not be directed to specific individuals but would be mailed to all members of a particular class and which would contain statements, general in nature, concerning a lawyer's availability in certain types of matters, perhaps a recitation of his experience, a statement of his fees, and the like, much like what is now being carried on in newspaper advertising by lawyers in this state and elsewhere.

In Kentucky Bar Association v. Stuart, Ky., 568 S.W. 2nd, 933 (1978) the Bar Association sought to discipline attorneys who sent letters to real estate agencies on their law office stationery advising the agencies that the law firm handled all aspects of legal work concerning real estate transactions, and would set forth, in specific amounts, their fees for particular aspects of such legal work. The Kentucky Court held that the letters did not constitute "in person solicitation" but rather constituted advertising and as such was constitutionally protected commercial speech. MSBA would agree with the conclusion reached by the Kentucky Court in that case that such communciations are advertising rather than solicitation.

The conduct which the MSBA contends should continue to be prohibited is the type of conduct which the United States Supreme Court condemned in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L. Ed. 2d, 444, 98 S. Ct. 1912 (1978) whether it is done in person or by direct mail. The Court in Ohralik makes clear the power of courts to regulate the practice of law even though such regulations may involve restrictions on First Amendment rights and privileges. Thus the Court said (56 L. Ed. 2d, 444 at p. 453):

> "Expression concerning purely commerical transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,'*** we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech.*** We have not discarded the 'common-sense' distinction between speech proposing a

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commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *** To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Moreover, 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed'*** Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, ***, corporate proxy statements, *** the exchange of price and production information among competitors, *** and employers' threats of retaliation for the labor activities of employees, ***. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public, whenever speech is a component of that activity. Neither Virginia Pharmacy nor Bates purported to cast doubt on the permissibility of these kinds of commercial regulation.

In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in Bates and Virginia Pharmacy, it lowers the level of appropriate judicial scrutiny."

The Court goes on to recite the evils inherent in solicitation and the interest of the state in preventing those evils by regulation: (56 L. Ed. 2d, 444 at p. 457):

"The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and missrepresentation. The American Bar Association, as amicus curiae, defends the rule against solicitation

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> primarily on three broad grounds: It is said that the prohibitions embodied in DR 2-103(A) and 2-104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.
>
> We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed 'compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'. *** We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest."

The question before this Court is whether or not direct mail solicitation has inherent in it the same or similar dangers to in-person solicitation. In contending that it does, MSBA concedes that there are situations, like those present in In Re Primus, 436 U.S. 412, 56 L. Ed. 2d, 417, 98 S. Ct. 1893 (1978) in which the solicitation of employment is not for pecuniary gain. The position of the MSBA on direct mail solicitation is limited to those situations in which a lawyer solicits the business for his own pecuniary gain. MSBA contends that in such situations, the dangers inherent in in-person solicitation are essentially present and that the State has a compelling interest in preventing such dangers through regulation. It should be noted, that in Ohralik it was argued that even though the State has an interest in prohibiting the "vexatious" conduct, that it would be necessary to prove that the evils feared actually existed before the lawyer could be disciplined. The Court rejected that argument and held that the State had a sufficient, compelling interest in preventing the evils of solicitation to justify total prohibition.

Without continued prohibition of direct mail solicitation, we would have situations like the following:

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Dear Mrs. Jones:

I recently read in the newspaper of your husband's unfortunate death in an airplane crash.

I am a lawyer, practicing in Minneapolis with extensive experience in all types of personal injury litigation including litigation arising from airplane crashes.

I wish to advise you, that in recent years, families of persons who died in airplane crashes have received many awards of substantial sums resulting from litigation against the airplane manufacturer, distributor, and others associated with the airplane or its operation.

One thing you may not be aware of is that successful airplane crash litigation frequently depends on early investigation and development of the case. If this is not done, your rights, which may be to a substantial amount of money, may be lost forever because the evidence simply might disappear and not be available.

I urge you, at your earliest opportunity, to contact me so that we might discuss what your rights are and determine whether or not I might be of assistance to you in obtaining a damage award which, in some way, would compensate you for your loss.

Thank you.

Very truly yours,

Not having heard from Mrs. Jones, the lawyer then, if the rule were amended as Mr. Kirwin suggests, would be free to write as many follow up letters as he chose. Similarly, any other lawyer licensed to practice in this state, would be permitted to solicit, through the mails, Mrs. Jones' potential action arising out of the airplane crash. Because of the extremely lucrative nature of this type of litigation, it is conceivable that Mrs. Jones might receive one thousand or more such solicitations. The "invasion of her privacy" and the "vexatious" nature of these communications is obvious. MSBA submits that the state has a compelling interest in preventing these aspects of solicitation, and that to do so would not be violative of the First Amendment.

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TRADE NAMES

In response to Mr. Murrin's impassioned plea for ending the prohibition against trade names by lawyers, MSBA would ask the Court to continue the matter for a period not to exceed one year during which time MSBA would continue to study the entire subject of trade names and would report back to this Court within that period with a recommendation.

Initially, it was felt by the MSBA Advertising by Lawyers Committee that the prohibition against trade names might not be constitutionally permissible. However, the decision of the United States Supreme Court in Friedman v. Rogers, 59 L. Ed. 2d 100, 99 S. Ct. ____ (1979) held that the Texas law against optometry practice under a trade name did not violate either the First or Fourteenth Amendments. The Court said (59 L. Ed. 2d 100 at p. 109-110):

> "In both Virginia Pharmacy and Bates, we were careful to emphasize that 'some forms of commercial speech regulation are surely permissible' *** For example, restrictions on the time, place or manner of expression are permissible provided that 'they are imposed without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing, they leave open ample alternative channels for communication of the information."
>
> "***Because it relates to a particular product or service, commerical speech is more objective, hence more verifiable, than other varieties of speech. Commercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation. These attributes, the Court concluded, indicate that it is 'appropriate to require that a commerical message appear in such a form as is necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints."

The Court went on to distinguish a trade name from the speech permitted in Virginia Pharmacy and Bates as follows: (59 L. Ed. 2d, 100 at p. 111):

> " A trade name is, however, a significantly different form of commercial speech from that considered in Virginia

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> Pharmacy and Bates. In those cases, the State had proscribed advertising by pharmacists and lawyers that contained statements about the products or services offered and their prices. These statements were self-contained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the service offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public."
>
> "The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. By using different trade names at shops under his common ownership, an optometrist can give the public the false impression of competition among the shops. The use of a trade name also facilitates the advertising essential to large-scale commercial practices with numerous branch offices, conduct the State rationally may wish to discourage while not prohibiting commercial optometrical practice altogether."

Clearly, the decision in Friedman relieves this Court from the constitutional pressure to eliminate the prohibition now contained in DR2-102(B). Whether or not the Court may wish to end that prohibition because it would be a "good thing" as Mr. Murrin argues, is quite a different question. The MSBA Advertising By Lawyers Committee did not specifically address itself to the concerns expressed by Mr. Murrin in his statement and argument. It would like that opportunity to do so and at the same time to review the current prohibition against lawyers who simply share office space holding themselves out as a law firm. MSBA would be willing to conclude its study and report to this Court no later than one (1) year from now, and ask the Court to continue the current prohibition against the use of trade names until the matter can be considered further by the organized Bar

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and then reconsidered by this Court.

DESCRIPTION OF PRACTICE

The MSBA position on DR2-105 relating to a lawyer's description of his practice, was essentially developed by David C. Brink, immediate past president of MSBA, and chairman of the ABA Committee on Specialization. The response to the arguments of Mr. Kirwin and Mr. Hoover on behalf of the Lawyer's Professional Responsibility Board was essentially formulated by Mr. Brink.

The principal objection raised to the Bar Association proposal on DR2-105 is based on the fact that it contains a list of specific designated categories of law practice. The ABA's Proposals A and B on Lawyer's Advertising both contain the requirement of such a list, without supplying any specific list, and both were subjected to, and passed, rigorous scrutiny on grounds of the First Amendment, the anti-trust laws and FTC Rules by Counsel for the ABA and consumer groups. The present MSBA proposal is derived from Discussion Draft II developed after Bates and after ABA Proposals A and B, by the ABA Standing Committee on Specialization. Throughout the hearings, open discussions and written comments on Discussion Draft II from Courts, lawyers, consumerists and other informed spokesman for the public, it was generally conceded that Discussion Draft II had cured any lingering doubts as to whether ABA Proposals A and B had satisfied constitutional, anti-trust and FTC objections. This conclusion was reached because Discussion Draft II proposed definite and comprehensive categories of law practice and because it introduced flexibility with regard to those categories contained in ABA Proposals A and B.

Flexibility in a lawyer's use of the categories was added by Discussion Draft II and the present Bar Association Proposal in three ways. First, new categories of law practice can be added whenever needed. Second, lawyers are permitted to add qualifiers

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to explain or limit their advertising of their general field of practice. Third, whenever existing categories do not adequately describe a lawyer's individual practice, the lawyer may, without violation of the rule, use appropriate words to describe his or her actual practice. These elements of flexibility clearly meet constitutional and other requirements.

The Bar Association believes that the arguments made by Kirwin and Hoover ignore the interest of the public and the bulk of lawyers and focus on making the job of enforcement easier. We strongly suspect that it is easier to gauge whether a lawyer actually practices in the standard field than to determine case-by-case whether the varying descriptions lawyers have to create for themselves may not be false or misleading as relating to that lawyer's practice.

The real purpose of DR2-105 as proposed by MSBA is to assist the public in finding an appropriate lawyer. That clearly was the touchstone of the analysis in Bates. An incidental benefit to lawyers is that description of the usual fields is made easy and lawyers are less likely inadvertently to mislead the public by describing the standard practice in what appears to be a unique way.

Because of the provisions for flexibility, the essence of MSBA's proposal on DR2-105 is to encourage lawyers to use standard categories without harming any lawyers engaged in a non-standard practice When standard categories fit, a number of benefits are conferred on the public and the profession.

First, a process of public education is begun by which standard names for the common fields of law practice become instantly recognizable to the public. These ultimately should gain much more recognition-value than the more difficult names of medical diseases, remedies and specialties, which, notwithstanding the language difficulties of Latin and Greek routes or the use of names of famous physicians and common medical terms, are already commonly recognized

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by the public. Leaving every lawyer to describe his or her own practice in his or her own way defeats the present opportunity of our profession to establish at least an equal degree of recognition and standardization.

Second, the use of standard names makes possible listing of lawyers by kinds of practice in yellow pages, official legal directories or directories published by organizations devoted to labor, a trade or business or consumer interests. If all lawyers who in fact offer a similar service and background devise their own differing names, no such listing is possible, and the public loses that opportunity to find, compare and choose a lawyer on the basis of otherwise meaningful criteria such as fees, location, language or availability. Even individual lawyer's ads become hard to compare and evaluate.

Third, because there are actually basic standard kinds of legal service and practice, the opportunity for willful or accidental misleading of the public is greatly increased when unique descriptions of that practice are used in lawyer advertising. The public is assisted when what is common to the practice of many lawyers is emphasized rather than what appears to be different. Language used to describe a lawyer's practice intentionally or unintentionally may make it appear that that lawyer uniquely is qualified to serve the needs of the individual client, when in fact, many lawyers can do so. Whether the objectors now perceive it, we think the unique description of standard services raises more problems for persons charged with the enforcement of the disciplinary rules under the "false, or misleading" test than does the question whether a lawyer in fact engages in a well-understood field of practice identified by a standard name.

It has been suggested that the necessarily vague and subjective "false and misleading" tests offer the Board of Professional

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Responsibility more protection because, if the argument is reduced to its essence, no one can suggest that the Board made a mistake since no one is sure what the test means as applies to the facts of a given case. That puts the emphasis on cases involving comparatively few violators and on the convenience of the Board and its Directors. It ignores the interest of the great mass of lawyers who would prefer to know they are doing the right thing, who can read rules and understand them, and who, if they have a more objective test to follow, will never be summoned before the Board.

We submit that MSBA proposals on DR2-105 serves a much greater utility to the public and to the great mass of the well intentioned lawyers to justify it despite somewhat greater length and surface complexity.

Respectfully submitted,

Peter J. Schmitz
Chairman
MSBA Advertising by Lawyers Committee
111 East Fourth Street
P.O. Box 237
Northfield, Minnesota 55057
Telephone: (507) 645-9541
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(41)

TO: SUPREME COURT OF THE STATE OF MINNESOTA

FROM: JOHN O. MURRIN
MURRIN METROPOLITAN LEGAL CLINIC

RE: CODE OF PROFESSIONAL RESPONSIBILITY PROPOSED RULE CHANGES

SOURCE: CALIFORNIA BUSINESS AND PROFESSIONAL CODE §6076 et seq.
AS AMENDED JANUARY 1, 1979

October 3, 1979

DR 2-101 Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public "communication" whether it be in the form of an announcement, notice, advertisement, trade name, letterhead or other means, which shall:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstnaces under which they are made, not misleading to the public; or

(4) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

DR 2-102 Professional Notices, Letterheads, Offices and Law Lists

A lawyer or law firm shall not be prohibited from issuing a public communication in the form of an announcement, notice, advertisement, trade name, letterhead, professional card, office sign, telephone directly listing or in any other form as long as it is not inconsistent with this code of professional responsibility and DR 2-101.

DR 2-105 Description of Practice

(A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or any combination of those terms, in any public communication. A lawyer engaged in the trademark practice may use the designation "Trademarks", "Trademark Attorney", or "Trademark Lawyer", or any combination of those terms in any public communication; and a lawyer engaged in the admiralty practice may use the designation "Admiralty", "Proctor in Admiralty", or "Admiralty Lawyer", or any combination of those terms in any public communication.

(2) A lawyer who is recognized under a certification, self-designation or other regulated plan of specialization in a particular field of law or law practice by the Minnesota Supreme Court or anybody to which it may delegate its authority from time to time, may hold himself out as such, but only in accordance with such plan; law firms may disclose publicly only such recognition of individual members.

(49) 46994

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OF COUNSEL
THOMAS VENNUM
DENNIS M. MATHISEN

September 20, 1979

The Honorable Robert J. Sheran
Chief Justice
Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

Dear Chief Justice Sheran:

I have received a copy of the letter sent to you by Dick Klein dated September 18, 1979, and on behalf of the Board of Law Examiners.

We anticipate that a specific proposal concerning the matter of reexamination for disciplined lawyers will be considered by the Lawyers Professional Responsibility Board at its next meeting on October 26, 1979. Following that, and assuming affirmative action by our Board, we would expect to submit to the Court proposed amendments to the Rules dealing with this matter.

Sincerely,

Gerald E. Magnuson

GEM:crg
cc: Mr. Michael J. Hoover
Mr. Robert Henson

RICHARD E. KLEIN
DIRECTOR OF BAR ADMISSIONS

STATE OF MINNESOTA
STATE BOARD OF LAW EXAMINERS
200A MINNESOTA STATE BANK BUILDING
200 SOUTH ROBERT STREET
ST. PAUL, MINNESOTA 55107 • TELEPHONE (612) 222-2050

September 18, 1979

Honorable Robert J. Sheran
The Supreme Court of Minnesota
State Capitol Building
St. Paul, Minnesota 55155

Dear Chief Justice Sheran:

The Board of Law Examiners held a joint meeting with Messrs. Gerald E. Magnuson and Mr. Robert Henson of the Board of Professional Responsibility regarding the proposal that disbarred attorneys must be re-examined before being returned to practice and that disciplined attorneys should pass the examination on the Code of Professional Responsibility.

At the conclusion of the discussion, the Board of Law Examiners adopted the following resolution:

> "That the Board of Law Examiners endorses the proposal of the Board of Professional Responsibility requiring re-examination for admission to the bar of disbarred attorneys and examination on the Code of Professional Responsibility of disciplined attorneys; and further that the Board of Law Examiners will provide whatever assistance may be necessary in such matters in order to accomplish the desired results."

I was instructed by the Board of Law Examiners to inform you of this action so that it might be taken into consideration at the time you and the other members of the Court vote on a proposed amendment to the Code of Professional Responsibility.

Sincerely,

R E Klein

Richard E. Klein
Director

REK:gk
CC: Gerald E. Magnuson
Robert Henson

(36)

John O. Murrin III
Robert M. McClay
Joseph M. Hoffman
Thomas E. Johnson

Murrin Metropolitan Legal Clinic

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September 26, 1979

Supreme Court
State of Minnesota
State Capitol Complex
St. Paul, MN

46994

Attn: John McCarthy

Dear Sir:

Please reserve a time for me to speak before the Supreme Court on the amended Code of Professional Responsibility as it relates to attorney advertising and use of trade names by attorneys.

Please contact me regarding any other arrangements I will need to know about to address the Court.

Very truly yours,

John O Murrin

John O. Murrin

JOM/jh

STATE OF MINNESOTA

IN SUPREME COURT

46994

HEARING ON AMENDMENTS
TO MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY

STATEMENT OF KENNETH F. KIRWIN

A. RECOMMENDATIONS

For the reasons hereinafter stated, it is respectfully recommended that:

1. DR 2-101(A) should be retained in its present form, rather than changed as recommended by the Minnesota State Bar Association ("MSBA").

2. DR 2-101(B) should be retained in its present form, as recommended by the MSBA.

3. DR 2-102 should be amended as recommended by the MSBA.

4. DR 2-103(F)(2) should be amended to provide:

"(2) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics."

5. DR 2-103 should be amended by adding a provision specifying:

"(G) The provisions of DR 2-103 shall not apply to a public communication or written communication, or to employment resulting therefrom, if the communication contains no statement or claim prohibited under DR 2-101."

6. DR 2-104(B)(3) should be deleted and DR 2-104(B)(4) renumbered as DR 2-104(B)(3).[1]

7. DR 2-104 (B)(5) should be deleted.

8. DR 2-104(C), (D), (F) and (G) should be deleted and DR 2-104 (E) and (H) renumbered as DR 2-104(C) and (D).

9. DR 2-105 should be amended as recommended by the Minnesota Lawyers Professional Responsibility Board, rather than as recommended by the MSBA, to read in its entirety as follows:

"DR 2-105 DESCRIPTION OF PRACTICE

"(A) A Lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firm's practice or in indicating its nature or limitations.

"(B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so."

---

[1] If for some reason DR 2-104(B)(3) is not deleted, DR 2-104 should be amended by adding a provision specifying:

"(G) The provisions of DR 2-104 shall not apply to a public communication or written communication, or to employment resulting therefrom, if the communication contains no statement or claim prohibited under DR 2-101."

B. DISCUSSION

1. DR 2-101(A) should be retained in its present form.

The Court should adhere to its approach of a year and a half ago,[2] of declining to add further limitations in DR 2-101.

Experience during the last year and a half[3] has not shown the necessity for adding prohibitions on statements "laudatory, or comparative in nature, about a lawyer" or "intended or likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions."

Furthermore, such prohibitions would be unconstitutionally vague and overbroad.[4] Their language is unconstitutionally vague, violating Due Process as well as the First Amendment, in not adequately notifying those to be regulated as to exactly what is prohibited--persons "of common intelligence must necessarily guess as to its meaning and differ as to its application."[5]

---

[2]The Court declined to include, inter alia, Proposal A's words "laudatory" and "unfair," see Proposal A's DR 2-101(A), or Proposal C's prohibition on a statement that "contains laudatory statements about a lawyer" or "is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions," see Proposal C's DR 2-101(B)(3), (8).

[3]The United States Supreme Court has indicated the importance in commercial speech regulation that the state's concerns be "not speculative or hypothetical, but . . . based on experience." Friedman v. Rogers, 99 S.Ct. 887, 896 (1979). See id. at 897 (state's interest "well-demonstrated").

[4]The fact that the United States Supreme Court has restricted standing to assert overbreadth in litigation regarding commercial speech, see Bates v. State Bar, 433 U.S. 350, 380-81 (1977), does not justify countenancing unconstitutional vagueness or overbreadth at the drafting stage.

[5]Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961).

Each prohibition fairly bristles with unconstitutionally vague terms--"laudatory," "comparative," "primarily," "fears," "greed," "desires for revenge," "similar emotions." And the prohibitions would be unconstitutionally overbroad as not narrowly tailored to attaining the interest in preventing false, deceptive or misleading claims, which is the only government interest the United States Supreme Court has recognized as sufficiently compelling to support restriction of lawyer advertising.[6]

2. DR 2-101(B) should be retained in its present form.

The MSBA is correct in recommending that DR 2-101(B) be retained in its present form, adopted by the Court in 1978.

3. DR 2-102 should be amended as recommended by the MSBA.

The MSBA's proposed amendment of DR 2-102 seems appropriate as making DR 2-102 consistent with the policy evinced by this Court's 1978 amendment of DR 2-101, except that there is some reason to doubt the propriety of continuing DR 2-102(B)'s flat ban on trade names.[7]

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[6] See Bates v. State Bar, 433 U.S. 350, 368-79, 383 (1977). It should be noted that the Bates Court specifically upheld the right to use the words, "Legal Services at Very Reasonable Fees." This hardly squares with the MSBA's proposed prohibition on statements "comparative in nature, about a lawyer." Moreover, such a prohibition seems highly anticompetitive in nature. See FTC Policy Statement, 48 U.S.L.W. 2136 (August 13, 1979), stating "The use of truthful comparative advertising should not be restrained by . . . self-regulation entities," and "Comparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions."

[7] The MSBA Advertising by Lawyers Committee had proposed omitting the ban on use of trade names, see First Committee Draft (January 1979), until the United States Supreme Court held in Friedman v. Rogers, 99 S.Ct. 887 (1979) that Texas could prohibit the practice of optometry under a trade name. Minnesota lawyers' ability to practice under trade names would not seem to pose all the dangers specified in Friedman, see id. at 895-96, which the Court emphasized were "not speculative or hypothetical, but . . . based on experience," see id. at 896.

An alternative would be to replace DR 2-101(B)'s first sentence with the following:

> "A lawyer in private practice shall not practice under a name that is false, fraudulent, misleading or deceptive, or a firm name containing names of persons other than those of one or more lawyers in the firm, except that, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

4. DR 2-103(F)(2) on public speaking and writing should be amended.

DR 2-103(F)(2) should be amended to include only its opening language, "Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics," and to delete the remaining language, "so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice." The concluding language is plainly in conflict with the First Amendment.

5. DR 2-103 should be amended to except written communication.

DR 2-103 should be amended by adding a provision specifying:

> "(G) The provisions of DR 2-103 shall not apply to a public communication or written communication, or to employment resulting therefrom, if the communication contains no statement or claim prohibited under DR 2-101."

The effect of this would be to allow a lawyer to recommend the lawyer's own employment or to accept employment resulting from the lawyer's unsolicited advice to obtain counsel or take legal action if the recommendation or advice is by written communication.[8]

Several jurisdictions already take this approach,[9] some members

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[8] Specifying that these things may be done by "public communication" merely makes explicit what is clearly implicit in DR 2-101 as amended by this Court in 1978. Compare Proposal A's DR 2-103(A) ("not except as authorized in DR 2-101(B), recommend" own employment), 2-104 (not accept employment resulting from "in-person unsolicited advice").

[9] See, e.g., In re Madsen, 68 Ill. 2d 472, 370 N.E.2d 199 (1977) (no discipline for mailing 2,090 clients a communication entitled "Tips from your Lawyer for 1973" advising on many topics and indicating types of services the lawyer's firm could provide); Kentucky Bar Ass'n. v. Stuart, 568 S.W.2d 933 (Ky. 1978) (no discipline for mailing letters to real estate agencies stating prices for routine real estate legal services and guaranteeing how promptly services would be performed); N.Y. State B.A. Opinion No. 507 (March 30, 1979), 47 U.S.L.W. 2657, N.Y.L.J., April 9, 1979, at 28 col. 1 (lawyer may mail 2,000 corporate executives announcement of availability for legal work on corporate matters). But see Allison v. Louisiana State Bar Ass'n., 362 So. 2d 489 (La. 1978) (no injunction against disciplining lawyers for sending letters to employers soliciting formation of prepaid legal service arrangements under which lawyers would serve). Cf. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978) (injunction against associates who in person, by phone, and by mail told clients on whose cases they had worked that the clients could--using enclosed forms--discharge the law firm and retain a new firm the associates were forming).

Several jurisdictions go further than the recommendation herein by allowing some in-person solicitation. Action News, vol. 4, no. 6 (June 1979) reports that the District of Columbia has allowed solicitation since 1978 and that on May 1, 1979, Maine adopted the following Rule:

> "3.9(f) Recommendation or Solicitation of Employment
>
> "(1) A lawyer shall not solicit employment on behalf of himself or any lawyer affiliated with him through any form of personal contact:
>
> "(i) By using any statement, claim, or device that would violate this rule if part of a public communication;

of the MSBA's Advertising by Lawyers Committee supported it,[10] and the MSBA's Proposal A last year was consistent with it as to accepting employment resulting from unsolicited advice to obtain counsel or to take legal action.[11]

But the most important reason for this approach is that it appears compelled by the United States Supreme Court's interpretation of the First Amendment. In Ohralik v. Ohio State Bar,[12] the Court held that the First Amendment permits a state to discipline a lawyer for solicitation that is "in person, for pecuniary gain, and under circumstances likely to pose dangers"[13] the state has an "important"[14] interest in preventing, such as overreaching and undue

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"(ii) By using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or engaging in deceptive, vexatious, or harassing conduct; or

"(iii) When the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited. Without limitation, such circumstances will be deemed to exist as to the person solicited if he is in the custody of a law enforcement agency or under treatment in a hospital, convalescent facility, or nursing home, or if his mental faculties are impaired in any way or for any reason. Notwithstanding the foregoing, such circumstances shall be deemed not to exist when a lawyer is discussing employment with any person who has, without solicitation by the lawyer or anyone acting for him, sought the lawyer's advice regarding employment of a lawyer."

Similarly, Rule 10.2 of the ABA Rules of Professional Conduct (Unofficial Tentative Draft 1979), Legal Times of Washington, Aug. 27, 1979, p. 26, provides:

"10.2 Solicitation

"A lawyer shall not solicit employment:

"(a) By any means involving coercion, duress, or vexatious or harrassing conduct; or

"(b) By any personal contact initiated by a lawyer, or a person acting on behalf of the lawyer, with a lay person with whom the lawyer does not have an established client-lawyer relationship and who is in custody of a law enforcement agency or under treatment in a hospital, convalescent home, or nursing home; or

"(c) By a lay person who has made known a desire not to receive communications from the lawyer."

[10] See MSBA Advertising by Lawyers Committee's Report prefacing MSBA's current recommendations (lack of Committee consensus on direct mail solicitation).

[11] Proposal A's DR 2-104 only forbids accepting employment resulting from "in-person" unsolicited advice. It will be noted that this would apparently allow telephone communication as well as written communication. As indicated in footnote 16, infra, it seems that obtaining employment by unsolicited telephone advice should be prohibited.

[12] 98 S. Ct. 1912 (1978).

[13] Id. at 1915.

[14] Id. at 1922.

influence, invasion of individual privacy, or the lawyer's professional judgment being clouded by his own pecuniary self-interest.[15]

Written communications, as a class, are not likely to pose dangers of the magnitude the United States Supreme Court requires to justify restriction of commercial speech. The recipient is not subject to the psychological intimidation that will often accompany in-person physical presence. Nor is individual privacy substantially invaded when the recipient's personal pursuits are not interrupted by the communication and when any unwanted communication may be conveniently tossed into a waste basket.[16]

In In re Primus,[17] one of the factors the United States Supreme Court emphasized in holding that a state could not discipline a lawyer for offering legal assistance to a nonlawyer was that the offer was by letter.[18] The Court noted that "Unlike the situation in Ohralik . . . appellant's act of solicitation took the form of a letter" rather than "in-person solicitation,"[19] and said:

> "The transmittal of this letter--as contrasted with in-person solicitation--involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend rules of professional conduct."[20]

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[15] Id. at 1921-22.

[16] It seems that use of the telephone to recommend employment or give unsolicited advice resulting in employment is distinguishable and should continue to be prohibited because of the substantial invasion of individual privacy involved.

[17] 98 S.Ct. 1893 (1978).

[18] Id. at 1899. The other factors were that the legal assistance was free, the legal assistance was provided by a nonprofit organization, and the lawyer was seeking to further political and ideological goals through associational activity. Id. at 1899-1900.

[19] Id. at 1899.

[20] Id. at 1906-07. See Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175, 1187-88 (1978) (Manderino, J., dissenting) (distinction between written communications and "the ambulance-chasing tactics used by the lawyer in Ohralik").

6. DR 2-104(B)(3) should be deleted.

DR 2-104(B)(3) should be deleted and DR 2-104(B)(4) renumbered as DR 2-104(B)(3).

DR 2-104(B)(3) currently provides that a lawyer may knowingly render legal services to a member or beneficiary of an organization that employes, pays for, or recommends him or anyone associated with him to render the services only if:

> "(3) He has not, and he does not know and it is not obvious that anyone associated with him has, except with respect to a legal service arrangement initiated, sponsored, or operated by a bar association:
> "(a) Requested or compensated any person to recommend or secure, or compensated any person for having recommended or secured the initiation of the organization or its legal service arrangement;
> "(b) Participated in the initiation of the organization or its legal service arrangement, other than by rendering, at the unsolicited request of those wishing to form it, legal services incident to its formation;
> "(c) Recommended, or requested another to recommend or secure, the organization's employment, payment, or recommendation of himself or any lawyer associated with him, when the organization had not sought advice regarding its employment, payment, or recommendation of a lawyer, unless the recommendation was for employment by the organization on a full-time basis; or
> "(d) Compensated any person to recommend or secure or for having recommended or secured the organization's employment, payment, or recommendation of himself or any other lawyer associated with him."

Communications with an organization providing for legal services for others, as opposed to communications with the intended recipient of the legal services, are not, as a class, likely to pose dangers of the magnitude the United States Supreme Court requires[21] to justify restriction of commercial speech.[22] They are not likely to

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[21] See Ohralik v. Ohio State Bar, 98 S.Ct. 1912, 1921-22 (1978).

[22] See In re Jaques, 281 N.W.2d 469 (Mich. 1979)(no discipline for requesting union official to recommend lawyer to injured workers). But see Allison v. Louisiana State Bar Ass'n., 362 So. 2d 489 (La. 1978) (no injunction against disciplining lawyers for sending letters to employers soliciting formation of prepaid legal service plans under which the lawyers would serve employees).

pose substantial dangers of such harms as overreaching, undue influence, or invasion of individual privacy. Therefore, DR 2-104 (B)(3)'s restrictions on such communications should be deleted.[23]

7. DR 2-104(B)(5) should be deleted.

DR 2-104 (B)(5) should be deleted. It specifies that a lawyer may knowingly render legal services to a member or beneficiary of an organization that employs, pays for, or recommends him or anyone associated with him to render the services only if:

> "(5) Any member of beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief."

This provision was adopted in 1975 against the recommendations of the Supreme Court Study Committee on Prepaid Legal Services.[24] A revision of the Canon 2's Disciplinary Rules on manner of obtaining employment should include deletion of this provision.

8. DR 2-104(C),(D),(F) and (G) should be deleted.

DR 2-104(C), (D), (F) and (G) should be deleted and DR 2-104(E) and (H) renumbered as DR 2-104(C) and (D).

DR 2-104(C) and (D) provide

> "(C) A lawyer shall not render legal services under DR 2-104(B) if he knows or it is obvious that the organization is organized for profit or, irrespective of its legal structure, is in fact operated for profit, and that the employment, payment, or recommendation is pursuant to a regular practice of providing for legal services to others, unless the services are provided for:
> "(1) As an employment fringe benefit, directly or through insurance;"

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[23] If for some reason DR 2-104(B)(3) is not deleted, for the reasons stated in Part 5 hereof, supra, DR 2-104 should be amended by adding a provision specifying:

> "(G) The provisions of DR 2-104 shall not apply to a public communication or written communication, or to employment resulting therefrom, if the communication contains no statement or claim prohibited under DR 2-101."

[24] See Kirwin, Explanation of Supreme Court Study Committee on Prepaid Legal Services Recommendations, 31 Bench & Bar of Minn. 13, 14-15 (April 1975).

"(2) Through insurance used in connection with an employee organization's arrangement to provide for legal services to its members or their beneficiaries;
"(3) Incident to a liability insurance policy; or
"(4) Through an insurance policy under which the insurer does not employ or recommend the lawyer but only pays for the rendering of legal services by any lawyer the member or beneficiary may select.

"(D) A sole proprietor providing for legal services as an employment fringe benefit is deemed an "organization" for purposes of this Rule."

The reason for deleting these two provisions is well stated in the Comment to Rule 8.4(a) of the ABA Rules of Professional Conduct (Unofficial Tentative Draft 1979)[25] as follows:

> "Non-lawyer ownership in a firm or corporation employing lawyers can result in exploitation of the lawyer's services, with consequent adverse effect on their quality. If a lawyer is compensated at a reasonable rate and is protected against interference in matters of professional judgment, however, the form of organization is essentially a question of efficiency and convenience.
>
> "Thus, subject to these conditions, a legal services agency may employ lawyers to represent clients and insurance companies may directly employ lawyers to represent their insured as well as retaining lawyers in independent practice for that purpose."

DR 2-104(F) provides:

"(F) A lawyer selected by an organization to render legal services to a member or beneficiary thereof shall not accept employment from the member or beneficiary to render legal services other than those for which the organization selected him if he knows or it is obvious that it results from unsolicited advice by him or any lawyer associated with him that the member or beneficiary should obtain counsel or take legal action."

This provision was adopted in 1975 despite the opposition of

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[25] Rule 8.4(a) of the draft provides:

" A lawyer may be employed to render legal services by an organization in which a non-lawyer owns an interest if reasonable compensation is paid for the lawyer's services and if there is no interference with the lawyer's independence of professional judgment."

the MSBA.[26] It was a questionable restriction on the manner of obtaining employment at the time it was adopted,[27] and it is indefensible now that the United States Supreme Court has indicated the magnitude of state interest needed to justify restrictions on expression used to obtain legal employment.[28]

DR 2-104(G) provides:

> "(G) Notwithstanding any Disciplinary Rule, a lawyer who renders legal services or who has been requested by an organization to be available to render legal services, under DR 2-104(A) or (B) may, without affecting the right to accept employment:
>
> "(1) Authorize, permit, or assist the organization to use a public communication or commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal service activities.
> "(2) Participate in activities conducted or sponsored by the organization and designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services, so long as he does not emphasize his own professional experience and does not undertake to give individual advice.
> "(3) Except as to an organization under DR 2-104(C)(4), authorize, permit or assist limited and dignified identification of himself as a lawyer and by name, along with the biographical information permitted under DR 2-102 (A)(6), in communications by the organization directed to its members or beneficiaries."

This provision should be deleted because it is superfluous in light of this Court's 1978 amendment of DR 2-101.

9. DR 2-105 should be amended as recommended by the LPRB.

Rather than being amended as recommended by the MSBA,[29] DR 2-105

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[26] See Delivery of Legal Services Committee, Action Report, 31 Bench & Bar of Minn. 21 (May-June 1975).

[27] It tends to put the client covered by prepaid or group legal services in a second-class position by reducing the likelihood of being treated (as clients generally should be treated) as a person rather than as a narrow legal problem. DR 2-103(F)(1) permits lawyers to accept employment resulting from unsolicited advice to clients generally.

[28] See Ohralik v Ohio State Bar, 98 S.Ct. 1912, 1921-22 (1978).

[29] The MSBA's proposal is quite similar to its proposal which this court declined to adopt a year and a half ago. See Proposal A's DR 2-105.

should be amended as recommended by the Minnesota Lawyers Professional Responsibility Board,[30] to read in its entirety as follows:

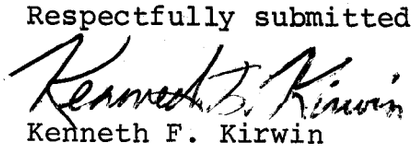
> "DR 2-105 DESCRIPTION OF PRACTICE
> "(A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firm's practice or in indicating its nature or limitations.
> "(B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so."

The motion adopted by the Lawyers Professional Responsibility Board "provided that the Supreme Court be clearly advised that the reason for the Board's opposition to DR 2-105 as proposed by the Bar Association was its concern that administration and enforcement would be difficult, if not impossible."[31]

C. CONCLUSION

For the foregoing reasons, it is respectfully submitted this Court should amend the Minnesota Code of Professional Responsibility as recommended herein.

Respectfully submitted,



September 25, 1979

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[30] See Minutes of Thirty-Second Meeting of Lawyers Professional Responsibility Board, p. 4 (April 27, 1979).

[31] Id.

APPENDIX

ABA RULES OF PROFESSIONAL CONDUCT
(Unofficial Tentative Draft 1979)
Legal Times of Washington, Aug. 27, 1979, p. 26)

PROVISIONS REGARDING ADVERTISING AND SOLICITATION

10.1 Advertising

(a) A communication about a lawyer's services shall not contain any false, fraudulent, or misleading statement.

(1) A "communication" includes oral statement, mail, professional announcement, telephone directory, legal directory, professional card, newspaper, magazine, radio, television, and any other form of communication.

(2) A communication is false, fraudulent, or misleading if it:

(i) Contains a material misrepresentation of fact or law, omits a fact necessary to make the statement considered as a whole not misleading, or is intended or is likely to create unjustified expection;

(ii) Includes pictorial representation, such as a television picture, that is false, fraudulent, or misleading;

(iii) States or implies that the lawyer can improperly influence a court, tribunal, or official;

(iv) Except as permitted by section 8.3, states or implies that the lawyer is a specialist; or

(v) States or implies the quality of the lawyer's services as compared with other lawyers' services, unless the comparison can be factually substantiated.

(b) Advertising of legal services may contain any information relevant in a potential client's seeking legal assistance, including:

(1) The lawyer's name, address, and telephone number;

(2) The lawyer's educational and other background and the types of legal matters in which the lawyer will accept employment;

(3) The basis on which the lawyer's fees are determined (including prices for specified services), and payment and credit arrangements;

(4) The lawyer's foreign language ability;

(5) Names of references and, with their consent, names of clients regularly represented;

(6) Other information about the lawyer or the lawyer's practice that a reasonable person might regard as relevant in determining whether to seek the lawyer's services.

(c) If a communication about a lawyer's services is made through public media, such as a newspaper, general mailing, or radio or television, a copy or record of the communication i its entirety shall be kept for one year after its dissemination.

(d) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of a communication permitted by those rules.

Avertising can help lay persons in obtaining legal services, particularly persons who have never before employed a lawyer or who have done so infrequently. Lawyer advertising traditionally was prohibited by rules of professional ethics, but is now substantially protected by the Constitution. See *Bates and Osteen v. State Bar of Arizona*, 433 U.S. 350 (1977).

It is universally recognized, however, that there should be prohibitions on false or misleading advertising. Some jurisdictions have more extensive prohibitions, for example against television advertising, against advertising going beyond a few permitted facts about a lawyer, or against "undignified" advertising. Such restrictions may serve the economic interests of some members of the bar but they do not advance the general public interest. Television is now one of the most powerful media for getting information to the lay public, particularly persons of low and middle income; prohibiting television advertising therefore would impede flow of information about legal services to a substantial sector of the public.

Limiting the information that advertising may contain has a similar effect and assumes that Rules of Professional Conduct can accurately forecast the kind of information that is relevant to the public. A prohibition on "undignified" advertising simply would express a matter of taste. Subsection (b) expressly permits advertising various specific matters of information but also permits any information that a lay person might reasonably regard as relevant.

Record of advertising. A record of the content of advertising should be kept in order to facilitate enforcement of this Section.

Paying others to recommend a lawyer. A lawyer should be allowed to pay for advertising permitted by this Section, for example media charges or the cost of participating in a lawyer referral service. Beyond this, a lawyer should not pay another person for channelling professional work. Thus, paying a person to solicit by personal contact with lay persons is prohibited.

However, this restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid organization or prepaid legal services plan may make expenditures to advertise legal services provided under its auspices.

10.2 Solicitation

A lawyer shall not solicit employment:

(a) By any means involving coercion, duress, or vexatious or harrassing conduct; or

(b) By any personal contact initiated by a lawyer, or a person acting on behalf of the lawyer, with a lay person with whom the lawyer does not have an established client-lawyer relationship and who is in custody of a law enforcement agency or under treatment in a hospital, convalescent home, or nursing home; or

(c) By a lay person who has made known a desire not to receive communications from the lawyer.

Personal solicitation by a lawyer or someone on his behalf is subject to regulation under the decisions in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978). As those decisions recognize, personal solicitation can entail risk of overreaching, particularly if the solicitation follows upon an event that is traumatic to the lay person.

At the same time, it is legitimate for a lawyer to obtain professional employment as a consequence of personal acquaintance or encounter with a person who has not previously been a client. This Section therefore prohibits personal solicitation that is overreaching or which occurs in circumstances in which the risk of overreaching is very high, as where the client is in jail or hospitalized. It also prohibits a lawyer from soliciting professional work from a person who has previously indicated to the lawyer that the lawyer's services are not wanted.

10.3 Designation of specialization

A lawyer shall not hold himself out as a specialist, except as follows:

(a) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "patents," "patent attorney," "trademark lawyer," or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty," "admiralty lawyer," or a substantially similar designation;

(c) A lawyer whose practice is limited to an area or field of law may indicate that fact as follows: (applicable provisions on designation of specialization).

Regulations regarding specialization vary from one jurisdiction to another and likely will continue to do so for some time. The Rules of Professional Conduct do not contain such regulations but assume their incorporation in this Section.

References: DR 2-105; EC 2-14.

10.4 Firm names and letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates section 8.1.

(b) A list of a firm's members or associates in a firm name, letterhead, or other professional designation containing the firm's address shall indicate any lawyers not admitted in the jurisdiction in which that address is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a firm, or in advertising on its behalf, during any significant period in which the lawyer is not actively and regularly practicing with the firm.

A firm's name should not be misleading. The use of a trade name is not prohibited if it conforms to this standard. In particular, it is permissible to use in a firm name the names of former members of the firm as long as no confusion results as to the identity of the firm.

References: DR 2-102 (B); EC 2-11 through 2-13.

(37)

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 46994

HEARING ON AMENDMENTS TO
MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY

STATEMENT OF MICHAEL J. HOOVER
ADMINISTRATIVE DIRECTOR ON
PROFESSIONAL CONDUCT, IN BEHALF
OF THE LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

INTRODUCTION

The Court has directed, by its Order dated August 14, 1979, that interested persons file written statements setting forth their objections to the Petition for Amendments to the Minnesota Code of Professional Responsibility. In response to the Court's Order, and at the request of Mr. Gerald E. Magnuson, Chairman of the Lawyers Professional Responsibility Board, the undersigned submits this statement, outlining the Board's position concerning the pending Amendments.

RECOMMENDATIONS

At its April 27, 1979, meeting, the Lawyers Professional Responsibility Board considered the proposed Amendments. Mr. Peter Schmitz, Chairman of the Minnesota State Bar Association Advertising by Lawyers Committee, was present to outline the proposed Amendments and to answer questions concerning them.

With the single exception hereinafter outlined, the Board voted to take no official position concerning the proposed Amendments. In so acting, the Board anticipated that individual members of the Board and its staff could and would argue their personal views concerning the proposed Amendments at the hearing thereon.

Although the Board took no official position with respect to the bulk of the proposed Amendmemts, it did recommend the adoption of the following DR 2-105, instead of the version proposed by the Bar Association:

"DR 2-105 DESCRIPTION OF PRACTICE

"(A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his firm's practice or in indicating its nature or limitations.

"(B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so."

The motion adopted by the Board provided that the Court be clearly advised that the Board's opposition to the Bar Association's version of DR 2-105 was its concern that the administration and enforcement of the proposed rule would be difficult, if not impossible.

The Board's proposed DR 2-105 is patterned after DR 2-101 (A) and (B), as promulgated by the Court in April, 1978. It is believed that the prohibition of false, fraudulent, misleading, or deceptive statements, claims, or designations, in describing one's practice, is not only workable, but highly preferable to the Bar Association's attempt to categorize areas of practice. The Bar Association's attempt to authorize the areas of practice which might be listed by attorneys in public communications is difficult, if not impossible, to enforce. Such difficulties are only heightened by the exemption contained in the Bar Association's DR 2-105(A)(2), for "minor departures" from the labels "if necessary, in a good faith effort to describe their practices accurately". It may also be noted that while the Board's proposed DR 2-105 is patterned after the current DR 2-101, the Bar Association's proposed DR 2-105 is similar to a proposed rule which this Court has previously declined to adopt.

CONCLUSION

With respect to the bulk of the Amendments proposed by the Bar Association, the Lawyers Professional Responsibility Board takes no official position. The Court is, however, urged

to adopt the Lawyers Professional Responsibility Board's version of DR 2-105, rather than that submitted by the Minnesota State Bar Association.

Respectfully submitted,

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