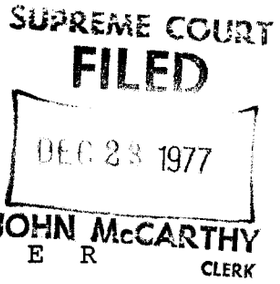
STATE OF MINNESOTA

IN SUPREME COURT



O R D E R

HEARING ON AMENDMENTS
TO MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY
No. 46994

WHEREAS the Minnesota State Bar Association has extensively considered the issues relating to lawyer advertising, and

WHEREAS, the Minnesota State Bar Association has petitioned this court to amend the Minnesota Code of Professional Responsibility to allow for lawyer advertising in a manner substantially in accord with Proposal A developed by a Task Force of the American Bar Association and approved by the A. B. A. House of Delegates in August, 1977 with modifications approved by the Minnesota State Bar Association on November 19, 1977, and

WHEREAS the proposed amendments would alter current practices and substantially change the Minnesota Code of Professional Responsibility which specifies the manner and extent to which lawyers may advertise,

IT IS HEREBY ORDERED that a hearing on the petition of the Minnesota State Bar Association to amend the Minnesota Code of Professional Responsibility provisions relative to lawyer advertising be held before this court in the Supreme Court, State Capitol Building, St. Paul, Minnesota, on Monday, February 6, 1978 at 3:00 P.M.

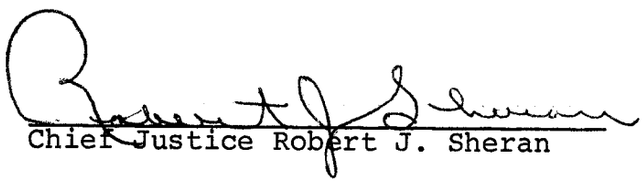
IT IS FURTHER ORDERED that true and correct copies of the proposed amendments be made available upon request to persons who have registered their names with the Clerk of the Supreme Court for the purpose of receiving such copies and who have paid a fee of $9.00 to defray the expense of providing the 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 the publication of this order once in the Supreme Court edition of Finance & Commerce and the St. Paul Legal Ledger.

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 to be heard shall file a written statement setting forth their objections to the Petition and shall notify the Clerk of the Supreme Court, in writing, on or before Tuesday, January 31, 1978, of their desire to be heard on the proposed amendments.

Dated: December 22, 1977

BY THE COURT



Chief Justice Robert J. Sheran

HENSON & EFRON
PROFESSIONAL ASSOCIATION
LAWYERS
1200 TITLE INSURANCE BUILDING
MINNEAPOLIS, MINNESOTA 55401

ROBERT F. HENSON
STANLEY EFRON
WELLINGTON W. TULLY, JR.
LESLIE H. KITTLER
RICHARD B. SOLUM
JOSEPH T. DIXON, JR.
ALAN C. EIDSNESS
WILLIAM F. FORSYTH
STUART T. WILLIAMS
PETER H. HITCH
DAVID F. FISHER

AREA CODE 612
339-2500

February 1, 1978

Mr. David R. Brink
President-Elect
Minnesota State Bar Association
Dorsey, Windhorst, Hannaford,
Whitney & Halladay
Attorneys at Law
2300 First National Bank Bldg.
Minneapolis, Minnesota 55402

Dear Mr. Brink:

Acting for the Executive Committee of the Minnesota State Bar Association, you submitted to me as Chairman of the now disbanded Supreme Court Study Committee on Prepaid Legal Services the proposal of MSBA to amend certain provisions of the Code of Professional Responsibility respecting lawyer advertising for the purpose of getting my views on the revisions being suggested by MSBA in the changes adopted by the Supreme Court on the recommendations of my Committee.

The Supreme Court Study Committee on Prepaid Legal Services recommended certain changes in disciplinary rules which differed from the proposal adopted by the ABA House of Delegates on the recommendation of its Prepaid Legal Services Committee. Although there was modest substance to the differences when the Supreme Court largely adopted our recommendations, the Bates case has made the differences meaningless.

I have discussed the amendments MSBA proposed with Mr. Ken Kirwin, the consultant to the Supreme Court Study Committee on Prepaid Legal Services, and he agrees with my conclusion that in the interest of uniformity the ABA Prepaid Legal Services version as presented in the proposal of MSBA to the Supreme Court of Minnesota is appropriate for adoption by the Court.

Very truly yours,

Robert F. Henson

Robert F. Henson

RFH/jt

NO. 46994

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of Petition of Minnesota State Bar Association, a Minnesota nonprofit Corporation, for Adoption of an Amendment to Canon 2 of the Minnesota Code of Professional Responsibility	PETITIONER'S PROPOSED AMENDMENTS TO MINNESOTA PROPOSAL A

Petitioner, Minnesota State Bar Association ("MSBA"), proposes the following amendments to Minnesota Proposal A, being Exhibit 1 attached to MSBA's Petition dated December 9, 1977, and further alleges:

1. MSBA, by action of its Executive Committee subsequent to execution of said Petition, proposes that DR 2-105(A)(2) as it appears in Exhibit 1 be amended to read as follows:

"DR 2-105 (A)

(2) A lawyer who (or a law firm which) publicly discloses fields of law in which the lawyer (or the law firm) practices or publicly states that he (or it) does not practice in one or more fields of law shall do so by using the following designated fields of law, plus any others duly authorized and approved by this Court or any body to which it may delegate its authority from time to time:

Administrative Agency Matters
Admiralty
Antitrust and Trade Regulations
Appeals

Banking Law
Civil (Non-Criminal) Trial
Civil Rights and Discrimination
Claims Against Government
Constitutional Law
Consumer Claims and Protection
Corporate and Business Law
Corporate Finance and Securities
Criminal and Traffic Charges
Debtor-Creditor and Bankruptcy
Education
Entertainment and Sports
Environmental Law
Divorce, Adoption and Family Matters
General Practice
Health Care and Mental Health
Immigration and Customs
Insurance
International and Foreign Law
Labor Law
Legislation and Legislative Appearances
Military Law
Municipal and Local Government Law and Finance
Natural Resources
Patent, Trademark and Copyright
Pension, Profit Sharing and Employee Benefits
Personal Injury and Property Damage
Public Utility Matters
Real Estate
Taxation
Transportation
Wills, Estates and Estate Planning
Workers Compensation

A lawyer who (or a law firm which) does not practice in all aspects of any one of such designated fields of law or does not wish to state that he (or it) so practices shall state the designated field, but shall use brief, appropriate and accurate words of limitation or qualification immediately following the title of the designated field of law, which, if written, shall be in parentheses or otherwise clearly shall qualify the title used. The primary purpose of requiring use of such designated fields is to assist the public in finding and comparing lawyers who practice in the same fields and to make statements as to their fields of practice readily comprehensible

by the public, and, therefore, minor departures from such use by lawyers if necessary in a good-faith effort to describe their practices accurately are not infractions of this section."

This proposal follows action recently taken by the ABA Standing Committee on Specialization on the motion of David R. Brink, a member of the Committee, that will be submitted to the states for consideration and to the ABA House of Delegates for approval. In the opinion of Petitioner this proposal, while preserving the advantages of the original provision, will:

a. Describe the fields of law practice in a more complete and comprehensible manner.

b. Permit more accurate qualification of a lawyer's actual field of practice.

c. Authorize departures from the list of fields of practice when necessary to permit accurate description.

2. MSBA proposes that existing DR 2-103(E), which is shown in Exhibit 1 as deleted, instead be retained without cancellation or change. This section was erroneously shown as deleted in the retyping of Exhibit 1.

Wherefore, Petitioner respectfully requests this Court to amend Canon 2 of the Minnesota Code of Professional Responsibility in accordance with Exhibit 1 as modified by the proposals made herein.

February 4, 1978

MINNESOTA STATE BAR ASSOCIATION
a Minnesota Non-Profit Corporation

by Members of its Executive Committee:

Kelton Sage

David A. Beard

NO. 46994

STATE OF MINNESOTA
In Supreme Court

In the matter of Petition of Minnesota State Bar Association a Minnesota nonprofit corporation for the Adoption of an Amendment to Cannon 2 of the Minnesota Code of Professional Responsibility	))))))	HEARINGS ON AMENDMENTS TO MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

OBJECTIONS TO PETITION TO AMEND CODE OF PROFESSIONAL RESPONSIBILITY

Steven I. Winer
Pro Se
360 Wabasha Street
Suite 500
St. Paul, Minnesota 55102

Stewart C. Loper
Pro Se
360 Wabasha Street
Suite 500
St. Paul, Minnesota 55102

I. STATEMENT OF THE CASE AND ITS FACTS.

The signers herein are attorneys licensed to practice law in the State of Minnesota. They make this objection to a portion of the proposed amendments to the Code of Professional Responsibility, specifically the portions dealing with tradename - Ethical Consideration 2-11, and Disciplinary Rule 2-102 (B), stating as follows:

> EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of tradename or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.
>
> 2-102(B) A Lawyer in private shall not practice under a tradename, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and 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. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notice of the firm.

II. REPRESENTATIONS AND RECOMMENDATIONS

EC 2-11 and Disciplinary Rule which accompanies it is founded on the assumption that the use of a tradename or assumed name in the practice of law is, by itself, misleading to the general public. While the concern expressed in this ethical consideration and disciplinary rule that lawyers be easily identifiable by the public is valid, it seems clear that the allowance of the use of a trade or assumed name by lawyers would not materially change the identifiability of the individuals practicing in association with one another.

As the current and proposed rules stand, lawyers are not required to give the full and correct names of the lawyers practicing together in the name of the firm, hence the practice of conducting the law business under a tradename is condoned today. For example a firm made up of individual lawyers named Johnson, Olson, and Peterson* and several associates is permitted to hold itself out under the name and style of Johnson and Peterson* without identifying the other members and associates of the firm. Under these circumstances, the public is not able to identify attorney Olson, for example, from the firm name.

As another example, the rules apparently allow a firm to continue to use the name Smith & Jones*, even though both Smith and Jones have been dead for several years. There are prominent Minnesota law firms practicing under similar names, with many individual partners and associates, none of whom can be identified as being part of the firm by looking at the name of the firm alone.

As a third example, look at the prominent Minnesota law firm,

for the purposes of this argument we'll call Able and Baker. here is a firm comprising nearly a hundred lawyers with offices in various other cities and countries. While Able is a Member of the Minnesota Bar duly admitted to practice in this state, Baker is the parner in charge of the branch offices, and is not admitted to practice in Minnesota. In this case, not only can the general public not identify the members of the firm by looking at the firm name, they cannot readily ascertain that Baker isn't even qualified to practice in this state, and they may be mislead.

The point of these examples is only to demonstrate that under the current rules the general public may be mislead as to the identity of persons practicing law in association. The mere fact that a fictious tradename is not permitted does not prevent deception, nor does it really prevent the practice of law under a tradename.

The ethical considerations of the medical profession permit the use of tradenames (ie. Internists, Ltd.). The public has no greater right to know the actual names of attorneys in practice together than it does to know the names of doctors who are associated in the practice of medicine.

In point of fact, a procedure to register names, with an annual filing, could be established similar to the one now required for professional corporations. Such annual statement could provide for the listing of the full, correct and complete names of persons assiciated with the firm, and would provide a source of information as to the identies of persons associated with particular law firms.

III. CONCLUSION AND PRAYER

The signers below respectfully submit that a ruling on the ethical considerations and disciplinary rule cited herein should be deferred until such time as hearings can be held on the matter and further input obtained from the practicing community and the public.

Steven I. Winer Pro Se
360 Wabasha Street
St. Paul, Minnesota 55102
(612-298-1950

Stewart C. Loper Pro Se
360 Wabasha Street
St. Paul, Minnesota 55102
(612)-298-1950

* The names of lawfirms signed herein are strictly fictional.

#84 (1978)
JAN
RECEIVED
Chief Justice
Sup. Ct.

LEVANDER, ZIMPFER, BUEGLER & ZOTALEY
A PROFESSIONAL ASSOCIATION
LAWYERS
720 NORTHSTAR CENTER (CARGILL BUILDING)
625 MARQUETTE AVENUE
MINNEAPOLIS, MINNESOTA 55402

BERNHARD W. LEVANDER
BERNARD G. ZIMPFER
PAUL W. BUEGLER
BYRON L. ZOTALEY
JAMES G. VANDER LINDEN

TELEPHONE (612) 339-6841

Circulate
5

January 31, 1978

The Honorable Chief Justice Robert Sheran
and Members of the Supreme Court
State of Minnesota
Supreme Court Chambers
State Capitol
St. Paul, Minnesota 55101

Re: In the Matter of the Petition of the Minnesota State Bar Association to Amend Minnesota Code of Professional Responsibility Respecting Lawyer Advertising, etc.
No. 46994

Honorable Members of the Court:

The undersigned objects to the petition seeking amendment of the Minnesota Code of Professional Responsibility upon the grounds that the proposal contained in said petition is over-broad and opens the floodgate of advertising and demeans the profession of law. In the opinion of the undersigned, it goes far beyond the provisions of the holding by the Supreme Court of the United States in Bates v. State Bar of Arizona.

I wish to commend to the Court's attention the well-reasoned article found on Pages 54 - 58 of Bench and Bar in the January 1978 issue, prepared by Mr. Melvin Ogurak.

Sincerely yours,

Bernhard W. LeVander

BWL:ch

(25)

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 46994

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

In the Matter of Petition of
Minnesota State Bar Association,
a Minnesota nonprofit Corporation,
for Adoption of an Amendment to
Canon 2 of the Minnesota Code of
Professional Responsibility.

STATEMENT
OF
R. WALTER BACHMAN, JR.

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

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The undersigned hereby states to the Court as follows:

1. The undersigned is Administrative Director on Professional Conduct, appointed by this Court pursuant to the Rules on Lawyers Professional Responsibility.

2. The undersigned submits to this Court for its consideration the following personal views and opinions pertaining to portions of the Petition of the Minnesota State Bar Association to amend Disciplinary Rule 2, Minnesota Code of Professional Responsibility. Such views and positions as are contained herein are personal and do not necessarily reflect the position of the Lawyers Professional Responsibility Board or any of its members.

3. It is submitted that "Minnesota Proposal A on Lawyer Advertising", now being proposed to this Court for consideration by the Minnesota State Bar Association, if adopted by this Court, would require the enforcement of rules which would unduly and unreasonably restrict truthful and fair advertising by Minnesota attorneys. The undersigned believes that certain portions of the proposed Amendments, if approved, would create a cumbersome and overly-technical system for the regulation of public communications

or advertising by Minnesota attorneys.

4. The undersigned respectfully submits that certain features of the pending proposal would cause enforcement difficulties, as follows:

(a) Proposed DR 2-101 contains an all-inclusive list of items which could permissibly be advertised. While a proceeding would be created, under proposed DR 2-102(C), for expansion of items on the all-inclusive list, such a procedure would, in the undersigned's opinion, be cumbersome and unworkable. It is respectfully submitted that any regulation of a subject as complex as advertising for an entire profession cannot be done by means of a list of permitted advertisements, prohibiting all others. Any such system of regulation will, inevitably, give rise to a high incidence of inadvertent and innocent violations by attorneys whose advertisements are otherwise truthful and fair. Such a system of regulation allows insufficient flexibility to this Court and the Lawyers Professional Responsibility Board to determine, on a case-by-case basis, whether a particular advertisement is false, deceptive, misleading, or otherwise improper.

(b) Proposed DR 2-102(A) would continue in effect almost all of the existing restrictions regarding professional cards, announcement cards and notices, professional signs, and attorneys' letterheads. Perpetuation of the old regulations

in these fields, coupled with the expanded permissibility of public advertising, would lead to anomalous results. For example, lawyers would be permitted to advertise on radio and in newspapers, but they would be prohibited from sending most such advertisements to clients in the form of a mailed notice.

(c) Proposed DR 2-105 contains an all-inclusive list of permissible designated fields of practice. It is respectfully submitted that this proposed regulation is fraught with the same problems discussed under paragraph 4(a) above. In these times of specialization by practitioners, no finite list of designated fields of practice will allow full and free disclosure to the public of the fields of practice in which an individual lawyer is engaged.

RECOMMENDATION

The undersigned recommends that this Court adopt the provisions of "Minnesota Proposal C", attached as Exhibit 3 to the Petition herein, in lieu of Minnesota Proposal A, for the following Disciplinary Rules: DR 2-101; DR 2-102(A); and DR 2-105.

Respectfully submitted,

R. WALTER BACHMAN, JR.
Administrative Director
on Professional Conduct
Lawyers Professional Responsibility Board
200 Minnesota State Bank Building
200 South Robert Street
St. Paul, Minnesota 55107
(612) 296-3952

Dated: January 31, 1978.

(24)

WILLIAM MITCHELL
College of Law

ADMINISTRATION

BRUCE W. BURTON
DEAN
MARVIN J. GREEN
ASSISTANT DEAN
CURTIS L. STINE
ASSISTANT DEAN

BOARD OF TRUSTEES

HON. RONALD E. HACHEY,
PRESIDENT AND TREASURER
CYRUS RACHIE
VICE PRESIDENT
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SECRETARY
HON. DOUGLAS K. AMDAHL
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CHARLES R. PIHL
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HON. HYAM SEGELL
LEE H. SLATER
MARCY S. WALLACE
CHARLES H. WILLIAMS, JR.

TRUSTEES EMERITUS

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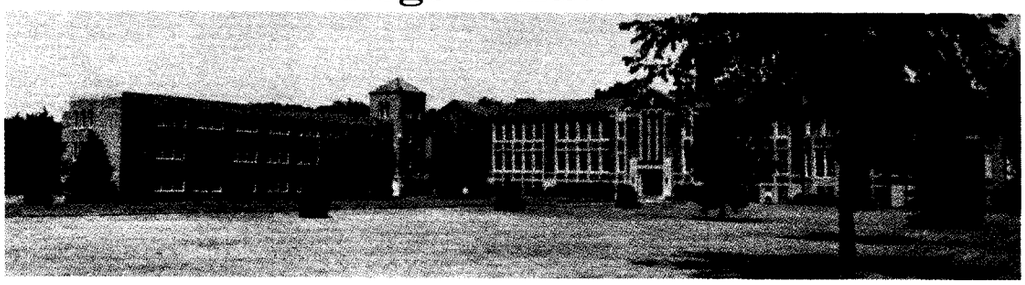
HON. HARRY A. BLACKMUN
HON. WARREN E. BURGER
DONALD R. GRANGAARD
JAMES E. KELLEY
PAUL W. KRAEMER
RUSSELL T. LUND



875 SUMMIT AVENUE □ ST. PAUL, MINNESOTA 55105
TELEPHONE: (612) 227-9171

January 30, 1978

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

RE: Amendments to Minnesota Code of Professional Responsibility
No. 46994

Dear John:

Enclosed please find original and nine copies of "Statement of Objections of Kenneth F. Kirwin, Douglas R. Heidenreich, and Paul Marino," for filing in the above matter.

I would like to be heard orally for five or ten minutes at the hearing on the matter Monday, February 6. Paul Marino would like to be heard for five minutes.

Thank you.

Sincerely,

Kenneth F. Kirwin

KFK/dw
Enclosures
cc. (with enclosure): Minnesota State Bar Association

1-31 -- Copy of statement given to each justice. Copy of cover letter to Sheran, C.J.

STATE OF MINNESOTA

IN SUPREME COURT

AMENDMENTS TO MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY

No. 46994

STATEMENT OF OBJECTIONS OF KENNETH F. KIRWIN, DOUGLAS R. HEIDENREICH & PAUL J. MARINO

I. CERTAIN PROVISIONS IN PROPOSAL A ARE UNCONSTITUTIONAL

A. CONSTITUTIONAL STANDARD

A restriction upon commercial expression is unconstitutional if the restriction is not shown to be necessary to serve a compelling government interest.[1] In Bates v. Arizona State Bar,[2] the United States Supreme Court recognized the prevention of false, deceptive or misleading claims as the only compelling government interest relevant to restriction of lawyer advertising.[3] Accordingly, the controlling constitutional questions as to any proposed restriction on

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[1] See Bates v. Arizona State Bar, 97 S.Ct. 2691 (1977) (prohibiting lawyers' price advertising not justified by interests in maintaining lawyers' professionalism and quality of service or in preventing misleading statements, stirring up litigation, passing on of advertising costs, or enforcement difficulties); Linmark Associates, Inc. v. Willingboro Township, 97 S.Ct. 1614 (1977) (ban on "for sale" and "sold" signs not justified by desire to stem panic selling); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (ban on drug price advertising not justified by interest in maintaining pharmacists' professionalism or quality of service); Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (ban on abortion referral advertising not justified by interest in deterring practices that adversely affect quality of medical care).

[2] 97 S.Ct. 2691 (1977).

[3] See id. at 2708 ("Advertising that is false, deceptive, or misleading of course is subject to restraint"). The Court also said, "Advertising concerning transactions that are themselves illegal obviously may be suppressed," id. at 2709, but that is not relevant to lawyer advertising restrictions. The Court found restriction of lawyer advertising could not be justified as necessary to serve the interest in maintaining lawyers' professionalism, id. at 2701-03, or quality of service, id. at 2706, or in preventing stirring up of litigation, id. at 2705, passing on of advertising costs, id. at 2706, or enforcement difficulties, id. at 2706-07.

lawyer advertising are--

(1) Does the restriction really serve the interest[4] of preventing false, deceptive or misleading claims, and

(2) Is the restriction necessary to serve that interest, in that no less restrictive alternative would serve the interest with reasonable adequacy.[5]

B. PROPOSAL A'S APPROACH OF LISTING WHAT MAY BE SAID

Proposal A's approach of listing what may be said,[6] as opposed to prohibiting what may not,[7] is unconstitutional. It is not necessary to serve the interest of preventing false, deceptive or misleading claims, because the less restrictive prohibitory approach would serve that interest with reasonable adequacy.

Advertising generally is not regulated by the approach of listing what may be said, and lawyers of all people should not be heard to say that they cannot proceed under the same prohibitory approach that regulates other advertisers but need to be told exactly what they may say.

It is obvious that the First Amendment is violated by a provision[8] purporting to determine in effect that there are only 26 things a lawyer ad can say without posing a danger of false, deceptive or misleading claims which cannot be adequately alleviated by any less restrictive alternative.

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[4]Compare id. at 2701 ("we find the postulated connection between advertising and the erosion of true professionalism to be severely strained"); id. at 2705-06 (not proven that advertising costs will result in higher fees).

[5]Compare id. at 2703-04 (prohibiting price advertising not necessary to prevent misleading claims); id. at 2706 ("Restraints on advertising . . . are an ineffective way of deterring shoddy work").

[6]See Proposal A's DR 2-101(B) and (H), 2-102(A), and 2-105.

[7]See Recommendations 1, 6, and 11 in Part II hereof, infra.

[8]Proposal A's DR 2-101(B).

The same is true of the provision[9] specifying only 31 ways in which one may describe his practice. This would preclude lawyers practicing only in such areas as appeals, bankruptcy, aircraft litigation, zoning or countless others from accurately describing their practices. Oftentimes it would be use of one of the 31 designations (rather than one better tailored to the lawyer's actual practice) that would be "false, deceptive or misleading."

The listing approach's invalidity is further underscored by the fact that although the Bates Court took pains to indicate modes of lawyer advertising regulation that might possibly pass constitutional muster,[10] nowhere in its opinion did it provide the least modicum of direct or indirect support for the proposition that the listing approach might be a constitutionally legitimate response to Bates.

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[9]Proposal A's DR 2-105.

[10]"Advertising that is false, deceptive, or misleading of course is subject to restraint. . . . [B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services--a matter we do not address today--are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation. We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

"As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. . . . Advertising concerning transactions that are themselves illegal obviously may be suppressed. . . . And the special problems of advertising on the electronic broadcast media will warrant special consideration. . . ."

Bates v. Arizona State Bar, 97 S.Ct. 2691, 2708-09 (1977). (Footnote omitted.)

"The bar. . .retains the power to define the services that must be included in an advertising package, such as an uncontested divorce, thereby standardizing the 'product.'"

Id. at 2703 n. 28.

C. TELEVISION ADS

Proposal A's prohibiting televised lawyer advertisements[11] appears unconstitutional.[12] It is not necessary to serve the interest of preventing false, deceptive or misleading claims, especially in light of the less restrictive alternative of requiring retention of a recording.[13]

This restriction is not supported by the "scarce resource" justification urged in support of some broadcast restrictions (e.g., the fairness doctrine).[14]

Television is the principal source of information for many persons. Precluding it as a medium of lawyer advertising does not seem constitutionally defensible.

D. OVERBROAD PROVISIONS

Proposal A includes the following provisions that appear unconstitutionally vague or overbroad in not being narrowly tailored to attaining the interest of preventing false, deceptive or misleading claims:

(1) DR 2-101(A)'s prohibition of "laudatory or unfair" statements or claims;

---

[11] See Proposal A's DR 2-101(B) (introductory portion).

[12] The Bates Court's only discussion of this issue was to note that "the special problems of advertising on the electronic broadcast media will warrant special consideration," citing, "Cf. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (DC 1971), aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972)." Bates v. Arizona State Bar, 97 S.Ct. 2691, 2709 (1977). Requiring retention of a recording seems to adequately respond to the "special problems."

[13] See Proposal A's DR 2-101(D). See also Recommendation 2 in Part II hereof, infra.

[14] See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

(2) DR 2-102(B)'s prohibition on practicing under a trade name; and

(3) DR 2-102(E)'s restriction on dual practice.[15]

E. RECOMMENDING EMPLOYMENT; SUGGESTING NEED OF SERVICES

Proposal A's provisions on recommending employment[16] and suggesting need of legal services[17] may very well be unconstitutional. The Bates Court's only discussion was to say:

> "[A]dvertising claims as to the quality of services--a matter we do not address today--are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation."[18]

It is hard to believe that Proposal A's flat prohibitions upon recommending one's employment and (with a few exceptions) upon accepting employment from a nonlawyer to whom one has given unsolicited legal advice can pass Freedom of Speech muster any more than the flat ban on lawyer advertising could pass Freedom of Press muster. Rather, it is likely that such restrictions must more narrowly focus upon evils like "false, fraudulent, misleading or deceptive" statements or claims or "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct."[19]

The United States Supreme Court has noted probable jurisdiction in and set for argument two cases which may provide further light on this area.[20]

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[15]This restriction has been severely criticized for years, long before the advent of Bates. See Goldberg, Dual Practice of Law and Accountancy: A Lawyer's Paradox, 1966 Duke L.J. 117; Mintz, Accountancy and Law: Should Dual Practice be Proscribed? 53 A.B.A.J. 225 (1967); Wilson, The Attorney-C.P.A. and the Dual Practice Problem, 36 U. Det. L.J. 457 (1959).

[16]DR 2-103(A).

[17]DR 2-104.

[18]Bates v. Arizona State Bar, 97 S.Ct. 2691, 2709 (1977).

[19]See Recommendations 9 and 10 in Part II hereof, infra.

[20]Ohralik v. Ohio State Bar Ass'n, 98 S.Ct. 49 (1977); (noting probable jurisdiction); In re Smith, 98 S.Ct. 49 (1977) (same).

II. PROPOSAL A SHOULD BE CHANGED TO RENDER IT CONSTITUTIONAL

To render it constitutional, Proposal A should be adopted only with the following changes, which incorporate the best features of both Proposal A and Proposal C:

1. Change DR 2-101(A), (B) and (C) to specify:

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 containing a false, fraudulent, misleading or deceptive statement or claim.[21]

(B) A "public communication" as used herein includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, book, law list or legal directory.[22]

(C) A false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:

(1) Contains a misrepresentation of fact;

(2) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

(3) Is intended or is likely to create false or unjustified expections of favorable results;

(4) Conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(5) Is intended or likely to result in a legal action or legal position being taken or asserted merely to harass or maliciously injure another; or

(6) Contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived.[23]

2. In DR 2-101(D), add "or television" after "radio."[24]

3. In DR 2-101(F), omit "authorized under DR 2-101(B)" from each of the three sentences.[25]

4. In DR 2-101(G), omit "authorized under DR 2-101(B)."[26]

---

[21]This omits the words "laudatory" and "unfair."

[22]This is the second sentence of Proposal C's DR 2-101(A).

[23]This sets forth clauses (1), (2), (4), (6), (7) and (9) of Proposal C's DR 2-101(B).

[24]This accords with Proposal C's DR 2-101(D).

[25]This conforms the provision to the proposal in Recommendation 1. Proposal C has no comparable provision.

[26]See footnote 5.

5. Omit DR 2-101(H)[27] and renumber DR 2-101(I) as DR 2-101(H).

6. Change DR 2-102(A) to specify:

DR 2-102. PROFESSIONAL NOTICES, LETTERHEADS AND OFFICES
(A) A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead or similar professional notice or device containing a false, fraudulent, misleading or deceptive statement or claim.[28]

7. In DR 2-102(B), omit "a trade name" from first sentence.[29]

8. Omit DR 2-102(E) and renumber DR 2-102(F) as DR 2-102(E).[30]

9. Change DR 2-103 to specify:

DR 2-103. RECOMMENDATION OF PROFESSIONAL EMPLOYMENT
(A) A lawyer shall not recommend, or request or assist another person to recommend, employment of himself or anyone associated with him if the recommendation involves the use of:
  (1) A false, fraudulent, misleading or deceptive statement or claim; or
  (2) Coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.[31]
(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure, or as a reward for having recommended or secured, employment by a client of himself or any lawyer associated with him, except that he may pay for publicity or advertising permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.[32]
(C) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.[33]

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[27]This accords with Proposal C's DR 2-101.

[28]This is rather similar to Proposal C's DR 2-102.

[29]This is rather similar to Proposal C's DR 2-102(B).

[30]This accords with Proposal C's DR 2-102.

[31]This is similar to the manner in which Proposal C's DR 2-104(A) addresses the related matter of suggestion of need of legal services.

[32]This is similar to Proposal C's DR 2-103(C).

[33]This is current DR 2-103(E). Proposal A's omission of this is probably inadvertent.

10. Change DR 2-104 to specify:

DR 2-104. SUGGESTION OF NEED OF LEGAL SERVICES
(A) A lawyer who has given unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice if the advice involves the use of:
(1) A false, fraudulent, misleading or deceptive statement or claim; or
(2) Coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.[34]

11. Change DR 2-105 to specify:

DR 2-105. DESCRIPTION OF PRACTICE
(A) A lawyer shall not use a false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firm's practice or in indicating its nature or limitations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Proposal A should be adopted only with the changes enumerated in Part II above.

Respectfully submitted,

January 30, 1978

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---

[34]This is similar to Proposal C's DR 2-104.

(23)

Cullen Law Firm

James P. Cullen, J.D.
Attorney at Law

SUITE 1300
SOO LINE BUILDING
MINNEAPOLIS, MINN. 55402
(612) 338-8656

January 24, 1978

Honorable Members of the
Minnesota Supreme Court
State Capitol
St. Paul, Minnesota

Attention: John McCarthy, Clerk of Supreme Court

Re: Amendments to Code of Professional Responsibility
46994
arg. 2-6-78 #84

Gentlemen of the Court:

I wish to call your attention to proposed DR2-105(A)(2) and what appears to be an inadvertent omission.

Since my departure from all teaching responsibilities at the University of Minnesota Law School, I have tended to specialize in several areas of law, one of which is Immigration and Naturalization. This is a highly complex area of practice and one that not many attorneys willingly choose to engage in - I happen to find it somewhat challenging and rewarding.

I believe "Immigration and Naturalization" should be an "authorized" field of practice within DR2-105 (A)(2) and under the present proposal it is not. It is neither separately listed nor is it a sub-part of a topic listed. I cannot believe that it was intentionally left off the list - rather its absence is more reflective of the fact that few attorneys practice in this field and one of the reasons for this is the complexity of the statutes and regulations extant on this subject.

Please give this matter your due consideration. Thank you.

Very truly yours,

James P. Cullen

JPC:hp

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STATE OF MINNESOTA

IN SUPREME COURT
File # 46994

IN THE MATTER OF The Petition of Minnesota State Bar Association, etc., for amendment to Canon Two of the Minnesota Code of Professional Responsibility.

OBJECTION TO AMENDMENT AS PROPOSED

* * * * * * * * * * * * * * * * *

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Respondent, member of Petitioner Association duly admitted and licensed to practice in all courts in the State of Minnesota, objects and opposes the Amendment proposed by the Petition on file in specific respect, and for the reason, hereinafter stated:

1. Proposed disciplinary rule DR2-101(B)(22) reads as follows:

> "Contingent fee rate subject to DR 2-106(c), provided that the statement discloses whether percentages are computed before or after deduction of costs;" (emphasis added)

2. Computation of contingent fee by formula applied to a recovery after costs or other expenses are deducted violates existing Canon 5, specifically ethical consideration EC 5-8 and disciplinary rule DR 5-103(B). These provisions preclude lawyers from acquisition of interests in pending litigation they are handling as counsel by agreement to bear costs or expenses incurred to prosecute it. They emphasize that ultimate responsibility for such costs and expenses must remain with the client and cannot be assumed by the lawyer. The wording of the proposed amendment underscored implies otherwise. It thereby conflicts with existing provisions of Canon 5.

3. The present rule embodied in Canon 5 is desirable and should be continued without implied limitation or amendment by the revision of Canon 2 proposed. Therefore, the underscored portion of proposed DR 2-101(B)(22) should be deleted.

4. If, nevertheless, it is decided to adopt the proposed amended rule, the apparent conflict between the underscored portion of the proposed rule and existing provisions of Canon 5 should be eliminated by further appropriate amendment.

5. Objector does not oppose any other provision of the proposed amendment of Rule 2.

6. Objector rests on his written statement of objection. Oral argument is not requested.

January 7, 1978

Noah S. Rosenbloom

Noah S. Rosenbloom, New Ulm, Mn. 56073

DISTRIBUTION:
Original - John McCarthy, Clerk of Supreme Court
Copies: F. Kelton Gage, President, Minnesota State Bar Association
Judges, Fifth Judicial District/File

OGURAK LAW OFFICES

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TELEPHONE (612) 339-2731

January 5, 1978

Clerk of the Supreme Court
230 State Capitol
St. Paul, MN 55155

46994

Re: Hearing on Amendments to Minnesota Code of Professional Responsibility, Monday, February 6, at 3 p.m.

Dear Clerk:

It is my desire to be heard on the proposed amendments to Minnesota Code of Professional Responsibility on Monday, February 6, 1978, at 3 p.m.

I object to the Petition to amend the Minnesota Code of Professional Responsibility to allow the lawyer advertising manner substantially in accord with Proposal A because it does not conform with the decision of the United States Supreme Court handed down on June 27, 1977, entitled Bates v State Bar of Arizona 97 S. Ct. 2691 (1977). My objections are outlined in the attached article.

Very truly yours,

OGURAK LAW OFFICES

Melvin Ogurak

MO/ts

Enclosure

1-6 -- copy given to all Justices

On June 27, 1977, the United States Supreme Court handed down its landmark decision in the case of Bates v State Bar of Arizona, 97 S. Ct. 2691 (1977). This decision lifts the traditional ban imposed upon lawyers' advertising; however, it does not allow unrestricted use of advertisements by attorneys.

On November 19, 1977, the Board of Governors of the Minnesota State Bar Association voted to recommend Proposal A to the Minnesota Supreme Court. Proposal A would modify the provisions of the Code of Professional Responsibility relative to lawyers' advertising in order to implement the mandates of the Bates decision. Proposal A is reprinted in the December, 1977, issue of Bench and Bar of Minnesota.

In order to allow the members of the Minnesota State Bar Association a ready comparison between the content of Proposal A and the Bates decision, a review of the Bates decision and a comparison to Proposal A follows.

In February of 1976, in order to publicize their "legal clinic" in Phoenix, Bates and O'Steen placed an advertisement (a copy of which is appended hereto) in a popular Arizona newspaper in which they listed routine legal services which their clinic would undertake and the related fees. The ad also stated "information regarding other types of cases furnished on request." The Arizona State Bar found the advertisement to be in violation of their Disciplinary Rule as adopted by the Supreme Court of Arizona, and the Arizona Supreme Court

upheld the State Bar's ruling.

At issue were two questions regarding the constitutionality of the ban on lawyer advertisement. First, does such a ban violate the Sherman Act; and second, does such a ban infringe Appellant's First Amendment rights to free speech?

The United States Supreme Court found that restraint on lawyer advertising does not violate the provisions of the Sherman Act, but that such a restraint did, indeed, infringe upon the Appellant's First Amendment rights.

The Court's First Amendment analysis can be briefly summarized as follows:

First, commercial speech is entitled to some First Amendment protection since commercial speech "serves individual and societal interests in assuring informed and reliable decision making." Bates at 2699. (For a detailed discussion of commercial free speech see Virginia Board of Pharmacy Board v Virginia Consumer Council, 425 US 748, 96 S. Ct. 1817, 48 L. Ed. 346 (1976)). Second, the justifications offered for the restriction on lawyer advertisments were not sufficiently compelling to allow the First Amendment restraint imposed by the disciplinary rule.

Pursuing their First Amendment analysis, the Court was quick to point out that the issue before them was a narrow one. The Court specifically declined to address the issue of advertising claims relating to either the quality of legal services or in-person solicitation. The Court also noted that Appellee's criticism of advertising does not apply with much force to basic factual content

of advertising such as name, address, etc. (See Bates at 2700) "The heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed." Bates at 2701.

A detailed examination of the various justifications offered for restricting lawyer advertisements was then undertaken. First, lawyers would undermine professionalism and the dignity of the legal profession. Such a claim failed to recognize that virtually all clients recognize that lawyers must charge for their services. Also, the Code of Professional Responsibility itself suggests that discussions as to fees should be undertaken "as soon as feasible after a lawyer has been employed." Bates at 2701. Moreover, the Court found other professionals such as bankers and engineers advertise without an apparent adverse effect on the dignity of their professions. The Court stated, "Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for advertising restraint has crumbled." Bates at 2703.

The Court then addressed what was perhaps the strongest argument in favor of restrictions on price advertisements; that such advertisements are inherently misleading. The Court found that so long as the price advertisements were limited to routine services there was no great danger of misleading the public.

> "Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like--the very services advertised by Appellants." Bates at 2703.

The Court next dealt with the claim that lawyer price advertising may have a detrimental effect on the administration of justice. They noted that lawyer price advertising may actually have a beneficial effect on the administration of justice by offering greater access to the Bar. (See Bates at 2704-5).

The Court next found that, far from having an undesirable economic effect on the cost of legal services, "It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer." Bates at 2706.

Similarly, the Court reasoned that it is dubious to assume that price advertising would adversely effect the quality of legal services since "An attorney who is inclined to cut quality will do so regardless of the rule on advertising." Bates at 2706.

Possible difficulties of enforcing rules allowing advertising were not deemed a significant concern since "We suspect that, with advertising, most lawyers will behave as they always have; they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system." Bates at 2707.

The Court's finding of the inapplicability of the First Amendment overbreadth doctrine to professional advertising is omitted for present purposes.

Finally, the Court addressed the question of whether the specific terms of the advertisement in question were misleading. For if they were, the ad would not deserve First Amendment protection, despite what the Court had held up to that point in the opinion. The Court had very little trouble finding that the terms "legal clinic" and "very reasonable" prices were reasonably accurate and within the

meanings commonly ascribed to them by the public. Also, merely because the ad failed to disclose that a name change could be obtained without an attorney's aid did not make it misleading since, ". . . most legal services may be performed legally be the citizen himself." Bates at 2708.

That the Court had little difficulty in finding that the specific terms used in the advertisement at issue were not misleading should not be looked upon as an indication that the Court was approving a broad range of language to be used in prospective advertisements. On the contrary, the Court went on to point out that, to avoid misrepresentation, lawyer advertising will be subject to stricter standards than other advertisements, ". . . because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates at 2709.

The Court concluded its opinion by reiterating that their holding was a narrow one: "The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of Appellant's truthful advertisement concerning the availability and terms of routine legal services." Bates at 2709.

Taken as a whole, the Bates decision has a distinctly cautionary tone to it. The Court refused to throw open the door to all forms of legal advertisements and instead limited its holding to newspaper advertisements of routine legal services. Exemplifying "routine legal services" were, ". . . the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of

name, and the like. . ." Bates at 2703.

An item by item comparison of the proposed disciplinary rule regarding lawyer advertising known as "Proposal A" to the standards set forth in Bates shows clearly the large margin by which the proposed changes exceed the scope of the Supreme Court's pronouncements on advertising.

The Bates opinion authorized only newspaper advertisements, while Proposal A allows ads to be run on radio, and by negative implication, in all print media (Proposal A, DR 2-101(B).

The Bates Court found that only "routine services" lend themselves to advertisement, yet Proposal A extends to "fixed fees for specific legal services." (Proposal A, DR 2-101(B)(25). Thus, Proposal A, in effect, allows price advertising of any legal service whatsoever, which is clearly not intended by Bates.

Proposal A, in DR 2-101(B), allows the advertising of: home addresses and phone numbers of attorneys (Sub. 1), date and place of birth (Sub. 2), date and place of admission to Bar of State and Federal Courts (Sub. 4), schools attended, graduation dates, degrees and honors (Sub. 5), public or quasi-public offices (Sub. 6), military service (Sub. 7), legal authorships (Sub. 8), legal teaching positions (Sub. 9), memberships, offices, and committee assignments in Bar Associations (Sub. 10), memberships and offices in legal fraternities and societies (Sub. 11), techinical and professional licenses (Sub. 12), memberships in scientific, techinical, and professional associations and societies (Sub. 13), foreign language ability (Sub. 14), names and addresses of bank references (Sub. 15), names of regular clients

(with written consent) Sub. 16), prepaid or group legal service programs in which the lawyer participates (Sub. 17), whether credit cards or other credit arrangements are accepted (Sub. 18), contingent fee rates (Sub. 22), range of fees for services (Sub. 23), hourly rates (Sub. 24), and the fixed fee for any specific legal service (Sub. 25), none of which are authorized by the Bates opinion or contained in the advertisements which Bates and O'Steen published. Moreover, Proposal A at DR 2-102(C) authorizes the Minnesota Supreme Court to "expand the information authorized for disclosure in DR 2-101(B) or provide for its dissemination through other media or forums," in apparent disregard of the restrictive language of the Bates opinion.

Proposal A at DR 2-101(B)(2) would allow an attorney to list as practicing or not practicing, any of 31 "designated fields of practice." listed in DR 2-105 (A)(2). Again, the Bates Court did not directly address itself to the issue of describing or limiting a law practice; therefore, Proposal A goes beyond the Bates opinion in this respect also.

Although the Court in Bates spoke specifically only of newspaper advertising, it is clear that no meaningful distinction can be drawn between newspapers and other print media such as magazines and handbills. However, as Justices Posell and Stewart state in their opinion concurring in part and dissenting in part, ". . . questions remain open as to time, place, and manner restrictions affecting other media such as radio and television." Bates at 2718 footnote 12.

This article is presented for the sole purpose of informing the members of the Minnesota State Bar Association of the scope of

the Bates decision and its relation to Proposal A, which was recommended to the Minnesota Supreme Court.

A hearing to amend the Minnesota Code of Professional Responsibility provisions relative to Proposal A will be held before the Minnesota Supreme Court on Monday, February 6, 1978, at 3 o'clock p.m. All persons desiring to be heard should file a written statement setting forth their objections to Proposal A and should notify the Clerk of Supreme Court, in writing, on or before January 31, 1978, of their desire to be heard on the proposed amendments.

OGURAK LAW OFFICES

Dated: January 3, 1978

By Melvin Ogurak
Melvin Ogurak
654 Midland Bank Building
Minneapolis, MN 55401

APPENDIX

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

- Divorce or legal separation--uncontested [both spouses sign papers]

  $175 00 plus $20 00 court filing fee

- Preparation of all court papers and instructions on how to do your own simple uncontested divorce.

  $100 00

- Adoption--uncontested severance proceeding

  $225.00 plus approximately $30 00 publication cost

- Bankruptcy--non-business, no contested proceedings

  Individual
  $250.00 plus $55 00 court filing fee

  Wife and Husband
  $300 00 plus $110 00 court filing fee

- Change of Name

  $95.00 plus $20 00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone [602] 252-8888

LAW OFFICES
OF
SCHMITZ AND OPHAUG
111 EAST FOURTH STREET
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PETER J. SCHMITZ
JOHN M. OPHAUG

NORTHFIELD 507-645-9541
TWIN CITIES 612-336-1831

January 31, 1978

Mr. John McCarthy, Clerk
Minnesota Supreme Court
State Capitol Building
St. Paul, MN 55102

Re: MSBA Petition on Advertising
Supreme Court File No. 46994

Dear Mr. McCarthy:

I am the Chairman of the MSBA Committee on the Advertising of Legal Services, and I chaired the MSBA Task Force created to propose amendments to the Minnesota Code of Professional Responsibility on the subject of advertising.

The Task Force reported to the MSBA Board of Governors on November 19, 1977. At that time, a majority (8 of 13) members of the Task Force recommended that the Board of Governors adopt Proposal C which was based on the original ABA Discussion Draft of December 6, 1975. However, the Board of Governors overwhelmingly selected Proposal A and has now petitioned The Court for its adoption. It is my understanding that Proposal C was also filed with the Court as an additional exhibit to the MSBA's petition.

I am enclosing written objections to the MSBA petition, and I request an opportunity to be heard on the proposed amendments at the hearing to be held on Monday, February 6, 1978 at 3:00 P.M.

I should underline that my appearance before the Court will be on an individual basis and will be in conformity with the By-Laws of the Minnesota State Bar Association that prohibit a member from taking a public position on behalf of the Bar Association which would be contrary to policy of the Association established by the Board of Governors.

Would you please place this letter and my objections in the

file, and advise me of any special scheduling procedures that may be applicable to the hearing on February 6?

Thank you.

Very truly yours,

SCHMITZ & OPHAUG

Peter J. Schmitz

PJS:cr

Encs.

STATE OF MINNESOTA

IN SUPREME COURT

NO. 46994

In the Matter of Petition of Minnesota State Bar Association, a Minnesota nonprofit Corporation, for Adoption of an Amendment to Canon 2 of the Minnesota Code of Professional Responsibility	)	OBJECTIONS TO PETITION

— — — — — — — — — — — —

To the Supreme Court of the State of Minnesota:

The undersigned, duly admitted and licensed to practice law before the above Court, objects to the above described petition and alleges:

1. Proposal A totally prohibits the advertising of legal services through the television media. This total restraint is violative of the First Amendment to the United States Constitution.

2. Proposal A, by prescribing a "laundry list" of data which lawyers are permitted to advertise, will be productive of disputes over trifles and will draw attention away from the critical point in any advertisement on legal services, namely, whether that advertisement contains a statement that is false, fraudulent, misleading, or deceptive.

3. The "well-intentioned" lawyer is not in need of specific guide lines prescribing the information he may relate to the public by means of a "public communication". Lawyers, on a day to day basis routinely deal with the concepts of "reasonableness", "fraudulent", and "misleading". It is demeaning to the profession to suggest that well-intentioned lawyers will advertise in a manner to detract from the profession unless such public communications are

SCHMITZ & OPHAUG
ATTORNEYS AT LAW
111 EAST FOURTH STREET
NORTHFIELD, MINN. 55057

governed by an exclusive, detailed regulation as set forth in DR 2 - 101 of Proposal A.

4. Proposal C, based on the ABA Discussion Draft of December 6, 1975, is preferable to Proposal A for the following reasons:

(a) Television advertising would be permitted on a regulated basis.

(b) It focuses on the true responsibility of the individual lawyer who advertises, namely, that his statements not be false, fraudulent, misleading or deceptive.

(c) Disputes over minor, technical violations will be avoided.

(d) It does not contain the constitutional defects of Proposal A.

(e) It will be easier to enforce.

5. Proposal C is more in keeping with the spirit of the decision of the United States Supreme Court in Bates v. State Bar of Arizona than is Proposal A.

WHEREFORE, the undersigned respectfully requests this Court to dismiss the petition for the "General Practice Identification Plan" and to amend Canon 2 of the Minnesota Code of Professional Responsibility in accordance with Minnesota Proposal C attached to the petition of the Minnesota State Bar Association as an exhibit with such minor modifications thereof as may develop as a result of the hearing before this Court on February 6, 1978.

Dated this 31st day of January, 1978.

Peter J. Schmitz
Attorney at Law
111 East Fourth Street
P.O. Box 237
Northfield, Minnesota 55057
Telephone: 612-336-1831
507-645-9541

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