

SUPREME COURT

FILED

APR 1 1981

JOHN McCARTHY
CLERK

STATE OF MINNESOTA

IN SUPREME COURT

46994

HEARING ON AMENDMENT
TO MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY

O R D E R

WHEREAS, the Lawyers Professional Responsibility Board has petitioned the Supreme Court to amend Canon 5 of the Minnesota Code of Professional Responsibility as follows:

DR 5-103 AVOIDING ACQUISITION OF INTEREST IN LITIGATION

* * * * *

- (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except: that a
- (1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such the expenses.
 - (2) A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan.

WHEREAS, the Supreme Court wishes to hold a public hearing on this recommendation,

NOW, THEREFORE, IT IS HEREBY ORDERED, that a hearing on said petition to amend the Minnesota Code of Professional Responsibility be held before this Court in the Supreme Court, State Capitol Building, Saint Paul,

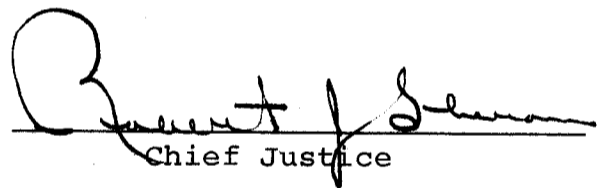
Minnesota, on Friday, June 5, 1981, at 9:30 a.m.

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, and BENCH AND BAR.

IT IS FURTHER ORDERED, that interested persons show cause, if any they have, why the proposed amendment 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 May 29, 1981, of their desire to be heard on the proposed amendments. Ten copies of each brief, petition, or letter should be supplied to the Clerk.

DATED: April 1, 1981.

BY THE COURT


Chief Justice

Peterson & Thompson, Ltd.

ATTORNEYS AT LAW

201 First Northwestern Bank Building

P.O. BOX 204, WINONA, MINNESOTA 55987



PHONE (507) 454-5710

DUANE M. PETERSON
WALTER R. THOMPSON

May 15, 1981

Supreme Court
State Capitol Building
St. Paul, Minnesota 55101

46994

RE: Proposed Rule DR5-103(B)

Gentlemen:

I have examined the proposed change which was dated April 1, 1981, and printed in the Finance and Commerce. I believe this is a needed amendment to the rules, and one which will allow attorneys to properly serve their clients in helping them avoid the necessity of accepting a harsh settlement in order to be relieved of economic stress.

Very truly yours,

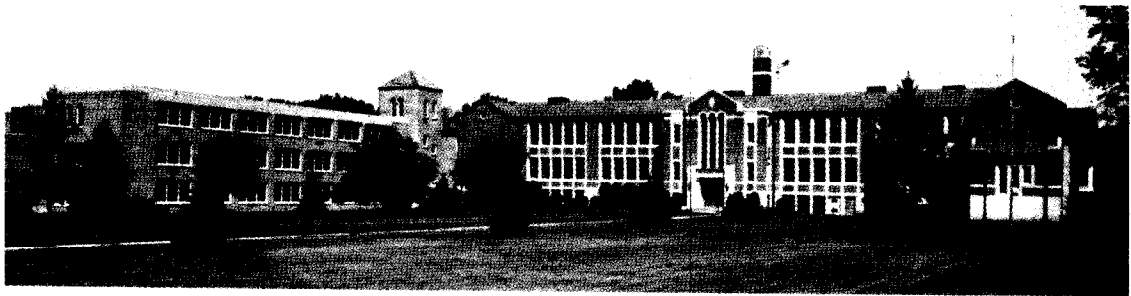
PETERSON & THOMPSON, LTD.

Duane M. Peterson

ran

59

WILLIAM MITCHELL College of Law



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

May 15, 1981

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

Re: Hearing on Amendment to Minnesota Code
of Professional Responsibility
No. 46994

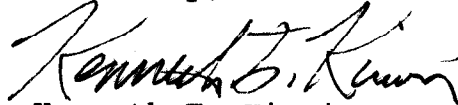
Dear Mr. McCarthy:

Enclosed please find ten copies of "Statement of
Kenneth F. Kirwin" regarding the above matter.

I would like to be heard for not more than five
minutes at the June 5 hearing.

Best regards.

Sincerely,


Kenneth F. Kirwin

KFK:ap
Encl.

cc: Mr. Michael J. Hoover
Mr. Gerald E. Magnuson
Mr. George R. Ramier
Mr. G. Thomas MacIntosh II
Mr. John B. Van de North, Jr.

5-21 -- copy to each justice.

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STATE OF MINNESOTA

IN SUPREME COURT

#46994

HEARING ON AMENDMENT
TO MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY

STATEMENT OF KENNETH F. KIRWIN

This statement is submitted in support of the Lawyers Professional Responsibility Board's petition to amend DR 5-103(B) of the Minnesota Code of Professional Responsibility. I was chairman of the Board's Rules Committee that drafted the proposed amendment.

The amendment would add the following exception to DR 5-103(B)'s prohibition on advancing or guaranteeing financial assistance to a client while representing the client in connection with contemplated or pending litigation:

A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan.

The Committee was convinced that an exception of this kind was appropriate to protect the impecunious party's right to meaningful access to the courts. The Roscoe Pound-American Trial Lawyers Foundation, American Lawyer's Code of Conduct (Public Discussion Draft June 1980)

includes a somewhat similar provision,¹ as do the Alabama Code of Professional Responsibility² and the California Rules of Professional

¹ Rule 5.6 of the Draft, reproduced in 16 Trial 44, 55 (Aug. 1980), provides:

A lawyer shall not give money or anything of substantial value to any person in order to induce that person to become or remain a client, or to induce that person to retain or to continue the lawyer as counsel on behalf of someone else. However, a lawyer may (a) advance money to a client on any terms that are fair; (b) give money to a client as an act of charity; (c) give money to a client to enable the client to withstand delays in litigation that would otherwise induce the client to settle a case because of financial hardship, rather than on the merits of the client's claim; or (d) charge a fee that is contingent in whole or in part on the outcome of the case.

(Emphasis added.)

² Alabama Code of Professional Responsibility DR 5-103(B) provides:

While representing a client in connection with contemplated or pending litigation, a lawyer may advance or guarantee emergency financial assistance to his client, provided that the client remains ultimately liable for such assistance without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in his behalf, prior to the employment of that lawyer by that client.

Conduct,³ and the Louisiana Supreme Court has judicially adopted a construction of DR 5-103(B) allowing advancement of living expenses in certain circumstances.⁴

³ Rule 5-104 of the California Rules of Professional Conduct provides:

Rule 5-104 Payment of Personal or Business Expenses Incurred By or For a Client

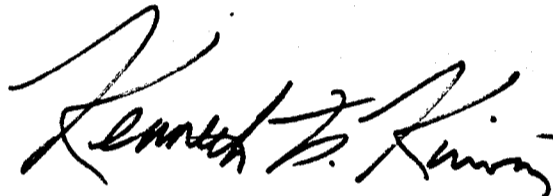
- (A) a member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:
- (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or
 - (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or
 - (3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.
- (B) Nothing in Rule 5-104 shall be deemed to abrogate any of the provisions set forth in Rules 5-101 through 5-103.
- (C) Nothing in this Rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this Rule.

⁴ In Louisiana State Bar Ass'n v. Edwins, 329 So.2d 437, 446 (La. 1976), the court construed D R 5-103(B) (prohibiting advancements except for expenses of litigation) to allow "the advancement of living expenses . . . so long as: (a) the advances were not promised as an inducement to obtain professional employment, nor made until after the employment relationship was commenced; (b) the advances were reasonably necessary under the facts; (c) the client remained liable for repayment of all funds, whatever the outcome of the litigation; and (d) the attorney did not encourage public knowledge of this practice as an inducement to secure representation of others."

The proposed amendment to the Minnesota Code allows a lawyer only to guarantee a loan, not to make the loan personally. The Committee thought this would keep the lawyer's interest one step removed and would emphasize the client's duty of repayment. It anticipated that there would be enough lenders available to satisfy impecunious parties' needs for loans of this type.

The Committee decided against trying to restrict communication about the availability of permitted loan guarantees.⁵ It viewed that kind of restriction as probably unconstitutional under current interpretation of the First Amendment as applied to commercial expression, as well as being generally inappropriate and virtually impossible to enforce.

Respectfully submitted,



Kenneth F. Kirwin

875 Summit Avenue

St. Paul, Minnesota 55105

Telephone 227-9171

May 15, 1981

⁵ Compare the formulations quoted in notes 2-4, supra.



RERAT LAW FIRM

A PROFESSIONAL ASSOCIATION

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GENERAL MANAGER
GLEN A. McNURLAN

OF COUNSEL
LOUIS N. CRILL

May 19, 1981

Clerk of Supreme Court
State Capitol Building
St. Paul, Minnesota 55101

Re: Public Hearing - Minnesota Code
of Professional Responsibility
June 5, 1981
File No.: 46994

Dear Sir:

Enclosed herewith and served upon you by mail, please find the following:

1. Original and ten copies of letter from Brotherhood of Railroad Signalmen, signed by Mr. Henry Gerth.
2. Original and ten copies of letter from the Brotherhood of Railway Carmen, signed by O. W. Jacobson, General President.
3. Original and ten copies of Petition of the Brotherhood of Railroad Signalmen, signed by its President, R. T. Bates.

Sincerely,

Robert N. Stone
Robert N. Stone

RNS/js
Enclosure

5-20 -- copy to each Justice

W.T.

H. S. GERTH, General Chairman
1421 Hooker Avenue
Madison, Wisconsin 53704
Telephone 249-1888

VINCE UNGER, Vice General Chairman
410 So. 10th Street
DeKalb, Illinois 60115

R. E. HICKERSON, Vice General Chairman
3830 15th Street
Moline, Illinois 61265

A. E. NENN, Secretary-Treasurer
301 South High Street
Pt. Washington, Wisconsin 53074

BROTHERHOOD OF RAILROAD SIGNALMEN

GENERAL COMMITTEE

Chicago and North Western Transportation
Chicago, Rock Island & Pacific Railroad Company
Green Bay and Western Railroad Company

Joint Texas Division

Clerk of the Supreme Court
Minnesota Supreme Court
State Capitol Building
St. Paul, Minnesota

May 14, 1981

Gentlemen:

I understand that there is a Petition before your Court to change Minnesota Code of Professional Responsibility so as to allow attorneys to guaranty loans to their injured client during the pendency of their lawsuits. The undersigned, as General Chairman for the Brotherhood of Railroad Signalmen of the Chicago and North Western Transportation Company, the Chicago Rock Island and Pacific Railroad Company, and the Green Bay and Western Railroad Company and the Joint Texas Division (the Rock Island and Burlington Northern Railroad Company) whose lines run in many states including Minnesota and in a position to know what without some financial assistance my members would suffer sorely because of lack of funds. It is absolutely essential that they have some means of sustaining themselves during the 2 or 3 years their lawsuit may be pending so as not to be subject to the economic sledge hammer that the railroad often utilizes.

The members of this Brotherhood are often urged to settle cases early for relatively small sums. They often accept small settlements because of the economic stress that await while full determination of the case is being made.

I urge this Court to adopt the proposed change in the Code.

Sincerely yours,

Henry S. Gerth

Office Of
O.W. Jacobson

General President

BROTHERHOOD RAILWAY CARMEN of the UNITED STATES and CANADA
Affiliated with A.F.L.-C.I.O. and C.L.C.

May 11, 1981

Clark of the Supreme Court
of the State of Minnesota
State Capitol Building
St Paul, Minnesota 55101

Re: In the matter of the petition
for amendment of Canon 5
Minnesota Code of Professional
Responsibility
State of Minnesota in
Supreme Court File No. 46994

Dear Sir:

I am the General President of the Brotherhood Railway Carmen of the United States and Canada, an International Labor Organization which represents approximately 90,000 Railway Carmen in the United States and Canada.

In this capacity I would like to state that the Brotherhood Railway Carmen strongly supports the revision of Canon 5 which would allow attorneys in the state of Minnesota to provide financial assistance for needy Federal Employers Liability Act clients during the pendency of their law suits. In fact if justice is to be done we feel that this is not only desirable, but necessary.

The railroad industry usually deals unique solutions to its problems. The Federal Employers Liability Act is such an example. When an employe is injured he does not receive much financial assistance from the government in the form of workers' compensation or unemployment insurance. His only recourse is to institute a law suit against the railroad in order to recover damages as a remedy for suffering his injury.

Carmen's Building • 4929 Main Street • Kansas City, Missouri 64112 • Telephone 816-561-1112

As you know, civil suits can take from two to three years to resolve, leaving this injured employe with at best a few weeks of unemployment insurance from the Railroad Retirement Board, conceivably forcing him to face years without income; placing him in a position of potentially losing all his worldly goods through bankruptcy, destroying his credit rating and destroying his self-esteem.

Without financial assistance it is probable that our members would, because of unnecessarily being placed in an adverse financial position, have to accept less than what they are justly entitled under the Federal Employers Liability Act.

In summary we feel that the intent of the Federal Employers Liability Act would be well served if attorneys were able to provide their FELA clients with financial assistance, therefore the Brotherhood Railway Carmen strongly recommends the changes in Canon 5 of the Minnesota Code of professional responsibility.

Sincerely,

O. W. Jacobson
General President

OWJ /mm

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 46994

In the Matter of the Petition for
Amendment of Canon 5, Minnesota
Code of Professional Responsibility

PETITION

The Brotherhood of Railroad Signalmen hereby Petition the Court to amend DR 5-103 (B), Minnesota Code of Professional Responsibility, as proposed by the Lawyers Professional Responsibility Board for the following reasons.

The Federal Employers' Liability Act provides that an injured railroad employee may bring a lawsuit against his employer. It was enacted in 1908 as part of a series of legislative actions which were intended to alleviate the unhealthy and unsafe working conditions in the railroad industry. This Court is undoubtedly familiar with the humanitarian purposes of that act, primarily designed as a means of redress for injured railroad employees. The right of the railroad Brotherhoods to counsel with their members and recommend attorneys to represent them in such claims has long been upheld by the Courts, most particularly by the United States Supreme Court in the well known Virginia Bar Association v. Brotherhood of Railroad Trainmen and Michigan Bar Association v. United Transportation Union cases.

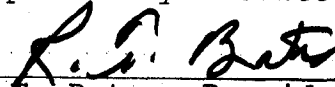
Without these rights of unions and their members and without lawyers willing to advocate them the statutory remedy would be of little avail. Injured railroad workers often receive virtually no compensation while off of the job due to injury. Without lawyers willing to accept these cases on a contingent fee basis ("the poor man's key to the court house"), and without the injured employee

being able to obtain some funds to maintain himself and his family, the same rights would likewise be meaningless.

The proposed change in the Minnesota Code of Professional Responsibility would bring Minnesota in line with nearly every other state which has any position on the matter and would enable the many attorneys in this state who represent lower to middle income clients to ease the financial burden caused by the natural delay between injury and ultimate conclusion of the lawsuit without placing the client in a position of having to determine the value of his case on any basis other than its merits.

It is respectfully urged that the Court amend the Code.

Respectfully Submitted



R. T. Bates, President
Brotherhood of Railroad Signalmen
Mount Prospect, Illinois