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April 9, 1993

Clerk of Appellate Courts
Minnesota Supreme Court
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

In Re: Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct
Court File No. C8-84-1650

Dear Clerk:

Enclosed herein for filing is an original and eleven copies of the following:

1. Request to Make Oral Presentation;
2. Statement of Position of Schwebel, Goetz, Sieben & Moskal, P.A. Regarding Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct; and
3. Appendix.

By copy of this letter, the Minnesota State Bar Association is being personally served this date. We will provide the Court with our affidavit of personal service next week.

Thank you.

Very truly yours,

Mary C. Cade

Mary C. Cade

MCC:mpn
enclosure
cc: David F. Herr, Esq.

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

In Re:

Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct

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REQUEST TO MAKE ORAL PRESENTATION

James R. Schwebel hereby requests leave of this Court to make an oral presentation at the hearing in the above-entitled matter on April 12, 1993.

Dated: April 9, 1993.

SCHWEBEL, GOETZ, SIEBEN & MOSKAL, P.A.

By _____
James R. Schwebel (#98267)
ATTORNEYS FOR PLAINTIFF
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STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

In Re:

Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct

STATEMENT OF POSITION OF SCHWEBEL, GOETZ, SIEBEN & MOSKAL, P.A. REGARDING PETITION OF MINNESOTA STATE BAR ASSOCIATION TO AMEND THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

I. HISTORICAL OVERVIEW.

In 1977, the United States Supreme Court held that the blanket suppression of advertising by attorneys violated the free speech clause of the First Amendment. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The court held that commercial advertising of legal services could be restrained if false, deceptive, or misleading and that it could be made subject to reasonable restrictions on the time, place and manner of such advertising. Since restrictions on lawyer advertising were wide spread across the country, many states like Minnesota were faced with the repeal of their advertising restrictions and the enactment of new rules to deal with lawyer advertising. The debate in Minnesota about the degree of restriction on lawyer advertising was heated. The issue was presented to this Court which held hearings and considered all of the varied positions on the issue. Ultimately this Court determined that lawyers were free to advertise in Minnesota. It banned only misleading

advertising and in-person solicitation. In adopting the rules, this Court chose to allow the maximum freedom for commercial speech. This Court has twice reaffirmed its commitment to the protection of the public's right to access to information and to the protection of First Amendment rights in this context. See In re Discipline of Appert, 315 N.W.2d 204 (Minn. 1981); In re Discipline of Johnson, 341 N.W.2d 282 (Minn. 1983). The rules have now been in effect in Minnesota for 13 years.[1] Few, if any, complaints regarding lawyer advertising have been registered anywhere in Minnesota since the adoption of these rules.

In August, 1990, 10 years after adoption of the rules, the Minnesota State Bar Association held the Greater Minnesota Lawyers Conference, a conference called to address issues and problems of lawyers practicing in out-state Minnesota. A report of this conference was subsequently prepared which reflected the concern of out-state lawyers with the loss of business to firms in large cities (A.1).[2] The report further reflected the feeling of the conference attendees that lawyer advertising was a major cause of this trend. One of the specific resolutions developed at the conference was stated as follows:

> 3. The MSBA should work toward adoption by Minnesota of the Iowa Advertising Rules, including disclaimers and warnings with respect to representations of specialization and capability of lawyer advertisers.

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[1]The disciplinary rules were initially found at DR2-101(A), 2-103(A)(1980) and can now be found at Minn. R. P. Cond. 7.1-7.5.

[2]"A" refers to the Appendix which accompanies this statement.

(A-9). In the comment to this resolution, the idea of elimination of attorney advertising all together was rejected as not a "feasible option" in light of the United States Supreme Court's decisions in Bates and other lawyer advertising cases. However, the comment further said:

> A Conference working group brought up the possibility of restrictions on attorney advertising, as recently adopted in Iowa. The result in Iowa has been a significant decrease in legal advertising.

(A-9). It was determined that the Greater Minnesota Lawyers Conference would be perpetuated and reconvened at appropriate intervals to work on implementation of the resolutions.[3] (A-10).

Shortly thereafter the Minnesota State Bar Association created the Advertising Subcommittee of the MSBA Rules of Professional Conduct Committee. The subcommittee was created to address "[a] recommendation from the Greater Minnesota Lawyer's Conference that the MSBA work toward adoption by Minnesota of the Iowa Advertising Rules." (A-33). The subcommittee's charge was as follows:

> To study and recommend to the Minnesota State Bar Association Rules of Professional Conduct Committee whether lawyer advertising proposals similar to those in Iowa, Florida or other states should be adopted in Minnesota.

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[3] Iowa has adopted a number of restrictions on lawyer advertising, restrictions which have resulted in a significant chill in lawyer advertising. From 1985 until at least 1991, no lawyer advertisements were broadcast on radio or television in Iowa. Affidavit of Executive Director of the Iowa Broadcasting Association (July 24, 1991) contained in Comment of the National Association of Broadcasting, app. A, No. R-90-0024 (filed with the Clerk of the Arizona Supreme Court, July 31, 1991).

(A-34). The committee began meeting on February 1, 1991. The subcommittee reported recommendations to the Rules of Professional Conduct Committee which in turn reported recommendations to the MSBA Board of Governors and General Assembly. The subcommittee ultimately issued a report in which it did not recommend any change be made.

Subsequent to the Bar Association Convention in June, 1991, a second committee was set up to study lawyer advertising. The charge to that committee by the Bar Association was:

> To develop a specific proposal regulating lawyer advertising to be presented at the 1992 convention.

(A-35). Thus, the first committee and its mandate to study the need for changes was disbanded and the Bar Association created a second committee not to study the situation, but to draft restrictions.

The Lawyer Advertising Committee undertook to respond to that charge beginning on September 20, 1991 (A-36). The committee met monthly until April of 1992. The meeting summaries reflect that this was a committee set up to regulate advertising and find a way to justify it, rather than to determine whether there was a problem to be addressed. At the October 25, 1991 meeting, "[i]t was suggested that Minnesota would need Minnesota specific emperical data to justify any restrictions on advertising." (A-38). The committee apparently had no consumer complaints. The Bar Association staff member present was directed to gather information about instituting a survey. The committee agreed to place a notice in MSBA In Brief, a Bar Association newsletter, asking lawyers to send in copies of ads

which they considered misleading and deceptive (A-39). The meeting summary reflected that, "[T]he notice would also ask for more information about the placement of the ad, any clients who were misled by the ad, and further information."[4] (A-39).

Ron Graham from the Minnesota Better Business Bureau was invited to be a member of the Lawyer Advertising Committee and first appeared at the December 20, 1991 meeting. The following is reflected in the meeting summary:

> Ron Graham stated that he had worked for the Better Business Bureau for 32 years and was pleased to serve on the Lawyer Advertising Committee. He summarized the Better Business Bureau's procedure for addressing advertising complaints. He noted that most complaints come from competitors rather than from the public. He noted that he had received few, if any, complaints relating to lawyer advertising.

(A-40). At that same meeting, Bertram Greener of the committee summarized the results of a meeting he and some other committee members had with Nick Critelli. Mr. Critelli was involved in the formation of Iowa's advertising rules and defended them before the Iowa Supreme Court. Mr. Critelli had reservations about making changes to Minnesota rules noting that "Minnesota's ethical rules already proscribe some of the abuses which the Lawyer Advertising Committee sought to correct." (A-40). He suggested "it might be more appropriate to focus on enforcement of the rules already written rather than to write more rules."

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[4]This ad was eventually run and while it generated some response from lawyers, the lawyer responses to this solicitation were apparently the only complaints about lawyer advertising that the committee could find.

(A-40). Additionally, he reminded the committee members and Mr. Greener that there were constitutional issues to be considered.[5] (A-40-41).

At that same meeting the topic of mail solicitation came up. One member reported that Minnesota allows mail solicitation as long as it is not false or misleading and noted that any attempt to restrict solicitation beyond that point would be fruitless in light of the United States Supreme Court decision in Shepiro v. Kentucky Bar Association, 486 U.S. 466 (1988). The meeting notes reflect that "[t]he committee discussed ways to make mail solicitation more palatable." (A-42).

By the time of the January 24, 1992, meeting, the committee's ad requesting that lawyers send them copies of ads which they considered misleading or deceptive had run and the committee had some responses (A-44). All of the responses were from lawyers and none concerned issues addressed by the rules now being proposed by the MSBA. The committee "decided to continue soliciting additional responses." (A-44).

Eventually the committee proposed a number of changes to the Rules of Professional Conduct. The matter was voted on at the Bar Association Conference in the summer of 1992. The petition now pending before this Court was subsequently prepared and filed.

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[5]Adoption of aspirational standards was suggested at the same meeting but the committee rejected the idea feeling "it was more worthwhile to draft rules which lawyers were required to follow." (A-43).

POSITION:

THE PROPOSED CHANGES TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT ARE UNNECESSARY, CONSTITUTIONALLY SUSPECT AND MOTIVATED PRIMARILY BY THE ECONOMIC INTERESTS OF CERTAIN FACTIONS OF THE MSBA. THEY SHOULD BE REJECTED.

In its Petition to Restrict Lawyer Advertising, the MSBA comes to this Court to propose a solution to a non-existent problem. It asks that this Court to impose wide-spread restrictions on lawyer advertising, restrictions which will chill commercial speech, with absolutely no justification for the imposition of such restrictions. Rather, the primary impetus for these changes has been and remains the economic welfare of certain sections of the Bar Association. Market share concerns of special interest groups, however, do not and cannot justify the use of the Rules of Professional Conduct to increase restrictions on lawyer conduct, especially restrictions on free speech. Consequently, these proposed changes should be rejected.

A. The MSBA Has Completely Failed To Demonstrate That A Problem Exists Which Warrants The "Solution" It Proposes.

The MSBA petition requesting amendment of the rules on lawyer advertising states that it had "considered numerous complaints about misleading advertisements to the public where the existing Rules where inadequate and ill-suited for the protection of the public." The petition suggests that the proposed changes were an attempt to remedy the problems regarding "misleading advertisements to the public." However, there simply

is no evidence to support any allegation that misleading lawyer advertisements are a problem in Minnesota. Indeed, the evidence is to the contrary.

While it appears from the meeting notes that the Advertising Committee looked for complaints about lawyer advertising from the general public, it is clear it simply could not find any. Statistics available[6] reflect that in 1990 the Lawyer Board of Professional Responsibility[7] received 1,384 complaints regarding lawyers, and only 7 concerned advertising, all of which were filed not by clients but by lawyers. The number of advertising-related complaints rose to 33 in 1992 following a public request by MSBA soliciting complaints about advertising. Again, these complaints were generated by lawyers and not by consumers. (A-57-83). Indeed, the letters of complaint reflect that they were written in direct response to the Bar Association solicitation for such complaints in MSBA in Brief. (A-57-83).

Ron Graham of the Minnesota Better Business Bureau was invited to be a member of the committee. At his first appearance, Mr. Graham noted that across the board most complaints regarding advertising come from competitors rather than the public and further that the Better Business Bureau had received few, if any, complaints relating to lawyer advertising (A-40).

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[6]The statistics cited are taken from a commentary written by Stephen R. Bergerson which appeared in the Minneapolis Star Tribune on November 20, 1992 (A-84).

[7]The Minnesota State Board of Professional Responsibility is taking no position on this petition. Indeed, if a problem existed, certainly the Board of Professional Responsibility would be supporting the petition.

Apparently the only complaints the MSBA could find were complaints it generated with its solicitation in MSBA In Brief. Each and every one of these complaints is from a lawyer. Not one of the complaints deals with the issues of fee and cost disclosure in contingent fee cases, or any issues the proposed rules cover. All of the complaints about solicitation letters were registered by lawyers who were in competition with the firms soliciting clients. Thus, while the MSBA petition implies that these proposed changes were drafted to solve the problems raised in the "numerous complaints" it reviewed, this contention is simply not true.[8]

B. The Rules of Professional Conduct As They Exist Are Adequate To Protect The Public.

The proposed rules require that lawyers clutter their ads with wordy disclaimers regarding the division of costs and fees and the charging of costs to clients. However, the proposed disclosures are already required at the time of the signing of a retainer agreement by other portions of the Rules of Professional Responsibility. The public is already protected from attempts by lawyers to mislead them on these issues.

Proposed Rule 7.2(g) requires that advertisements and written communications which indicate that the charging of a fee is contingent on an outcome must disclose that the client will be liable for expenses regardless of the outcome if the lawyer so intends. Proposed Rule 7.2(h) requires that advertisements and

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[8]The MSBA, as petitioner, certainly has the burden of coming forward with evidence to demonstrate these changes are necessary. It has, however, provided this Court with nothing more than the unsubstantiated allegations in its petition.

written communications indicating that the fee will be a percentage of the recovery must disclose that the percentage will be computed before expenses are deducted if the lawyer so intends. However, Rule 1.5 already provides:

> (c) . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

Before any consumer of legal services enters into a contract with a lawyer in the State of Minnesota, he or she must be made fully aware of the method of calculation of costs and fees. There is absolutely no need to require lawyers to undermine the very purpose of advertising by requiring lengthy disclaimers such as are suggested in proposed Rule 7.2(g) and (h). Indeed, the effect of such requirement would be, not to further enlighten consumers of legal services, but rather to confuse them[9] and to eliminate a lawyer's ability to negotiate the issue of costs with the client.

C. Lawyer Advertising Performs An Important Function In Informing The Public And Should Remain Unfettered.

Both this Court and the United States Supreme Court have recognized the importance of advertising, specifically advertising by lawyers. This Court in In Re Discipline of

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[9]The general public, as a rule, is not versed in the legal distinctions between costs and fees. The lengthy disclaimers regarding their methods of calculation will undoubtedly be confusing and will substantially reduce the likelihood that people who feel they cannot afford a lawyer will contact one.

Appert, 315 N.W.2d 204, 210 (Minn. 1981) addressed the public policy considerations surrounding the use of solicitation letters and brochures. It said:

> The information supplied through respondents' distribution of the letter and brochure made several injured parties aware of their legal position and absent access to the letter and brochure, some of those individuals would not have been made aware of their rights. The manufacturer against whom the solicited litigation was directed, apparently engaged in particularly egregious conduct which resulted in severe and permanent injuries to a substantial number of people.

The court found "significant public and individual first amendment interests" required that such advertising be allowed. Id. The public has an interest in informing "injured parties of their rights and the availability of legal services that allow them to enforce those rights." 315 N.W.2d at 213. Indeed, this Court in adopting the existing rules on lawyer advertising in 1980 was presented with the opportunity to attempt to further restrict it but specifically chose not to do so. It should make this same choice again.

The United States Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) noted:

> Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.

433 U.S. at 370 (footnotes omitted). The Bates court went onto say:

> [Advertising by attorneys] may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the Bar acknowledges, "the middle 70 percent of our population is not being reached or served adequately by

> the legal profession." ABA, Revised Handbook on Prepaid Legal Services 2 (1972). Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. . . .

433 U.S. at 376 (citation omitted). The United States Supreme Court went onto point out that restrictions on advertising serve to increase the difficulty of discovering the lowest cost seller of acceptable ability and isolate attorneys from competition. Consequently, the incentive to price competitively is reduced. Bans on advertising serve "to perpetuate the market position of established attorneys" stifling competition from younger and less economically successful lawyers. 433 U.S. at 378.

Advertising meets the needs of the middle section of Americans as well as the needs of the poor and underprivileged. It provides access to legal services for those who do not know lawyers and do not know how to find one they can afford. Restrictions on advertising impact most broadly on this section of the population. Restrictions which serve only to reallocate market share positions of attorneys should not be enacted where the result is to preclude access to legal services by the groups of people who need them most.

D. Minnesota's Position On Lawyer Advertising Serves the Public Interest And Is Consistent With The United States Supreme Court's Interpretation Of First Amendment Protections For Commercial Speech. It Should Be Maintained.

This Court in 1980 struggled with the issue of whether restrictions should be placed on lawyer advertising and decided that restrictions should exist but should be minimal. This Court

has subsequently reaffirmed this decision. See In re Discipline of Johnson, 341 N.W.2d 282 (Minn. 1983); In re Discipline of Appert, 315 N.W.2d 204 (Minn. 1981). It has based its commitment to the free flow of commercial information on its finding that commercial speech is beneficial to the public interest and protected by the First Amendment. The protections it has set out are consistent with the United States Supreme Court's position on these issues.

In Appert, this Court quoted from the United States Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) regarding the public interest in the free flow of commercial information.

> The listener's interest is substantial: The consumers concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day, and commercial speech serves to inform the public of the availability, nature and prices of products and services and thus performs and indispensable roll in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interest in assuring informed and reliable decision making.

Appert, 315 N.W.2d at 208 (quoting Bates, 433 U.S. at 364.)

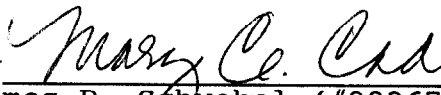
The protection of commercial speech is as important today as it was in 1977 when Bates was decided and in the early 1980's when this Court addressed these issues, first during the promulgation of new rules on advertising in 1980 and later in Appert and Johnson. This Court should continue its vigilance in this area.

CONCLUSION

The proposed changes to the Minnesota Rules of Professional Conduct are unnecessary. The MSBA has completely failed to demonstrate that any problem exists which warrants the solution that it proposes. The proposed changes are motivated primarily by economic interests of certain factions of the Bar Association. Such motivation is not sufficient to warrant changes to the Rules of Professional Conduct. Moreover, the rules currently in effect comport with this Court's decisions in this area and with the position of the United States Supreme Court on the First Amendment issues. Consequently, the proposed changes should be rejected.

Dated: April 9, 1993.

SCHWEBEL, GOETZ, SIEBEN & MOSKAL, P.A.

By 

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APPENDIX

Conference Report

Greater Minnesota Lawyers Conference

August 1990

Minnesota State Bar Association

ACKNOWLEDGEMENTS

The Greater Minnesota Lawyers Conference became a reality because of the hard work of a number of people and support from a number of organizations. The Minnesota State Bar Association wishes to acknowledge the efforts of the Greater Minnesota Lawyers Conference Planning Committee: Jeanne Bringgold, Wheaton; Pat Costello, Lakefield; and Rick Prebich, Hibbing. Their work and enthusiasm helped the conference succeed.

Richard Pemberton, past president of the MSBA, led the panel discussion and the plenary working session of the Conference. His facilitating skills were major parts of the success of the Conference.

The MSBA gratefully acknowledges the financial support contributed by the following, without which the Greater Minnesota Lawyers Conference would not have been possible:

Minnesota State Bar Foundation
Attorneys' Title Guaranty Fund, Inc.
Minnesota Lawyers Mutual Insurance Company

The MSBA also wishes to thank the management and staff at Ruttger's Bay Lake Lodge in Deerwood for providing excellent facilities and service.

Finally, the MSBA gratefully acknowledges the support and enthusiasm of all who participated in the Greater Minnesota Lawyers Conference. This report is a reflection of their contributions.

Robert A. Guzy
Vice President-Outstate
Minnesota State Bar Association

October 22, 1990

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CONTEXT

From the opening of the Conference, the term "Greater Minnesota" raised questions and comments. What is a "Greater Minnesota Lawyer?" Replacement terms suggested were country lawyer, outstate attorney, and rural lawyer. The term of choice was country lawyer. By whatever name, the question remains: What is happening to the country lawyer in Minnesota?

Minnesota and its lawyers are changing. In 1965 nearly one out of three Minnesota State Bar Association members was an outstate attorney. By 1990 less than one out of five members practiced outside of the Twin Cities metropolitan area, including the suburbs. Projections of the Office of the State Demographer, presented by Martha McMurry at the Conference, are that the change in population from 1990 to 2000 in greater Minnesota will show large increases in the middle-aged and very old. The Minnesota State Demographer's office also showed per capita income for 1988 to be lower in outstate areas. Thus, these country lawyers will be serving a population which is older and has less income than that in the Twin Cities metropolitan area and suburbs. Charts illustrating these facts are found at Appendix C.

In the past, an attorney became a country lawyer as a lifestyle choice. A picture of that lifestyle as it was and is now was painted by Jeanne Bringgold, Wheaton. The pace of life in a small community is more relaxed than in the larger cities. Professional relationships among attorneys are perceived by country lawyers as friendly and professional. The country lawyer is typically an important member of the community and is well-known. The country lawyer is also expected to contribute heavily in time and effort to the community and to live with less privacy than most. This fishbowl existence is only one of the problems faced by country lawyers.

The country lawyer knows and is part of the lives of a greater percentage of the community than his or her city counterpart. Questions involving conflicts of interest are a common occurrence in the country lawyer's professional life. It is not unusual for one client to

be opposite another client or for clients on both sides in a dispute to ask for a single attorney. Conflict of interest rules have a significant impact on the business of the country lawyer.

William Wernz, Director of the Office of Lawyers Professional Responsibility, spoke at the Conference on the ethical complaints arising in outstate Minnesota. During his discussion of conflict of interest problems, Wernz referred to the case of Gillespie v. Klun, 406 NW2nd 547 (Minn. App. 1987). In this case, existing clients of an attorney found themselves in a real estate transaction and asked an attorney to represent both sides. In this case a dispute arose and the attorney failed to withdraw from the case. The Court applied community standards to confirm that the attorney should have withdrawn and affirmed an award of punitive damages against him.

Although camaraderie and a friendly professionalism are frequently found in greater Minnesota, the risk of a sense of isolation also exists for the country lawyer. Serious professional and business problems are not easily confided to a competitor with offices just down the street. It is easy to feel alone and overwhelmed in the face of an unfamiliar or especially difficult situation. Isolation is not unique to the country lawyer, but is a significant part of his or her life.

Against this background of an attractive lifestyle with problems of conflict of interest, isolation, demands of community service, and lack of privacy, it was determined that the major problem faced by the country lawyer today is economics. Minnesota Supreme Court Justice John Simonett framed the issue as a question in his keynote address to the Conference: Why is business going elsewhere that should stay at home? The public's perception, as stated by Justice Simonett, is that "big is better." The local attorney is not the best choice for "big" cases. This perception is influenced by the recent phenomena of attorney advertising. Local telephone directories and newspapers contain advertising not just by local attorneys, but by metropolitan firms. Clients of the country lawyer are now asked to give their business to attorneys in regional metro centers and the Twin Cities.

Business is also "leaving home" due to economic structural changes in outstate Minnesota. Small, family farms are being replaced by larger operations with owners outside of the local community. Conference

participants told common occurrences of locally-owned banks and businesses being purchased and operated from headquarters in metropolitan areas. As ownership migrates away from the local community, so does the bulk of the legal business.

From his view on the Supreme Court, Justice Simonett noted that good and competent legal work is not limited to metropolitan areas and is not a matter of geography. Justice Simonett concluded that it is the public's perception that needs changing. As the Conference began he offered guidelines for consideration:

1. Do good work - there is no substitute for being good at what you do.

2. Use good stationery - your advertising is everything you do that reaches a client or the public and not just television or Yellow Pages advertising.

3. Avoid isolation - the country lawyer's horizon must extend beyond the county line.

4. Cultivate propinquity - the country lawyer lives next to the client and can build on that advantage.

A final element making up the context in which the Conference took place is the apparent tension between urban and rural Minnesota. As the Greater Minnesota Lawyers Conference began a column by Leonard Inskip appeared in the Minneapolis Star Tribune pointing out the need for Minnesota to approach the future as a single community instead of two groups, one urban and one rural. The Blandin Foundation is seeking a way to implement this vision. Justice Simonett brought this to the attention of the Conference and pointed out that the Conference could be a step in the right direction. A copy of the column by Leonard Inskip may be found at Appendix D.

RESOLUTIONS, STATEMENTS OF PRINCIPLE AND CALLS FOR ACTION

1. **Outstate law firms should cooperate, make referrals to one another, identify specialist capabilities and develop a marketing plan for joint and reciprocal services to outstate attorneys before making referrals to large metropolitan law firms.**

Comment

This resolution addresses one aspect of an issue known as the "big case drain." This issue was defined as the migration of legal business, especially significant cases involving large sums of money, from the local community to metropolitan law firms. Referrals by local attorneys were explored as one cause of the "big case drain." Legal advertising is not only directed to the public but also to local attorneys in outstate Minnesota. When a local attorney is faced with a client or a matter suitable for referral, the referring attorney often relies upon advertising in making the referral. Questions were raised how to best serve the client in making a referral and whether advertising provides enough reliable information to judge the best quality and value of legal services.

The Conference decided to approach this issue in a positive manner. It was recognized that valid reasons may exist in some cases to refer clients and legal matters to law firms in the Twin Cities metropolitan and suburban areas - matters of cash flow, resources to develop a case and expertise in certain areas of the law. Such choices may be the best way to serve the client. The Conference recognized that often referrals to metropolitan and suburban law firms are made by default. Due to a lack of sufficient information about regional and other outstate law firms available to local attorneys. Many outstate law firms are not being considered for referrals. This resolution seeks to fill that void and urges the creation of an objective and information-based networking system.

Implementation of the resolution could take a number of directions, including publication of a directory, the use of peer review, and expanded use of the MSBA Lawyer Referral System. The use of district bar associations

in implementation of this resolution led to a discussion of the possibility of altering MSBA district bar lines. No decisions were made as to implementation of the resolution other than continuation of the Conference.

2. **Outstate law firms should develop a vehicle and create a funding structure for marketing and advertising with emphasis on the availability of good and competent lawyers in outstate Minnesota and the public need for local and regional legal services.**

Comment

Public perception of the country lawyer is the focus of the second resolution. The Conference concluded that the public fails to perceive two factors in deciding to retain legal counsel for the "big" case. First, members of the local community typically do not appreciate the local attorney's competence and expertise. Second, the potential client typically fails to recognize the value of having attorneys practicing law in the local community.

It was the consensus of all speakers, that competence is not a matter of geography and that good and knowledgeable attorneys are found throughout Minnesota. Some participants stated that in their communities many believe the opposite: that competence is greater on the part of those who advertise, expecially those outside the local community. The rule seems to be that the special case deserves a "special" attorney, and special means "not local." This misperception is encouraged in part by the prevalence of legal advertising and in part by the failure to convince the public of the value of the local attorney.

This resolution seeks to satisfy this need by calling for public service announcements and marketing supporting local attorneys. Although the precise nature of this message was not determined at the Conference, it could include the following:

A. Good and competent attorneys are practicing law in local Minnesota communities;

B. A local attorney's knowledge of the unique regional aspects of a matter is valuable to a client; and

C. Local attorneys live with their clients and contribute their time and efforts to the community.

3. **The MSBA should work toward adoption by Minnesota of the Iowa Advertising Rules, including disclaimers and warnings with respect to representations of specialization and capability of lawyer advertisers.**

Comment

The economic issue referred to as the "big case drain" was the cause for addressing legal advertising in outstate communities. Through legal advertising the public is made aware of the availability of legal services and, hopefully, becomes better informed when retaining legal counsel. These advantages are not achieved without a cost, however. It was the opinion of many Conference participants that legal advertising in outstate Minnesota has not led to a better informed public, but instead shifted the criteria for choosing an attorney from reputation and competence to price and image. Legal advertising which is self-laudatory was seen as a poor way to help the public make an informed and objective decision when retaining a lawyer. Elimination of attorney advertising was not seen as a feasible option, especially in light of the First Amendment constitutional protection of commercial free speech. A Conference working group brought up the possibility of restrictions on attorney advertising, as recently adopted in Iowa. The result in Iowa has been a significant decrease in legal advertising.

The Iowa Disciplinary Rules prohibit advertising "which contains a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes or dislikes of a person and which contains any claim that is not verifiable." Iowa Disciplinary Rules DR 2-101 (B) (4) (a). A recent article from the News Bulletin of the Iowa State Bar Association summarizes the restrictions and is set out in Appendix E. The electronic media portion of these restrictions was upheld by the U.S. Supreme Court in Committee on Professional Ethics and Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984), vacated 472 U.S. 1004, on remand 377 N.W.3d 653 (Iowa 1985), appeal dismissed 475 U.S. 1114.

The Florida Bar has submitted proposed advertising rule amendments similar to the Iowa restrictions. A copy of the proposed Advertising Rule Amendments is available from the MSBA.

4. **The Greater Minnesota Lawyers Conference should be perpetuated and reconvened in plenary session at appropriate intervals, at least annually, and an interim committee composed of 1990 Conference participants should be appointed by the MSBA president to work with the Board of Governors, sections and committees to identify and seek solutions to the problems of outstate law practice, and fact finding and resource identification to benefit and foster the continuation of viable outstate law practice.**

Comment

It was the consensus of the Conference participants that the Greater Minnesota Lawyers Conference was a good beginning on addressing the future of outstate law practice. The fact that the Conference occurred was greatly appreciated since it afforded participants an opportunity to meet and focus on crucial issues. Much work remains in defining issues and preparing recommendations for implementation of these resolutions. It was assumed that this Conference would deal with the tensions between rural law practice and urban practice. As the Conference explored the issues, it became apparent that the problems could easily be restated in terms of smaller law firms and large firms or general practitioners and specialists. The Conference calls for more exploration of these issues.

Further exploration of the issues faced by outstate practitioners should include cooperation and an interface with the Blandin Foundation as it works toward building one Minnesota community. This vision is the subject of a column by Leonard Inskip in the Minneapolis Star Tribune on August 15, 1990. A copy of the column is found as Appendix D.

Implementation of this resolution was discussed in terms of continuing the Conference under an appropriate name, such as the Country Lawyers Conference. It was suggested that the Conference reconvene in conjunction with or prior to the MSBA annual convention rather than assigning that work to existing committees or sections of the MSBA.

5. **The Minnesota state and federal trial and appellate courts, excluding the Supreme Court, should be decentralized both in the administrative and hearing process, maintain administrative officers and hear administrative, court and jury cases in traditional seats of state and federal court divisions by resident judges with resident administrative staff.**

Comment

The state and federal court systems of Minnesota serve the entire state. They should not, therefore, limit their presence to the Twin Cities metropolitan area. The people of Minnesota and the administration of justice benefit when the courts maintain a physical presence in outstate areas of the state. When courts, through scheduling cases and maintaining administrative staff, are physically present in a community they become part of the community. In this way divisions between outstate and metropolitan Minnesota can be reduced.

The Minnesota Supreme Court is excluded from this recommendation because of its unique nature of finality. The Minnesota Court of Appeals is encouraged to continue its practice of hearing appeals in outstate locations. As the Minnesota Court of Appeals has traveled throughout the state, the judicial process has become more accessible and less distant to outstate citizens. The migration of trial and appellate court functions and state and federal court systems to a central location in the state diminishes the benefits of open access and familiarity. This trend is opposed.

6. **The Minnesota State Bar Association, Minnesota Lawyers Mutual, Lawyers Professional Responsibility Board and outstate law firms should continue and enhance emphasis on quality assurance and office efficiency of rural law firms, promoting the concept that bigger does not suggest better.**

7. **The MSBA and purveyors of statewide continuing legal education should continue being sensitive to the needs of outstate lawyers concerning substance, location, and timing of presentations and selection of presenters.**

Comment

Isolation of the country lawyer from continuing legal education resources was raised by a number of working groups. The problems of distance, travel and time hinder the access of outstate attorneys to quality continuing legal education courses. Conference participants recognized the efforts providers have made to overcome the difficulties of time and distance with videotaped courses scheduled for outstate presentations. There is a perception, however, that the speakers and faculty of CLE courses are predominantly metropolitan attorneys. Efforts to involve outstate attorneys as speakers are encouraged so that the perception of outstate attorneys as having competence and expertise is promoted.

As resolution #1 of this report is implemented, outstate attorneys and continuing legal education providers will have a resource for identifying potential speakers.

8. **State, federal and administrative courts should recognize the problems of distance and travel faced by all attorneys and freely permit accommodations, including telephone conferences in lieu of personal appearances.**

Comment

The factors of distance, travel and time as they apply to isolation of the outstate attorney and access to the courts was considered in this resolution. Outstate attorneys and clients often find themselves traveling long distances to make short pro forma personal appearances in court. Default hearings, short motion hearings, and certain bankruptcy proceedings were mentioned as examples.

With the availability of telephone conferencing and facsimile transmission, it is now possible to replace the personal appearance with a telephone conference appearance. Courts are urged to increase their efficiency and that of counsel and clients by permitting telephone conference appearances and other accommodations whenever possible.

9. **The MSBA should factor into the rotation toward the MSBA presidency the suburban areas as well as Minneapolis, St. Paul, and outstate Minnesota.**

Comment

Section 8.23 of the Articles, Bylaws and Rules of the Minnesota State Bar Association provides that the offices of President and President-Elect are rotated among members elected from the Hennepin County Bar Association, the Ramsey County Bar Association, and the outstate affiliated district bar associations. The rotation recognizes three components of the MSBA membership: Minneapolis, St. Paul, and outstate. The Conference participants forecast that the demographic trend of attorneys in Minnesota will result in four components: Minneapolis, St. Paul, outstate, and Twin Cities suburban. As the growth of suburban attorneys takes place it is possible that the outstate slot in the rotation could alternate between a suburban attorney and an attorney practicing outside of the Twin Cities metropolitan and suburban area. If this forecast is accurate, the result would be to have an outstate

attorney president of the MSBA once every six years and a suburban attorney president once every six years. By expanding the rotation to include suburban Minnesota, outstate and suburban areas would each elect a president-elect once every four years.

Future demographics of MSBA membership may require this change. An analysis of the current member distribution of the MSBA shows the following:

Metro	9,164	68.6%
Suburbs	1,604	12.0%
Outstate	2,585	19.4%

These figures are taken from the 1989-90 membership report of the MSBA and reflect figures for July 1990.

10. **The Minnesota Supreme Court should reconsider its specialization rules to recognize the differences between metropolitan and outstate practice and the unreality of conforming rural to urban rules on these subjects.**

Comment

The Minnesota Supreme Court has established minimum standards for specialization. A copy of Rule 6 of the Plan for the Minnesota State Board of Legal Certification and Rule 108 of the Internal Rules for the State Board of Legal Certification are set forth as Appendix G. As a minimum, an attorney seeking to be certified as a specialist must devote at least 25% of the attorney's practice to this specialty area. Two areas of specialty are now certified by the MSBA: Civil Trial Specialist and Real Property Law Specialist. To be certified as a Real Property Law Specialist a minimum 25% substantial involvement requirement is imposed. To be certified as a Civil Trial Specialist the substantial involvement requirement is satisfied by devoting at least 50% of the attorney's practice to the specialty.

A number of Conference participants asserted that the percentages of practice requirements are unrealistic as applied to outstate practitioners. During discussion it was stated that the economic realities of law practice in a rural community typically require an attorney to be a general practitioner and prohibit isolating a substantial portion of the practice to a single specialty area.

The Conference concluded that it will become increasingly difficult for outstate lawyers to meet the percentages of practice requirements to obtain or retain

certification. Approximately 128 outstate attorneys are now certified. The number of Twin Cities metropolitan and suburban attorneys now certified is 267. These numbers are based upon a review of the directory issue of Bench & Bar, September 1990, which was published following the close of the Conference.

11. **All lawyers should perpetuate and enhance the degree of civility and collegiality which they enjoy.**

Comment

The professionalism and civility exhibited among country lawyers is seen as one of the benefits of practicing law outside of the metropolitan areas. The erosion of this collegiality among all lawyers in the state is a real threat to both rural and metropolitan lawyers. The Conference was unanimous in urging all MSBA members to build upon the civility and collegiality they have enjoyed in the past.

12. **Country lawyers are proud to be called Country Lawyers and disclaim the term "Greater Minnesota" when applied to them.**

13. **Appropriate elaborating comments should be appended to these resolutions, statements of principle, and calls for action by the interim committee and the report of this conference, thus formalized, should be disseminated within the MSBA, within the court system and to other appropriate distributees and media and to lawyers and the public in their communities.**

14. **The Greater Minnesota Lawyers Conference of the Minnesota State Bar Association extends its gratitude and appreciation to each of the sponsors of the Conference and directs that this resolution be communicated to them. The sponsors are:**

Minnesota State Bar Foundation
Attorneys' Title Guaranty Fund, Inc.
Minnesota Lawyers Mutual

APPENDICES

APPENDIX A

Greater Minnesota Lawyers Conference

August 15-17, 1990

Ruttger's Bay Lake Lodge
Deerwood

Minnesota State Bar Association

Schedule of Events

WEDNESDAY, AUGUST 15

Time	*Event*	*Location*
7:00 p.m.	**Reception**	West Deck
8:00 p.m.	**Dinner**	Colonial Dining Room
8:45 p.m.	**Welcome** *Robert Guzy* *MSBA Vice President-Outstate*	
	Introduction of Speaker *The Hon. Jon Stafsholt* *Eighth District Court*	
	Keynote Address *The Hon. John Simonett* *Minnesota Supreme Court*	

THURSDAY, AUGUST 16

Time	*Event*	*Location*
7:30 a.m.	**Breakfast**	Colonial Dining Room
8:45 a.m.	**Life as a Lawyer in Greater Minnesota** *Jeanne Bringgold* *Wheaton*	Conference Room 1
9:15 a.m.	**Demographics of Greater Minnesota** *Martha McMurry* *Office of the State Demographer*	Conference Room 1

THURSDAY, AUGUST 16 CONT'D

Time	*Event*	*Location*
9:45 a.m.	**The Big Case Drain** *Jeanne Bringgold, Wheaton* *Charles Frundt, Blue Earth* *James Schultz, Houston* *Harry Sieben, Minneapolis*	Conference Room 1
10:45 a.m.	**Preview of Conference Report** *Coordinated by* *Dick Pemberton* *Fergus Falls*	Conference Room 1
11:00 a.m.	**Working Group Breakout**	Conference Rooms 2, 3, 9 and 214
Noon	**Lunch**	Conference Room 1
12:30 p.m.	**Claims in the Outstate** *Tim Gephart* *Minnesota Lawyers Mutual*	Conference Room 1
1:00 p.m.	**Complaints in the Outstate** *William Wernz* *Lawyers Professional Responsibility Board*	Conference Room 1
1:30 p.m.	**Working Group Breakout**	Conference Rooms 2, 3, 9 and 214
2:45 p.m.	**Reconvene and Collect Reports**	Conference Room 1
3:00 p.m.	**Recess**	
6:30 p.m.	**Family Barbecue**	West Deck

FRIDAY, AUGUST 17

Time	*Event*	*Location*
(Please note: Check-out time is 12:00 Noon.)		
8:00 a.m.	**Breakfast**	Colonial Dining Room
9:00 a.m.	**Identify and Rank Issues**	Conference Room 1
10:30 a.m.	**Develop Recommendations** *Coordinated by* *Dick Pemberton*	Conference Room 1
11:30 a.m.	**Recess**	
Noon	**Lunch**	Colonial Dining Room
	Closing Remarks *Robert Guzy*	
1:00 p.m.	**Adjourn**	

Sponsors:

Minnesota State Bar Foundation

Attorneys' Title Guaranty Fund, Inc.,

Minnesota's only bar-related ® title insurance company

Minnesota Lawyers Mutual

Greater Minnesota Lawyers Conference
August 15-17, 1990
Ruttger's Bay Lake Lodge

Participants

Anderson, Kurt
Bloomington
4th District

Baer, Zenas
Hawley
7th District

Breen, Richard
Brainerd
15th District

Bringgold, Jeanne
Wheaton
16th District

Cope, James
Virginia
Range Bar

Costello, Pat
Lakefield
17th District

Dimich, John
Grand Rapids
15th District

Ford, Michael
St. Cloud
7th District

Friedrichs, Karl
Mankato
6th District

Frundt, Charles
Blue Earth
17th District

Guzy, Robert
Columbia Hights
21st District

Halsey, Steve
Fridley
21st District

Hicken, Jeff
Anoka
21st District

Hinds, Elizabeth
Morris
16th District

Hughes, Keith
St. Cloud
7th District

Hughes, Kevin
St. Cloud
7th Distct

Jennings, Mark
Duluth
11th District

Kennedy, Charles
Wadena
7th District

Klein, Brad
Duluth
11th District

Klinger, Edward
Moorhead
7th District

Klosterbuer, Donald
Luverne
13th District

Koch, Gary
New Ulm
9th District

Leary, Pat
Marshall
9th District

Maland, Donald
Montevideo
12th District

Martin, James
Morris
16th District

McCormack, Mary
Marshall
9th District

Meyer, Bruce
Bemidji
15th District

Meyer, Mark
Melrose
7th District

Minge, David
Montevideo
12th District

Murphy, Phillip
Madelia
6th District

Palmer, Stephen
Plymouth
4th District

Pemberton, Richard
Fergus Falls
7th District

Prebich, Rick
Hibbing
Range Bar

Ryan, Mike
Aitkin
15th District

Schmitt, Roger
St. Cloud
7th District

Schultz, James
Houston
3rd District

Simonett, Hon. John
Little Falls
MN Supreme Court

Stafsholt, Hon. Jon
Elbow Lake
16th District

Stockman, John
Minneapolis
4th District

Swenson, Robert
Moorhead
7th District

Tuttle, Clark
New Ulm
9th District

Young, Bruce
Madelia
6th District

Younger, Blair
Olivia
12th District

Zander, Barb
Albert Lea
10th District

Zimmerman, Rick
Aitkin
15th District

MSBA Staff
Groshens, Tim
Jellinger, Rick
Kleeman, Nancy

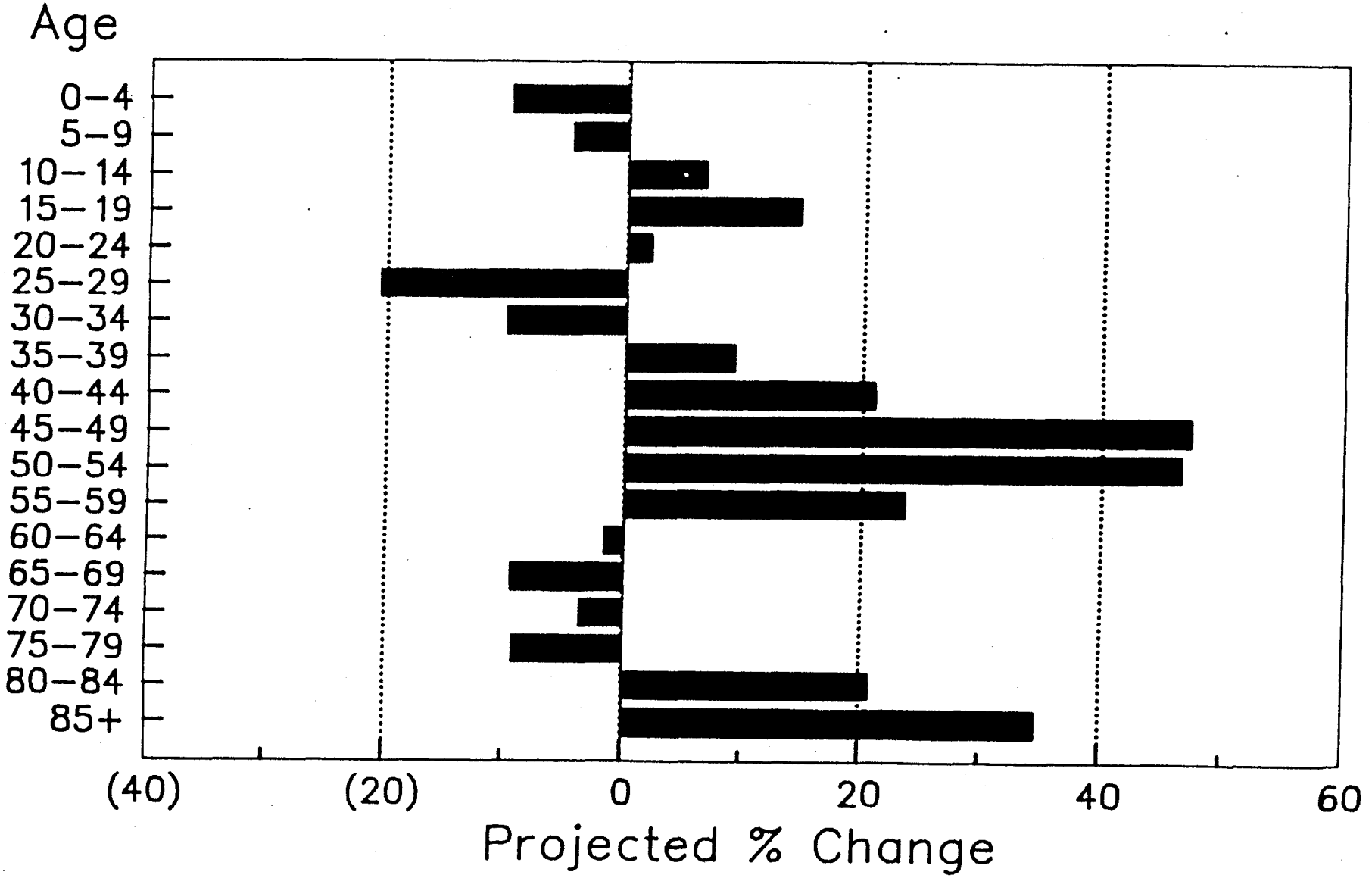
Demographics of Greater Minnesota

by

Martha McMurry
Office of the State Demographer
State of Minnesota

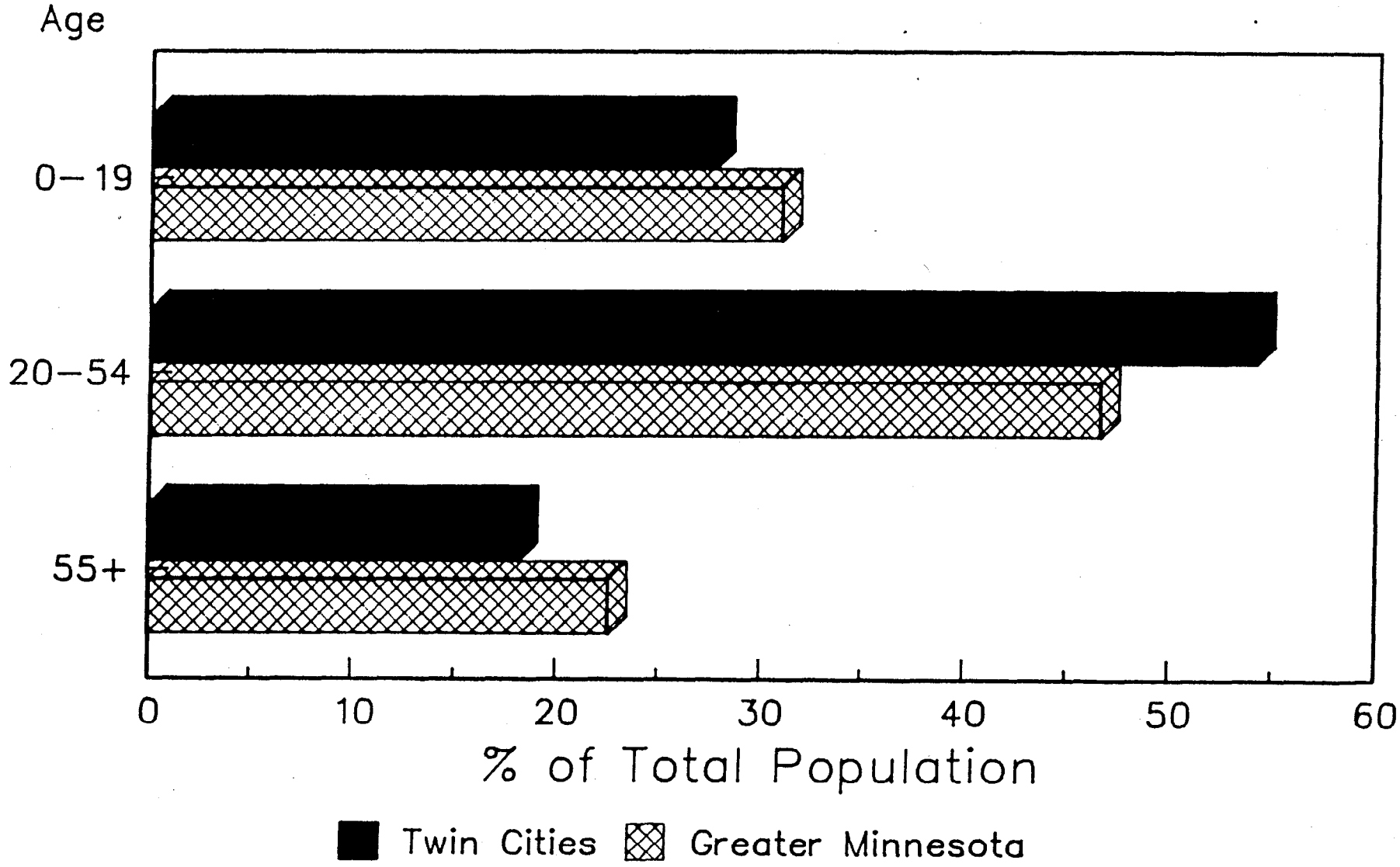
LARGEST INCREASES IN MIDDLE AGED AND VERY OLD

Projected Change in Population, 1990–2000
GREATER MINNESOTA

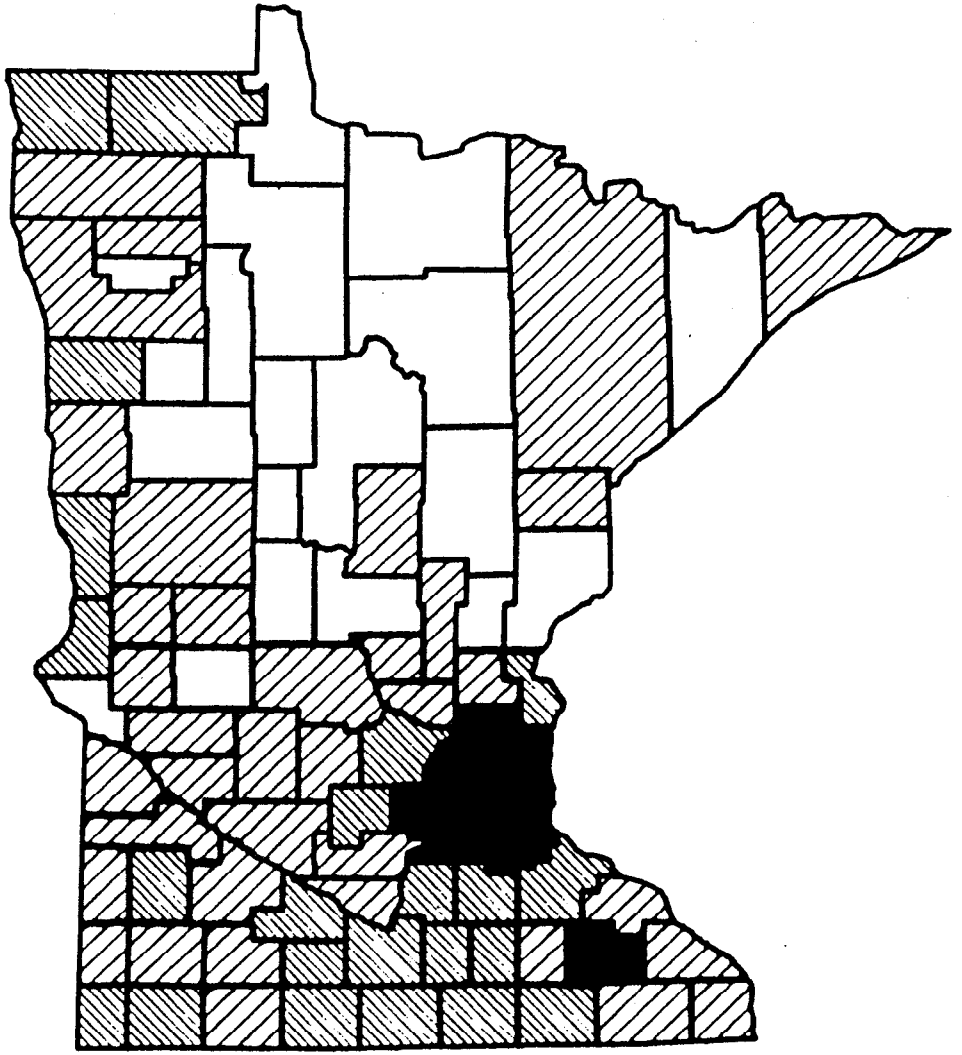


TWIN CITIES HAS MORE WORKING AGE ADULTS

Projected 1990 Population by Age
Greater Minnesota vs. Twin Cities



PER CAPITA INCOME, 1988



State: $16655

$9595 TO 12000

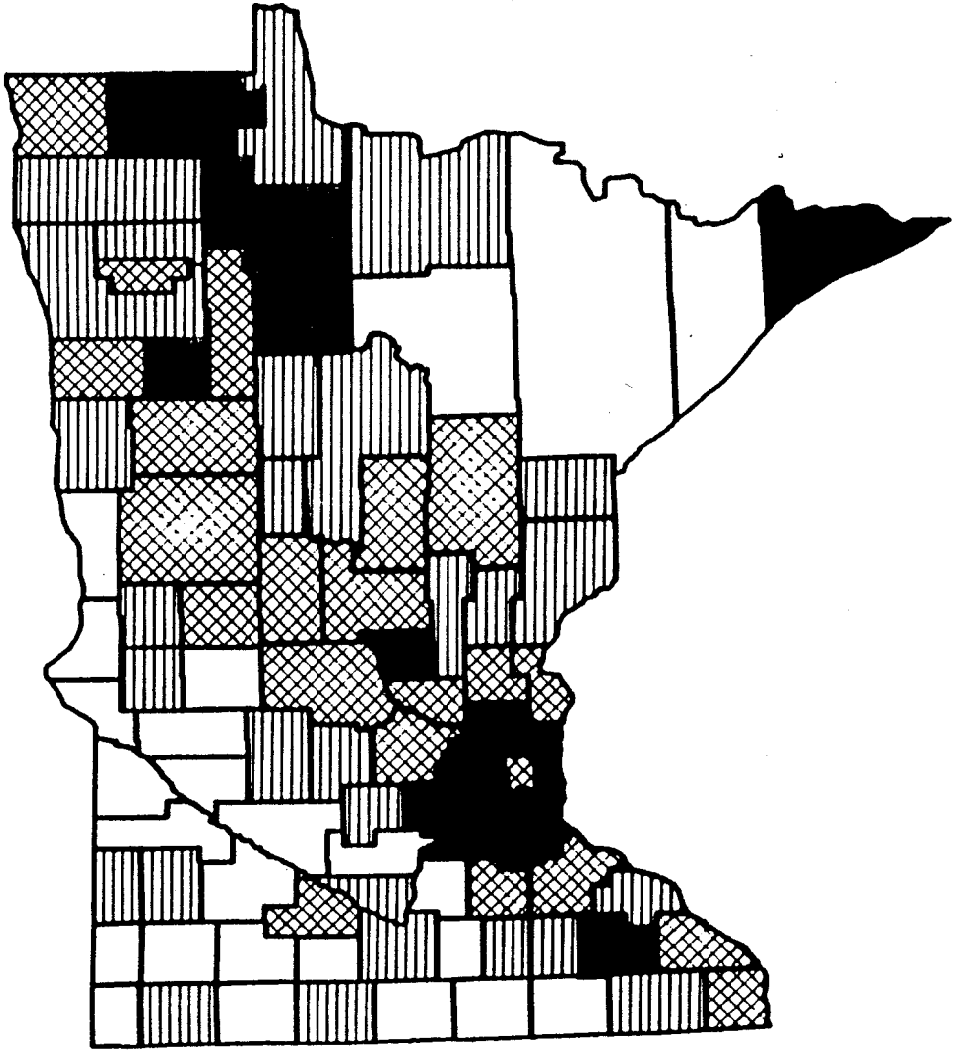
$12000 TO 14000

$14000 TO 16000

$16000 TO 21485

GREATEST INCOME GROWTH IN TWIN CITIES AREA

% Change in Per Capita Income, 1979–88

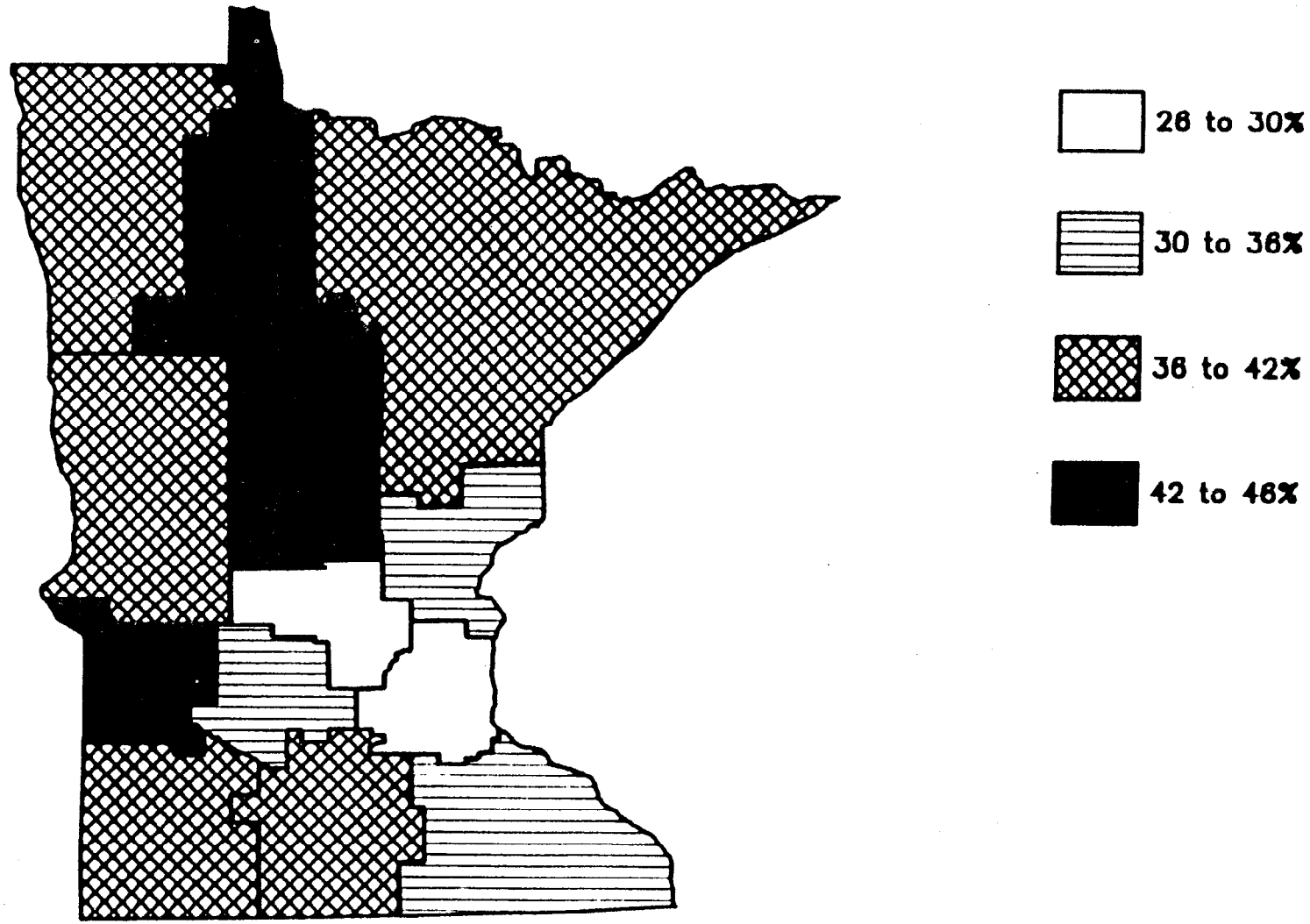


State: 80.5%

- 4 to 65%
- 65 to 73%
- 73 to 85%
- 85 to 110%

TWIN CITIES, ST. CLOUD RELY LESS ON UNEARNED INCOME

Unearned Income as % of Total Income, 1988, by Region



Greater sense of statewide community would help Minnesota

Minnesota often seems like two states: one urban, one rural. The Blandin Foundation is looking for ways to fight that perception.

Blandin's vision: As one community, Minnesota should build on its shared rural and urban interests and values, focusing more on cooperation and less on competition.

To fulfill the vision, Blandin officials propose research into rural-urban trends, interdependencies and future prospects; seminars for legislators and perhaps other groups, and leadership training that pairs rural and urban leaders. The concept, still being developed, will be presented to Blandin's board in September.

One concern is that some ties that connect Minnesotans are weakening or evolving. More executives lack Minnesota backgrounds. Worldwide competition is changing the focus of business. Fewer people have strong rural roots. The population's racial and ethnic composition is changing.

The 1990 census will change the present urban-rural balance in favor of the metropolitan area.

Leonard Inskip

If that exacerbates rural-urban tensions or reduces Minnesota's attention to rural needs, everyone might lose.

Several months ago, Blandin invited some rural and urban leaders to discuss "Minnesota as a Community."

James Krile of Blandin summed up the discussion: "There was a general feeling that as we face the future as a state, we do not have in front of us a common or collective vision .... Minnesotans struggle with how to build on our increasing pluralism and our interactions focus more on conflict and competition than on collaboration and cooperation."

Concern about Minnesota as one community is not new. In recent years, various groups have addressed the issue. The Minnesota Food Association has sponsored forums designed to improve communication between urban and rural citizens. The Domestic Policy Association held a forum called "Building Community: A Rural/Urban Dialogue."

A 1984 State Planning Agency report asked, "Metropolitan and Non-Metropolitan Minnesota: Are We Heading Toward Two Economies?"

"A major effort should be made to build bridges between the seven-county metro area and the rest of the state," the planning agency said. It urged research into such issues as dual economies. It also suggested a two-day symposium on rural development to raise awareness of government, business and other groups.

Research would be key to any Blandin effort to focus attention on Minnesota as a statewide community. The foundation would assemble scholars and writers in a sort of think tank to consider "one Minnesota" from such perspectives as history, attitudes, economic links, population trends, communications, higher education and human services. Presumably, such research would broaden Minnesotans' understanding of themselves, their connections to other Minnesotans and the problems that the state faces.

The next step would be to disseminate the research information. One proposal is to hold one or more seminars before the 1993 Legislature, the first to reflect the census results. That also would be a midpoint in the term of the governor elected this fall.

The seminar would be an opportunity for legislators to think beyond the issues of their individual districts and reflect upon broader concerns developed by the research. One model is the Minnesota Horizons conference for the 1983 Legislature, an event that should have been repeated but wasn't.

Blandin's third step would be a program of leadership development. It would grow from Blandin's existing leadership program, which has trained more than 700 people from a hundred communities outside the metropolitan area. One idea is to improve understanding and communication by pairing urban and rural leaders.

Last week, Blandin invited people from the discussion earlier this year to reassemble and consider the three ideas about research, seminars and leadership development. The rural people came. The urban people didn't. They had plausible excuses, Blandin officials said. Yet the rural people were concerned. "Do urban people care?" asked one. "How do we get the Twin Cities to buy into this?" was another question.

One possibility is to broaden the sponsorship. Blandin, located at Grand Rapids, is a rural foundation. An urban partner — say, the McKnight Foundation in Minneapolis — would strengthen the proposal. Similarly, an urban-based issues group like the Citizens League could be paired with Northern Minnesota Citizens League at Grand Rapids or the Countryside Council at Marshall. Such citizen study groups could contribute to the research.

Paul Olson, Blandin president, envisions a project lasting five to 10 years and costing $2 million or $3 million. Researchers would change as the project evolved. Names mentioned last week were Hyman Berman for history and retiring State Sen. John Brandl for politics. Both are University of Minnesota professors.

Blandin also would convene some of Minnesota's past and present leaders to get their insights. Mentioned last week were former Vice President Walter Mondale, former Gov. Elmer L. Andersen, former foundation head James Shannon, philanthropist and former business leader Kenneth Dayton, Judge Diana Murphy and former Agriculture Secretary Bob Bergland. Adding another person or two with rural backgrounds could be desirable.

Blandin is on the right track. Problem solving can be enhanced through better understanding of Minnesota's past and current trends and likely future directions. A greater sense of statewide community would help.

Minneapolis Star Tribune
August 15, 1990

APPENDIX D

The Bottom Line

July 1990

Tips on effective law office practice and operations

Iowa Lawyer Advertising Rules

by Charles L. Harrington

Rules governing advertising by Iowa lawyers are found in Canon 2 of the Iowa Code of Professional Responsibility for Lawyers and in the formal opinions of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. Effective June 1, 1989, the Supreme Court of Iowa adopted new versions of Disciplinary Rules DR 2-101, DR 2-102, and DR 2-105.

The Iowa rules prohibit advertising "which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes or dislikes of a person, or which contains any claim that is not verifiable." DR 2-101(A). In-person and telephone solicitation are prohibited. DR 2-101(B)(4)(a). Written advertising and solicitation, including telephone directory listings and mailings, is permitted subject to various restrictions, as is advertising by way of the electronic media.

Disclaimers and Disclosures.

Both written and electronic media advertisements must contain applicable disclaimers and disclosures. All lawyer advertisements must contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa." In the case of communications in telephone and city directories, newspapers, periodicals, trade journals, "shoppers," and other similar advertising media, this requirement is satisfied if the publisher agrees to print all required disclaimers in at least 9 point type on each page bearing the ad.

Lawyers wishing to include information as to fees in an advertisement should review DR 2-101(A) and DR 2-101(D). Any reference to fixed fees or hourly fees in the advertising copy requires disclosure:

(a) That the stated fixed fees and range of fees will be available only to clients whose matters are encompassed within the described services; and

(b) If the clients matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

A lawyer may advertise a contingent fee "provided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence." DR 2-101(D)(3).

If a lawyer wishes to suggest that the potential client(s) undertake litigation, DR 2-101(F) requires the communication to "disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process."

A lawyer who limits his or her practice to or practices primarily in a specified area of practice and who meets the requirements of DR 2-105 to list an area of practice may refer to the area of practice in an advertisement containing the following DR 2-105(A)(3)(b) disclaimer:

> A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

In all cases where a written commitment from the publisher to print a disclaimer is required, it is the responsibility of the advertising lawyer to insist on such commitment. *See* Opinion 89-46.

No disclaimer is required with publication of a "professional card,"

(continued on page 14)

The Bottom Line *is published in each monthly issue of* The News Bulletin *of The Iowa State Bar Association. It is an ongoing project of the Association's Committee on Bar Economics and Law Office Operations. Committee chair is David D. Beckman of Burlington. Material for publication and suggestions as to content are welcome. They should be sent to the editor Jim Mumford, 1000 Equitable Building, Des Moines, Iowa 50309, (515) 245-6789, or Steve Roy, Associate Editor, 1900 Hub Tower, Des Moines, Iowa 50309, (515) 283-3100. Neither The Bottom Line nor the Iowa State Bar Association endorse or promote particular software products. Comments about software products are those of the author only.*

ADVERTISING RULES

continued from page 12

however, "if anything is added, such as, but, not limited to 'General Practice,' 'No Fee for Initial Consultation,' 'etc., etc.,' the appropriate disclaimers are required."

Telephone Directory Advertisement.

Telephone or city directory advertising may be done either by a lawyer or a law firm. Listings for individual lawyers in the residential, business, and classified sections of the directory may only contain the lawyer's name, address, telephone number, and designation as a lawyer. DR 2-101(B)(2)(a). Classified listings must be under the general heading "Lawyers" or "Attorneys" except that a lawyer who has met the qualifications to list areas of practice under DR 2-105 "may be listed in no more than three classifications of headings identifying those fields or areas of practice as listed in DR 2-105(A)(2)." DR 2-101(B)(2)(b). Printed disclaimers must be contained in each display and box advertisement unless the publisher agrees to print all required disclaimers in at least 9 point type on each page bearing the ad.

Law firms may list the name of the firm, a list of members, address, and telephone number in the residential, business, and classified section of the directory. DR 2-101(B)(3)(a). Classified listings must be under the general heading "Lawyers" or "Attorneys" except that if one or more members of the firm is qualified to list an area of practice under DR 2-105, the firm name may be listed in a classification or heading identifying that area of practice. DR 2-101(B)(3)(b). Display and box ads may contain the names of firm members and shall include all applicable disclaimers unless the publisher agrees to print the disclaimers in at least 9 point type on each page bearing the ad. DR 2-101(B)(3)(c).

Lawyers wishing to advertise an area of practice in the classified listings of the directory must comply with Opinion 89-53 (published in this issue of the Bar Bulletin).

Mailings.

The new rules effective June 1, 1989, address for the first time the questions of targeted mail solicitation, i.e., mailings sent to persons known to need the offered legal services (as opposed to the general public). Targeted mail solicitation and other direct mailings to the general public are permitted, provided they comply with the following provisions of DR 2-101(B)(4):

(b) Written Solicitation. A lawyer who wishes to engage in written solicitation by direct mail to persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could upon reasonable inquiry be known to the soliciting lawyer shall, prior to the dissemination of the solicitation, file all such proposed written documents or solicitations with the committee on professional ethics and conduct of the Iowa State Bar Association. The soliciting lawyer shall, in addition thereto, bear the burden of proof regarding:

(i) the truthfulness of all facts contained in the proposed communication;

(ii) how the identity and specific legal need of the potential recipient were discovered; and

(iii) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

All such written solicitations shall contain the disclosures required by DR 2-101(A), (D), and (F). No such

dissemination shall be made until the committee or its designee shall, upon the facts presented, render a written finding that the solicitation is not false, deceptive, or misleading. No information disseminated by the soliciting lawyer shall make any reference to such submission and finding. Each separate written solicitation intended for dissemination must be submitted for a finding in accordance herewith.

(c) Direct Mail. Information permitted by these rules may be communicated by direct mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. All such communications shall contain the disclosures required by DR 2-101(A), (D), and (F).

(e) All communications authorized by paragraphs "b" and "c" hereof and the envelope containing the same shall, in addition to other disclosures that may be required hereunder, carry the following disclosure in red ink in 9 point or larger type: "ADVERTISEMENT ONLY". A copy of all direct mail communications shall be filed with the administrator, or the administrator's designee, of the committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 188, contemporaneously with the mailing of the communications to the general public and shall contain the disclosures required by DR 2-101(A), (D), and (F).

The written finding provided for by DR 2-101(B)(4)(b) shall be made "not more than twenty days after receipt by the committee of the proposed solicitation." Opinion 88-30. The lawyer shall then "have twenty days to take written exception to the committee finding, setting forth the factual reasons therefore" and the committee has twenty days following receipt of any exceptions to "issue a Formal Opinion concerning the same in pursuance to Committee Rule 6.1." *Id.*

Electronic Media Advertising.

Television and radio ads by lawyers are governed by DR 2-101(B)(5):

> Electronic Media. Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephone media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, and shall contain the disclosures required by DR 2-101(A), (D), and (F).

An earlier and similar rule was upheld in *Committee on Professional Ethics and Conduct v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated* 472 U.S. 1004, *on remand* 377 N.W.3d 643 (Iowa 1985), *appeal dismissed* 475 U.S. 1114.

Areas of Practice.

Before advertising an area of practice a lawyer must have filed a compliance report with the Commission on Continuing Legal Education. DR 2-101(B)(2)(b) and DR 2-105(A)(4). The listing of an area of practice in an ad must be preceded by the words "practice limited to" or "practicing primarily in" the specified area of practice. DR 2-105(A)(3)(a) and (b). *Minimal* deviation from the designation of fields of practice in DR 2-105(A)(2) is permitted (for example, "*Job* Discrimination and Civil Rights Law" instead of Discrimination and Civil Rights Law") but such deviation must not add to the areas of practice recognized for advertising purposes. *See* Opinions 88-33 and 89-46.

A lawyer advertising an area of practice may not also advertise a "general practice." DR 2-105(B).

Conclusion.

The foregoing addresses only some of the provisions governing lawyer advertising in Iowa. Lawyers wishing to advertise are cautioned to carefully review Canon 2 of the Iowa Code of Professional Responsibility for Lawyers and applicable opinions of the Committee on Professional Ethics and Conduct.

Charles Harrington is currently Counsel for the Committee on Professional Ethics and Conduct of the Iowa Bar Association.

Telephone directory advertising guidelines collected and republished

To the members of the Bar:

Representatives of the Ethics Committee and of US West have been in consultation concerning directory advertising. US West is making a real effort to work with the Bar and hopefully our members will benefit from this.

Reprints of Committee guideline opinions on directory advertising are submitted herewith.

Mike Figenshaw
Chair, Committee on
Professional Ethics and Conduct

Telephone Directory Guideline Opinions

DR 2-101(A)(3)(B) — TELEPHONE DIRECTORY CLASSIFIED HEADINGS (89-15 September 6, 1989)

DR 2-101(A)(3)(B) provides that:

"Classified listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys", except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2) in which one or more members of the firm are qualified."

DR 2-105(A)(2) lists the various fields permissible under the Iowa Code of Professional Responsibility for Lawyers.

Formal Opinion 88-33 of the Committee dated June 8, 1989, permits minor deviation from the specific terms listed in DR 2-105 but not to the point of adding to the areas of practice involved.

It is the opinion of the Committee that the publishers of telephone directories in some instances do not use the appropriate terminology contained in DR 2-105.

This opinion is to put the Iowa lawyers on notice not to permit their names to be listed under classified advertising headings which do not comply.

TELEPHONE-YELLOW PAGE ADVERTISING
(89-46 February 20, 1990)

Yellow Page Advertising — Headings and Guidelines

The committee is reviewing current telephone directory advertising with the recently adopted Disciplinary Rules in mind. There appears to be a pattern in what seem to be inadvertent violations, prompting adoption of the following opinions:

1. It is the opinion of the committee that the following words used with the areas of practice indicated clarify the meaning of the DR 2-105 terms and are permissible:

1. "Job" or "Employment" with "Discrimination and Civil Rights Law." The Rule permits "Discrimination and Civil Rights Law". "Job" or "Employment" can be used in connection with "Discrimination and Civil Rights Law". For example: "*Job* Discrimination and Civil Rights Law."

2. "Accident", "Bodily Injury" and/or "Property Damage" with "Personal Injury Law." The Rule permits "Personal Injury Law." "Accident," "Bodily Injury" and/or "Property Damage" can be used in connection with "Personal Injury Law." For example: "*Accident*, Personal Injury and *Property Damage Law*."

3. "Trust" with "Wills, Estate and Probate Law". The Rule permits "Wills, Estate and Probate Law." "Trust" can be used with "Wills, Estates and Probate Law." For example: "Wills, *Trust*, Estate and Probate Law."

2. The following guidelines are published as an opinion to avoid what appear to be the most common violations of the Disciplinary Rules governing yellow-page advertising:

1. Be certain that listings of areas is in compliance with the listing DR 2-105(A)(2) and the preceding paragraph 1 of this opinion, and any other Rules or Opinions published hereafter.

2. Do not enlarge areas of practice with descriptive terminology *i.e.* "brain damages," "divorce," "driving while intoxicated," etc., etc.

3. The firm cannot advertise areas of practice but its members can.

4. Any lawyer advertising areas of practice or who is listed under area headings *must* have filed a compliance report with the Commission on Continuing Legal Education. DR 2-105(A)(4) and DR 2-101(B)(2)(b).

5. No more than 3 areas of practice may be listed.

6. "General Practice" may not be advertised if areas of practice are advertised and vice versa ...

7. Be sure all necessary disclaimers will be published as required and in at least 9 point type.

This requires a written commitment from the publisher in certain cases, and you should insist to ensure your ad complies.

8. Be sure to avoid all the language prohibited in DR 2-101(A).

(continued on page 8)

DIRECTORY *continued from page 7*

ADVERTISING: WORDING IN TELEPHONE CLASSIFIED ADS UNDER DR 2-105 (89-53 MAY 11, 1990)

Inquiry has been made whether advertising by lawyers must contain language indicating whether practice is "limited to" or is "primarily in" listed areas, and as to listing by firms by classification or area of practice.

It is the opinion of the committee that:

1. If the lawyer accepts only matters in the listed fields of law the words,

"practice limited to"

must precede the list (DR 2-105(A)(5)(a)).

2. If the lawyer practices primarily in listed fields of law, but also in others, the words,

"practicing primarily in"

must precede the text (DR 2-105(A)(3)(b)).

3. Listings of names of lawyers qualified under DR 2-105 or law firms with such qualified member need not use the foregoing words in classified listings by areas of practice if they appear elsewhere in the directory (in an advertisement of the lawyer or firm); if they do not so appear they must appear in the listing;

a. This requirement can be met by having each page of the listing by classifications or areas contain the following statement:

"The following Iowa lawyers or law firms either practice primarily in or limit practice to the areas of practice in which they are listed",

Such publication is to be in 9 point or larger type.

Other wording may be submitted to the committee, if desired.

b. If a lawyer-member of a firm is qualified to limit practice or practice primarily in a designated field or area of practice under DR 2-105, the firm may list its name in the classified section under that area of practice only if the disclaimer required in DR 2-105 is published either with the name itself or on the page where the listing is published.

4. Only names and addresses of lawyers and law firms may be published in the alphabetical sections of telephone directories, however individual lawyers may include designation as a lawyer.

5. This opinion in no way lessens disclaimer requirements of the Iowa Code of Professional Responsibility for Lawyers.

APPENDIX F

Rule 6 of the Plan for the Minnesota State Board of Legal Certification is entitled "Minimum Standards for Recognition of Specialists" and provides as follows:

> 6.01 For a lawyer to be recognized as a certified specialist in this state, the lawyer must be duly licensed in active status and in good standing throughout the period for which specialty designation is granted and comply with the other requirements of this section.
>
> 6.02 The lawyer must be certified by an agency approved by the Board.
>
> 6.03 The lawyer must complete, every three years, a minimum of 20 hours of continuing legal education course work in the area of the lawyer's specialty. These hours shall constitute a part of the 45-hour C.L.E. requirement. Proof of completion of the required 20 hours shall be submitted to the Board at the end of the lawyer's three-year C.L.E. cycle.

Rule 108 of the Internal Rules for the State Board of Legal Certification is entitled "Standards for Certifying Attorneys" and provides as follows:

> An attorney may be certified in a specialty area for consecutive periods not exceeding six years each by complying with the rules and certifying agency's procedures for certification and recertification.
> A certifying agency may accept applications for certificaion if:
>
> a. The attorney is licensed and on active status in Minnesota.
>
> b. The attorney is able to show by independent evidence "substantial involvement" in the specialty area during the three-year period immediately preceding enrollment. "Substantial involvement" means at least 25% of the attorney's practice is spent in the specialty area of certificaiton;
>
> c. The certifying agency verifies three written peer recommendations, or more if required by the Board, in addition to references submitted by the attorney from attorneys or judges unrelated to, and not in legal practice with, the attorney;
>
> d. The attorney successfully completes an objective evaluation of the attorney's knowledge of the substantive and procedural law in the specialty area, as determined by written and/or oral examination; grading standards for tests must be available prior to the test administration, and model answers must be available for inspection after test results are determined;
>
> e. The attorney successfully completes an examination which includes a part devoted to professional responsibility and ethics as it relates to the particular specialty;
>
> f. The attorney is current with C.L.E. credits for any state of licensure thought the period of applicaiton;
>
> g. The attorney signs a release to share information of the applicant agency with the Board.

Meeting Notice

MINNESOTA STATE BAR ASSOCIATION

ADVERTISING SUB-COMMITTEE OF THE RULES OF PROFESSIONAL CONDUCT COMMITTEE

Friday, February 1, 1991

3:00 p.m.

Minnesota Bar Center
430 Marquette Ave., #403

Date: January 10, 1991

To: Advertising Subcommitee of the MSBA Rules of Professional Conduct Committee

From: Barb Zander, Chair

Re: February 1 Meeting

The first meeting of the Advertising Subcommittee of the MSBA Rules of Professional Conduct Committee will be held on Friday, February 1 at 3:00 p.m. in the Board Room of the Minnesota Bar Center, 430 Marquette in downtown Minneapolis. Our Subcommittee was created by the MSBA Rules of Professional Conduct Committee to study an issue referred to them by the MSBA Board of Governors: a recommendation from the Greater Minnesota Lawyer's Conference that the MSBA work toward adoption by Minnesota of the Iowa advertising rules. This recommendation was not adopted by the Board of Governors but referred to Rules of Professional Conduct for further study.

Our agenda on February 1 will include deciding future meeting dates, establishing a timetable and action plan for our efforts and preliminary discussions on attorney advertising.

A description of our committee and a committee roster is enclosed. Also enclosed are a President's page written recently by the Hennepin County Bar President relating to advertising, a recent Florida Supreme Court Case restricting lawyer advertising, and the report of the Greater Minnesota Lawyer's Conference. Their recommendations about advertising are on page six and information about the Iowa advertising rules is in the Appendix. Please review these materials in advance of the meeting.

I look foward to working with you over the coming months, and hope to see you on February 1.

Please also return the attached response form to indicate your attendance at the meeting. Thank you.

Minnesota State Bar Association
Committee Description
1991

Subcommittee Name: Advertising Subcommittee of the Rules of Professional Conduct Committee

Subcommittee Charge:

To study and recommend to the Minnesota State Bar Association Rules of Professional Conduct Committee whether lawyer advertising proposals similar to those in Iowa, Florida or other states should be adopted in Minnesota.

Type of Subcommittee: *Ad Hoc*

Subcommittee Reports Recommendations to:

The Subcommittee reports recommendations to the Rules of Professional Conduct Committee. The committee will report recommendations to the Board of Governors which will meet May 15 and June 14; or the General Assembly during the MSBA Convention in June.

Subcommittee Membership: Attached

Staff Liaison: Mary Jo Ruff, Associate Executive Director

LAWYER ADVERTISING COMMITTEE CHARGE

To develop a specific proposal regulating lawyer advertising to be presented a the 1992 Convention.

1992 Convention: June 25-27, Rochester, MN
Deadline for reports: April 27

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
SEPTEMBER 20, 1991

The Lawyer Advertising Committee was called to order on Friday, September 20 at 11:00 a.m. The meeting was held at the University of St. Thomas. The following members were present: Barb Zander, Chair, Bert Greener, Chair, Mary Maring, Mike Fetsch, Ken Kirwin, Tom Clure, Marty Cole, Tracy Eichhorn-Hicks, Don Bye, and Joan Bettenburg. Also present was Mary Jo Ruff of the MSBA staff.

KEY ITEMS DISCUSSED & ACTION TAKEN

Introduction

Co-Chairperson Bert Greener opened the meeting by asking committee members to introduce themselves and to state their initial predilection regarding lawyer advertising. He then circulated an article from "Skyway News" about lawyer advertising. He stated that he had chaired the Hennepin County Bar Association's committee on lawyer advertising which began to examine the issue last year and would now monitor MSBA developments on this issue.

Public Members

Discussion was held about the desirability of adding public members to the committee. Committee members were asked to forward suggestions for public members to Mary Jo Ruff.

Discussion of Suggested Procedures

Discussion was held about future meeting dates, times, and places. Committee members generally agreed that Friday was a good day to meet and that afternoons were better than mornings. The group agreed to meet October 25 from 1:00-4:00, November 22 from 1:00-4:00, and December 20 at a time to be confirmed. The group tentatively agreed to hold the December meeting at Joan Bettenburg's office in the midway area of St. Paul to avoid the downtown Minneapolis holiday chaos.

Discussion was held about the timetable and topics to be discussed at each meeting. Mary Jo Ruff noted that April 27 is the deadline for committee reports to be finalized to be considered at the June Bar Convention. During discussion of meeting topics, the group agreed to discuss the Iowa and Florida rules at the October meeting and to discuss constitutional issues at the November meeting (instead of vice versa). After discussion, the group agreed on the timetable and topics listed in the attached materials.

Preliminary Discussion of Advertising Issues

The group then discussed in an introductory fashion a number of issues relating to lawyer advertising. Bert Greener indicated that the Iowa advertising rules were adopted in the early 80's,

and were then challenged and upheld by the Iowa Supreme Court. Later, the United States Supreme Court decided the Zauderer decision and the Iowa Supreme Court reconsidered its decision in light of that case. The Iowa Supreme Court reaffirmed its decision. The United States Supreme Court then denied certiorari and dismissed the case for a lack of a federal question.

Bert Greener also reported that the Florida advertising rules were adopted by the Florida Supreme Court in 1990. The rules are now being challenged in federal court on constitutional grounds by three plaintiffs named the Citizens Against Censorship. In the meantime, the Florida Bar has a full time staff to review lawyer ads.

The group discussed whether to bring in speakers to talk about the effects of lawyer advertising, such as a person from the Attorney General's staff or an advertising professional. It was noted that studies have been conducted showing that the image of the profession is lowered by advertising, although a question was raised about whether such studies would have to be Minnesota specific to support a change in the Minnesota rules. Discussion then focused on whether regulation of advertising would necessarily improve the image of lawyers or whether the public perception of lawyers is determined by a variety of factors. The purposes for regulating lawyer advertising were discussed, such as protecting the public from misleading claims and protecting the image of lawyers as professionals.

Resource Materials

The committee agreed to review resource materials in advance of the next meeting. Materials to be reviewed include the committee charge, the Iowa and Florida rules, a summary of constitutional issues prepared by Ken Kirwin, a Stetson Law Review article, a recent story about advertising from "MN Law and Politics", and other miscellaneous articles.

The meeting was adjourned at approximately 1:30 p.m.

Future Meetings

The next meeting will be held October 25, 1991 at the University of St. Thomas from 1:00-4:00 p.m.

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
OCTOBER 25, 1991

The MSBA Lawyer Advertising Committee was called to order on Friday, October 25 at 1:00 p.m. The meeting was held at the University of St. Thomas. The following members were present: Bert Greener, Co-Chair, Barb Zander, Co-Chair, Marty Cole, Tom Clure, Ken Kirwin, Tracy Eichhorn-Hicks, Mary Maring, Tom Conlin, Don Bye, and Pat Costello. Also present was Mary Jo Ruff of the MSBA staff.

Opening Comments

The minutes from the first committee meeting were approved by consensus. Bert Greener announced hearings for the Minnesota Supreme Court Racial Bias Task Force. Discussion was held about finding public members for the committee. All members were asked to forward names of potential public members to the committee co-chairs or Mary Jo Ruff. Bert Greener announced that the annual ethics seminar sponsored by the Lawyers Professional Responsibility Board will be held November 8 at the Sheraton Midway and that lawyer advertising would be on the program from 11:00 to 12:15. He noted that Nick Critelli from Iowa would be the speaker. Finally, he noted that the MSBA Practice Development Section would like to maintain a liaison with the committee.

Surveys

Discussion was held about whether lawyers, jurors and/or the public should be surveyed about their attitudes concerning lawyer advertising. It was suggested that Minnesota would need Minnesota specific empirical data to justify any restrictions on advertising. Discussion was held about the timing of a survey, its contents, its cost, and its value. Mary Jo Ruff agreed to gather information from the ABA and other states about their surveys, the cost, and other information.

Advertising Restrictions Litigation

Discussion was then held about whether to invite individuals from Iowa and Florida to Minnesota to discuss the development of their rules and the subsequent litigation. After lengthy discussion, it was agreed to try to meet with Nick Critelli when he is in town on November 8 for the ethics seminar. Mary Jo Ruff agreed to call Bill Wernz to see if a meeting could be arranged.

Discussion was then held about the need to propose changes, if any, that would survive constitutional challenge. This led to a discussion about the cost of litigation and who would bear those costs. Marty Cole suggested that the Minnesota Supreme Court would be the likely defendant, not the MSBA, and that the Attorney General defends the court in litigation.

Iowa and Florida Rules

Discussion then began about the Iowa and Florida rules. Ken Kirwin agreed to prepare a chart contrasting the rules for the next meeting. He agreed to organize the chart according to categories such as solicitation, disclaimers, etc.

Discussion was held about whether the committees should request the assignment of a law student or an attorney to conduct research on advertising issues. Mary Jo Ruff agreed to talk with Tim Groshens (MSBA Executive Director) and then to Barb Zander and Bert Greener about this possibility.

MSBA in brief

The committee agreed generally to request placement of a notice in MSBA in brief asking lawyers to send in copies of ads which they consider misleading and deceptive. The notice would also ask for more information about the placement of the ad, any clients who were misled by the ad, and further information.

The Timetable for the Remainder of the Study

The group agreed to review the Iowa and Florida rules and discuss constitutional issues on November 22, to begin discussing adaptability of these rules for Minnesota in December and to begin drafting, if any, in January. Mary Jo Ruff agreed to distribute a modified timetable.

The group agreed to meet December 20 at 1:00. Mary Jo Ruff agreed to confirm whether that meeting will be held in Joan Bettenburg's office. She also agreed to distribute a list of parking ramps close to the new MSBA office at 514 Nicollet.

The meeting adjourned at approximately 3:30.

Next Meeting

The next meeting is at November 22 at the MSBA offices, 514 Nicollet Avenue, Suite 300.

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
DECEMBER 20, 1991
JODY BETTENBURG'S OFFICE

Present: Bert Greener, Chair, Tom Clure, Mark Munger, Ron Graham, Jon Hovanec, Marty Cole, Mary Maring, Pat Costello, Ken Kirwin, Don Bye, Joan Bettenburg, Joan Hackel. Also present was Mary Jo Ruff of the MSBA staff.

Absent: Barb Zander, Chair, Tom Conlin, Tracy Eichhorn-Hicks, Michael Fetsch, John Goetz, Ralph Peterson, and Gary Stoneking.

Reports and Discussion

Introductory Comments

Bert Greener announced that Barb Zander was unable to attend the meeting because she was ill. He announced that the previously selected committee meeting date of April 17 fell on Good Friday. The group decided to meet April 10 instead. Bert Greener announced the meeting dates on January 24, February 21 and March 20.

Introduction of Public Members

Bert Greener introduced Ron Graham from the Better Business Bureau and asked Ron to make a few comments. Ron Graham stated that he had worked for the Better Business Bureau for 32 years and was pleased to serve on the Lawyer Advertising Committee. He summarized the Better Business Bureau's procedure for addressing advertising complaints. He noted that most complaints come from competitors rather than from the public. He noted that he had received few, if any, complaints relating to lawyer advertising.

Bert Greener than introduced John Hovanec and asked him to make a few comments. John Hovanec stated that he had worked for the ad agency of Campbell/Mithun before entering the teaching profession. He now teaches marketing at the University of St. Thomas and the University of Minnesota and also serves as a marketing consultant.

Meeting with Nick Critelli

Bert Greener summarized the meeting with Nick Critelli for those not present at the November meeting. He and others who attended the meeting reported that Nick Critelli indicated reservations about the likely success of Minnesota changing its advertising practices to match the Iowa Rules since the climate differed so between Minnesota today and Iowa ten or twelve years ago. Nick Critelli was involved in the formation of Iowa's advertising rules and also successfully defended those rules before the Supreme Court, although little or no advertising existed in Iowa at the time the rules were written. He noted that the practice differs considerably in Minnesota today and also that Minnesota's ethical rules already proscribe some of the abuses which the Lawyer Advertising Committee sought to correct. He suggested that it might be more appropriate to focus on enforcement of the rules already written rather than to write more rules. He also reminded committee members of the constitutional issues and

costs involved in writing and perhaps defending restrictions on lawyer advertising. Bert Greener noted that Dick Pemberton, former MSBA President and Chair of the Outstate Practice Committee, had expressed reservations about going forward, at least to the extent orginally hoped, after the meeting with Nick Critelli. He did so in a letter to the outstate members of the Lawyer Advertising Committee.

Enforcement of Advertisement Rules

Discussion turned to the issue of whether the committee ought to focus on increased enforcement of the advertising proscriptions in the Minnesota Rules of Professional Conduct. Marty Cole, speaking on his own behalf and not that of the Office of Lawyers Professional Responsibility or the Lawyers Professional Responsibility Board, stated that if the committee felt the office was not enforcing the rules appropriately, perhaps the committee ought to write to the Lawyers Professional Responsibility Board and suggest a new policy direction. He indicated that the board currently had directed members of the Office that they should not be proactive by searching out violations of the rules, but reactive by responding to complaints filed. Marty Cole also stated that the Director of the Office has the ability to initiate a complaint but he needs Executive Committee approval to do so. Don Bye agreed to draft a resolution or request to the LPRB that it be more proactive on the issue of lawyer advertising. The committee will review his draft at the next meeting.

Mark Munger distributed an ad which appeared in a Cloquet newspaper by an organization called The Advocate which indicated that it has "Claims Service Agents and Attorneys to explain entitlements in laymens' terms to individuals who have been injured." A Cloquet lawyer asked the Lawyers Professional Responsibility Board to investigate and the response by Wendy Legge, Senior Assistant Director, was reviewed by the committee. She indicated that she spoke to an individual at The Advocate who said there were no attorneys who worked for The Advocate. Thus the Office has no jurisdiction. A number of committee members expressed concern that the LPRB was not able to investigate further, which led to a discussion about brokering of cases. It was noted that brokering occurs by nonlawyers and therefore the LPRB has no jurisdiction over them. It was also noted however, that the LPRB could enforce rules against attorneys who buy brokered cases. Ron Graham of the Better Business Bureau indicated that his office may be able to investigate the ad for The Advocate and indicated that it was potentially misleading due to its name, the reference to attorneys in the ad, and the pictures of the scales of justice. He indicated that his office would write a letter to The Advocate expressing concern and offering to assist in developing an ad which was not misleading to the public. As a final stage, his office may monitor placement of the ad in the Cloquet newspaper. Discussion continued about brokering of cases and the ethical rules which address it. Marty Cole noted that 7.2(c) referred to runners and Rule 1.5(e) relates to fee splitting among lawyers.

Screening Ads

Discussion ensued about whether the committee ought to recommend a screening function for the LPRB to review ads. Jody Bettenburg

suggested that the rules be amended to require all advertisements to be filed with the Office of Lawyers Professional Responsibility. She suggested that filing the ads may cause lawyers to be more cognizant of whether anything in the ad was misleading. Other committee members suggested that screening would be preferable if it were economically feasible. Another suggestion was that the MSBA screen ads and set up some voluntary aspirational standards about the content of ads. Bert Greener suggested that the issue be discussed again at the January meeting.

Bert Greener then reviewed the list of issues of the November meeting for the committee to discuss. He suggested that each of them be discussed in turn and that the committee agree with respect to each other to draft a proposal, drop it from further discussion, or discuss it further at a future meeting.

Fee Splitting

The committee discussed fee splitting. The committee noted that one purpose of permitting fee splitting is to provide the best representation possible to the public so that if a lawyer feels that he or she is not competent to handle a given case, he or she can refer the case to another lawyer without completely losing the fee. Marty Cole noted that the rules required that the client be informed of the arrangement and that the first attorney maintain responsibility for the case. It was suggested that competence could be approached more directly by requiring disclosures in ads if cases would be commonly referred to other lawyers. Mark Munger agreed to draft a proposal for the January meeting.

Celebrity Endorsements and Accident Reenactment

Bert Greener referred committee members to the discussion at the November meeting about the inherently misleading nature of accident reenactments and celebrity endorsements and testimonials. The committee generally agreed that they disliked endorsements and reenactments. Bert Greener and Mary Jo Ruff agreed to locate the rules passed in Florida and Iowa on this subject so that the committee could review exact language at its January meeting.

Mail Solicitation

Marty Cole reported that Minnesota allows mail solicitation as long as the solicitation is not false or misleading. He also noted that under the Shapero case, attempts to restrict solicitation would be fruitless. The committee discussed ways to make mail solicitation more palatable. It was suggested that restrictions could include requiring lawyers to stamp on the outside of the envelope that the contents were an advertisement or requiring a thirty-day waiting period between an accident or death and the mailing of the solicitation. Bert Greener and Mary Jo Ruff agreed to find examples of rules from other states for the committee to review at the January meeting.

Taste

The committee generally agreed that there was no way to regulate taste and that it was not an appropriate subject for further discussion.

Disclaimers

Pat Costello agreed to gather a number of disclaimers which were used or proposed for other states. One disclaimer the committee discussed was that in which ads would indicate whether the clients are required to pay cost if they lose the case. Bert Greener and Mary Jo Ruff agreed to find additional rules on this subject.

Specialization

Don Bye noted that he served on the State Board of Legal Certification and that the board had filed a number of complaints against lawyers who were advertising that they were specialists or experts when they had not become certified by the MSBA as civil trial or real estate specialists. He noted that the response from the LPRB seemed to be somewhat inconsistent. Marty Cole responded that the Office gave a narrow reading to the rules and would not, for example, ordinarily discipline a lawyer for using the word "expert" even if he or she had not been certified as a specialist.

Contingency Fees

It was noted that the Minnesota Rules allow the advancing of costs for litigation if a written agreement is signed by the client. Pat Costello agreed to look for examples of disclaimers which address contingency fees.

Estimated Fees

A number of committee members expressed their concern over estimated fees, such as an agency advertising "divorces for ninety-nine dollars and up". It was noted, however, that the ad was not technically untrue although it could represent a form of "bait and switch". The group noted that it was extremely rare for any divorce to be handled for ninety-nine dollars, even if it was a default divorce, since the filing fees are ninety-three dollars. Bert Greener and Mary Jo Ruff agreed to look for rules from other states on this subject.

Aspirational Standards

Committee members discussed whether to recommend aspirational standards for advertising in order to couch the subject in more positive terms. The committee generally agreed that it did not wish to draft aspirational, voluntary standards for advertising and that it was more worthwhile to draft rules which lawyers were required to follow.

The meeting was adjourned at 4:30 p.m.

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
FRIDAY, JANUARY 24, 1992

Co-Chairperson Barb Zander called to order the meeting of the Lawyer Advertising Committee on Friday January 24, 1992 at 1:00 p.m. at the Minnesota Law Center. The following members were present: Barb Zander, Chair, John Goetz, Ken Kirwin, Martin Cole, Sharon Anderson (attending for Loann Mockler), Don Bye, Tom Clure, and Tracy Eichhorn-Hicks. Also present was Rick Jellinger of the MSBA staff.

Absent: Bert Greener, Co-Chair, Joan Bettenburg, Tom Conlin, Pat Costello, Mike Fetsch, Joan Hackel, John Hovanec, Nancy Klossner, Mary Muehlen Maring, Mark Munger, Ralph Peterson, and Gary Stoneking.

KEY ITEMS DISCUSSED & ACTION TAKEN

Reports

Following a welcome by the chair and introductions of all present the meeting summary of the last meeting of the committee on December 20, 1991 was reviewed and approved.

Review of Submitted Advertising

The responses to the committee's request for copies of ads which should be regulated was reviewed. The copy of the responses received is attached. It was noted that Bench and Bar has an upcoming article on the topic of lawyer advertising and that the Duluth Better Business Bureau is looking into paralegal advertising. The committee by consensus decided to continue soliciting additional responses.

Draft Resolution for LPRB

Don Bye presented a draft resolution calling for the Lawyers Professional Responsibility Board to take a more proactive approach to lawyer advertising. A copy of the resolution is attached showing handwritten changes approved by the committee. Bye stated that the resolution was meant to reflect committee discussions over the past few months and was not meant as a criticism of the LPRB.

It was moved and seconded to adopt the resolution as part of the eventual committee report. It was moved and seconded to amend the resolution in the second paragraph by inserting "false or" prior to "misleading" and deleting "or offensive". The amendment was accepted as a friendly amendment.

It was moved and seconded to amend the resolution in the third paragraph by deleting the phrase "including more expansive definition of what is misleading". This amendment was accepted as a friendly amendment. It was moved and seconded to amend the resolution by adding to the last paragraph the phrase "and a more specific definition of what constitutes misleading advertising"; and deleting from the last paragraph the phrase "and other interested

agencies and groupings of the bar,"; and deleting from the last paragraph the phrase "in communicating with the Minnesota State Bar Association,". The amendments were accepted as friendly amendments. Following discussion the question was called and passed by a vote of five ayes and one abstention.

Fee Splitting

This topic was deferred to the next meeting of the committee.

Endorsements

Pat Costello moved that the committee recommend a ban on celebrity endorsements of legal services. The motion was seconded and discussion followed. The points made during the discussion included:

-The constitutional standard for banning advertising is whether or not it is "inherently misleading" and not whether it is undignified. (A reference was made to a law review article in 23 St. Mary's Law Journal 331)

-Rules adopted by Florida and Iowa may not pass future constitutional muster.

-Iowa's rules have already been before the Supreme Court, which let them stand.

-The future of restrictions depends upon how the U.S. Supreme Court handles the Florida Rules.

-The use of a celebrity may be misleading by its nature since the public assumes that the celebrity has knowledge of the attorney and therefore gives the endorsement.

-The New Jersey Supreme Court has banned celebrity endorsements without much fanfare.

-Because celebrity advertising is effective does not necessarily mean it is misleading. Florida allows celebrity endorsements while Iowa does not.

-Neither an unknown actor nor a celebrity used in an advertisement has actual knowledge of the quality of legal services.

-Bans on the use of celebrity advertising are based on unjustified expectations on the part of the public as well as the fact that they are misleading.

The motion was withdrawn and the chair noted that the committee was not yet ready to vote on celebrity advertising. Pat Costello was asked to draft a celebrity endorsement rule with comment for consideration by the committee at its next meeting.

Disclosure/Disclaimer

Pat Costello handed out material entitled "Disclosure/Disclaimer", a copy of which is attached. Following review of the material and some discussion, Pat Costello moved, and the motion was seconded, to recommend that the Minnesota Supreme Court should require lawyers to state in media advertising that "the determination of the need for legal services and the choice of lawyer are extremely important decisions and should not be based solely upon advertisements or self proclaimed expertise. This disclosure is required by rule of the

Supreme Court of Minnesota". During discussion of the motion the following points were raised:

-Yellow page advertising needs some disclaimers.

-Most would say that a lawyer should not be picked based solely on ads.

-Advertising could give better and more information but a disclaimer would not necessarily meet the constitutional standard of prohibiting only false or misleading advertising.

-Most people would not admit to picking a lawyer solely based on an ad, although some do. The disclaimer would seek to help those individuals who rely upon advertising but may instead offend them.

-The more extreme the ad the more the need for disclaimers.

-"Tombstone" ads could be exempted as could public service announcements; that is, those ads only for the purpose of putting the name of the attorney or law firm in front of the public (the example given was the difference between "Met Life" on a blimp would not need disclaimers or disclosures but a solicitation for mutual funds would.)

-Requiring disclaimers would put lawyers in a bad light and show that the Supreme Court does not trust lawyers to do proper advertising.

-Exempting some ads from the disclaimer requirements would make a distinction between "good" and "bad" ads and would therefore not pass constitutional muster.

-The public sees "bad" ads and says why don't lawyers do anything about it. Requiring disclaimers would give a positive image for lawyers.

-Ads could be defined as excluding those listed in Florida Rule 4-7.2(n), 1-8.

Pat Costello amended the motion by deleting the last sentence from the required disclaimer and inserting in its place the following: Before you decide ask us about our qualifications and experience. The chair considered this a motion to amend which was seconded and passed by voice vote.

Discussion turned to what types of advertising would be excluded from the disclaimer requirement. It was suggested that the exclusions include advertisements that list no more than the name of a lawyer, law firm, listing of lawyers associated with the firm, office addresses, telephone numbers, and designations such as attorney or law firm. It was also suggested that letterhead and business cards be exempted from the requirement along with required jurisdictional limitations and specialization certification. A question was raised as to whether sponsorship of a public service nature would also be exempted. Costello withdrew his motion and the chair stated that the matter would be considered again at the next meeting of the committee.

Contingency Fees

The chair moved that the committee recommend a rule on contingency fees based upon Florida Rule 4-7.2(h). The motion was seconded and discussion followed. The following points were raised during discussion:

-Minnesota already prohibits "no fee if no recovery" advertising if costs are later charged to the client since such an ad is misleading.

-Current rules would not fault a lawyer who says in an ad "no fees if no recovery" who then charges for cost as misleading. There may be a lack of communication instead. Clients conveniently forget any liability they may have for costs.

-Ken Kirwin moved to amend the motion by substituting for it that a paragraph be added to existing Minnesota Rule 7.1(d) as follows: "fails to disclose that client must pay cost, even if there is no recovery, if the lawyer will expect the client to do so". The motion was seconded, and discussion followed. A question was raised about non-contingency cases. Kirwin withdrew his motion to substitute and the chair amended her motion by deleting from Florida Rule 4-7.2(h) the first sentence and the word "additionally," from the second sentence. The question was called and the motion passed unanimously.

Next Meeting

The next meeting of the committee was scheduled for February 21, 1992 at 1:30 p.m. at the Minnesota Law Center.

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
FEBRUARY 21, 1992

Present: Bert Greener, Chair, Ken Kirwin, Marty Cole, Tracy Eichhorn-Hicks, Patrick Costello, Don Bye and Tom Clure. Also present were Mary Jo Ruff of the MSBA staff and Sharon Andrews.

Absent: Barb Zander, Chair, Joan Bettenburg, Tom Conlin, Michael Fetsch, John Goetz, Ron Graham, Joan Hackel, John Hovanec, Mary Muehlen Maring, Mark Munger, and Ralph Peterson.

REPORTS & DISCUSSION

Introductory Comments

The minutes from the January 24 meeting were reviewed and the following corrections were made: Pat Costello was added to the list of members who were present; Ron Graham was added to the list of members who were absent; Sharon Andrews and Nancy Klossner were removed from the list of members who were present or absent since they do not serve as committee members; and on page, three paragraph, two the second sentence was amended as follows: "~~It was suggested~~ Pat Costello moved that the exclusions include advertisements that list no more than the name of a lawyer, law firms, listing of lawyers associated with the firm, office addresses, telephone numbers, and designations such as attorney or law firm." The minutes were then approved as corrected.

Bert Greener noted that Mary Maring had asked to resign from the committee but that he encouraged her to remain a member, partly to retain an appropriate balance between those favoring restrictions on lawyer advertising and those opposed to restrictions.

Bert Greener reported that Ron Graham was unable to be present but that he had indicated that the Better Business Bureau was following up on the advertisement in the Cloquet newspaper for The Advocate. Because the BBB was unable to find out more information about them, the BBB will notify the Cloquet newspaper that it may wish to decline printing their advertisements in the future.

Discussion was held about whether the committee would have any special budgetary needs for 1992-93 other than administrative costs already borne by the MSBA. It was suggested that there would be no special budgetary needs because the committee would go out of existence after the convention. It was then suggested that

perhaps the committee should remain in place for a period of time to assist with implementation if any advertising restrictions are adopted. This matter will be taken up with MSBA President-Elect Bob Guzy as 1992-93 committees are discussed. A question then arose about what effect the Florida litigation would have on any resolutions adopted at the convention. It was suggested that if the Florida litigation invalidates any action taken at the convention, the matter could be returned to the Executive Committee before a petition is filed with the Supreme Court; or the petition could be filed and the matter resolved when the Supreme Court holds its hearing; or the resolution could be phrased so as to be contingent on legality as determined by the U.S. Supreme Court in the Florida litigation.

The group decided that it would not now reserve a meeting room and time at the convention at Rochester, but would raise at future committee meetings the possibility that those members attending the convention would like to caucus informally before the committee's recommendations are brought to the floor.

Sharon Andrews, representing the MSBA Practice Development Section, asked that their group be allowed to make a presentation at a future meeting. They have an interest in commenting upon lawyer advertising restrictions as they are being developed.

Bert Greener announced that he hoped to meet with Barb Zander, Ken Kirwin, and Mary Jo Ruff before the March committee meeting to catalog all of the items passed by the committee and to place them in draft rule form.

Discussion was held about whether the draft resolution calling for the Lawyers Professional Responsibility Board to take a more proactive approach to lawyer advertising had been sent to Bill Wernz. Marty Cole reported that Bill Wernz had been informally advised of the resolution but had not received any formal communication. A motion was made, seconded, and passed with one abstention that the resolution be sent to Greg Bistram, Chairman of the Lawyers Professional Responsibility Board, Bill Wernz, Director of the Office of Lawyers Professional Responsibility, and the President of the Minnesota State Bar Association.

Review of Advertising

Mary Jo Ruff reported that no additional responses had been received to the notice in in Brief for copies of ads which should be regulated. A number of the ads which the committee received in January were discussed, including that of a law firm in Bemidji which advertised, "Contact the attorneys who have the experience and staff to serve you better." It was suggested that this was a comparison which could not be factually substantiated under the rules, and it might be helpful for the law firm to be so advised by the

committee. A motion was made and seconded to contact the law firm for this purpose. After further discussion, the motion was withdrawn as it was determined not to be within the committee's charge.

Screening Ads

Bert Greener noted that the committee discussed in December whether to recommend a screening function for the LPRB or the MSBA to review ads, but that no decision had been made. He noted that Rule 7.2(b) requires lawyers to maintain advertising for two years after the last dissemination along with a record of when and where the ad was used. Discussion ensued about whether it would be helpful to require lawyers to file ads with the Lawyers Professional Responsibility Board. A motion was made and seconded to require Minnesota lawyers to file transcripts of broadcast media ads, copies of direct mail solicitations, and copies of print media advertisements other than those appearing in the Yellow Pages. Questions arose about what the purpose would be in filing this information, and if the Office of Professional Responsibility would then be expected to open complaints on the advertisements it received if they were objectional (especially with the request for the Office to be more proactive.) Those arguing in favor of the filing requirement stated that the Board would not be expected to open complaints on objectional ads but that the purpose of filing would be to maintain copies of advertisements which were not easily retrievable by the LPRB in the event a complaint was filed. Those arguing against the requirement asserted that the requirement would constitute a burden on expression which would need a compelling rationale, and that filing this material would present logistical and storage problems for the office. After additional discussion, the motion failed on a voice vote.

Fee Splitting

Mark Munger's draft rule regarding fee splitting was distributed and discussed. A motion was made and seconded that the draft be adopted. A friendly amendment was then offered and accepted that the sentence "Except as permitted by this rule, lawyers shall not design their advertising to attract legal matters they do not expect to handle" to the first paragraph of the comment to Rule 1.5(e). A second friendly amendment was made and accepted that the language "clients of this law firm" in the comment be replaced by the words "your case". After discussion, the motion as amended passed on a four-to-one vote. Copies of the draft rule will be circulated to the committee.

Testimonials and Celebrity Endorsements

The committee discussed the rule drafted by Pat Costello relating to testimonials and endorsements.

Pat Costello noted in his presentation that the ABA Model Ethical Rules are accompanied by comments that client endorsements should be prohibited. It was found, however, that the ABA model comments for this rule had been deleted with the exception of one sentence when the rule was adopted in Minnesota. After discussion, a motion was made and seconded that Rule 7.1 be amended to say "a communication is false or misleading if it ... uses client testimonials or celebrity endorsements" (new language underlined). A three-to-three vote was cast, after which the chair cast an opposing vote and the motion failed. The chair noted that he voted against the motion because he believed that the potential harm in client testimonials or celebrity endorsements is covered under Rule 7.1(b) which prohibits communication which is likely to create an unjustified expectation about the results a lawyer can achieve.

Disclaimers

It was noted that the committee adopted a disclaimer at the January meeting but had not decided what types of advertising, if any, should be exempted from the disclaimer requirement. A motion was made, seconded, and passed on a voice vote that the following exemptions be listed: "tombstone" advertising, public service announcements, letterhead, and business cards. Copies of the draft rule will be circulated to the committee.

Other Rules

The committee decided to discuss at the March meeting Bert Greener's drafts on fee information and solicitation. Bert noted that he used the Iowa Rules as a starting point for these drafts.

Adjournment

Bert Greener suggested that the draft minutes be sent to all members who were present at the February meeting for approval before being sent to the full committee. He noted that the next meeting would be held on March 20 and April 10. The meeting was adjourned.

The next meeting of the committee was scheduled for March 20 at 1:00 p.m. at the Minnesota Law Center.

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
MARCH 20, 1992

Present: Bert Greener, Co-Chair, Barb Zander, Co-Chair, Don Bye, Tom Clure, Martin Cole, Patrick Costello, Ron Graham, John Hovanec, Kenneth Kirwin, and Gary Stoneking. Also present were Sharon Andrews, Jim Seidl and Kevin Carpenter, representing the Practice Development Section, and Mary Jo Ruff of the MSBA staff.

Absent: Joan Bettenburg, Tom Conlin, Tracy Eichhorn-Hicks, Michael Fetsch, John Goetz, Joan Hackel, and Mark Munger.

Introductions and Announcements

The meeting opened with introduction of members. It was reported that Ralph Peterson had resigned from the committee. It was announced that the resolution encouraging the Lawyers Professional Responsibility Board to become more proactive had not been sent to them as planned since the resolution was worded in a way requesting that the MSBA undertake this action. Accordingly, approval by the MSBA Board of Governors would be needed before the resolution could be forwarded. The MSBA Executive Director recommended that the resolution be included in the committee's report and recommendations which will go before the convention in June. The minutes for the February 21 meeting were approved as submitted. A question arose about whether Sharon Andrews, the Practice Development Section representative was a committee member or a "mailing list" member. It was concluded that she was not a voting member but was on the mailing list.

Ron Graham then provided an update about action taken by the Better Business Bureau concerning the "Advocate" ad which appeared in the Cloquet Pine Knot. He reported that the Bureau had called the Advocate answering service a number of times without receiving a response, and that the Bureau then sent a letter. They learned that a Minnesota Department of Transportation employee named Lamont Knazze was operating the service. The Bureau intends to talk with Mr. Knazze to obtain additional information. It appears that the ad has not run again in the Cloquet newspaper but the Bureau is contacting other area newspapers to see if the ad has appeared elsewhere. The Bureau will raise a number of issues with Mr. Knazze about truth in advertising.

Presentation by Practice Development Section

Sharon Andrews, Jim Seidl and Kevin Carpenter gave a presentation on behalf of the MSBA Practice Development Section. They distributed their statement, copies of which are enclosed for members not present. During their presentation, they stated their belief that the restrictions suggested by the Lawyer Advertising Committee would not stop ads which are in bad taste and will be detrimental to the marketing process. They stated that they believe that the disclaimer requirement would be unattractive and distracting on advertisements, and that it had the effect of insulting consumers. They stated their preference for education about appropriate

marketing, encouraging dignified ads through awards such as those given by the ABA, and relying on the remedies of the Lawyers Professional Responsibility Board, the Better Business Bureau, or the Federal Communication Commission for advertisements which are false and misleading. Their presentation led to a discussion about the benefits and drawbacks of lawyer advertising, both to consumers and lawyers. The committee co-chairs thanked the section for its comments. The section indicated that they hope to work with the Lawyer Advertising Committee to address the concerns about inappropriate lawyer advertising.

Fee Information

Don Bye moved to adopt the draft reflecting Iowa's provisions regarding fee information. The motion was seconded. The committee agreed that the Iowa language should be changed as follows: (a) in the introductory portion to add "only as follows"; (b) in clause (3) to substitute the language approved at the previous meeting for Rule 7.3(g); (c) in clause (4) to substitute "the statement clearly and conspicuously discloses" for "in print size at least equivalent to the largest print used in setting forth the fee information"; and (d) to omit "All such information shall be presented in a dignified manner."

The committee discussed whether the provision should cover targeted mailings as well as advertisements and discussed other facets of the proposed provision. Bert Greener suggested the motion might be tabled, and that anyone desiring a provision on fees should bring a draft to the next meeting. Tom Clure moved to table the motion. The motion to table was seconded and passed. Pat Costello agreed to prepare material on fee information for the next meeting.

Letter from John Murrin

Bert Greener read a letter from John Murrin. Gary Stoneking moved to invite John Murrin to attend the April meeting. The motion was seconded. The committee discussed whether there would be time for this at the April meeting. The motion lost 4-5. The committee agreed that John Murrin should be informed that the committee did not believe that there would be enough time at the April meeting but that if there were additional meetings the committee would be glad to hear from him and he was welcome to provide written comments. Bert Greener agreed to communicate this to John Murrin.

Advertising Media

Ron Graham inquired about Rule 7.2(a)'s language "such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television." Gary Stoneking moved to omit that language. The motion was seconded. The committee discussed the motion, and passed it on a voice vote.

Solicitation

Tom Clure moved to adopt the draft reflecting Iowa's provisions regarding solicitation. The motion was seconded. It was suggested to incorporate language similar to that in the New Jersey Rules regarding the physical or emotional state of the recipient. The

committee discussed the type size and ink color provisions and the delineation of the communications to which the provisions applied. It was suggested that the language could be fine-tuned but that the provision should be approved in concept. The motion passed 5-4.

Ken Kirwin agreed to draft specific language for review by Bert Greener and Tom Clure and to present such language for consideration at the next meeting.

Discussion was held about the effect of motions previously passed and whether they will be presented again to the committee for final approval. Without formal action, the group agreed that it was not intended that subjects previously agreed upon be reopened for substantive change.

There being no further business, the meeting was adjourned.

<u>The next meeting will be April 10 at 1:00 p.m.</u>

MEETING SUMMARY
LAWYER ADVERTISING COMMITTEE
APRIL 10, 1992

Present: Bert Greener, Co-Chair, Barb Zander, Co-Chair, Pat Costello, John Hovanec, Ken Kirwin, Mark Munger, Tracy Eichhorn-Hicks, Marty Cole, Don Bye, and Tom Clure. Also present were Mary Jo Ruff of the MSBA staff and Sharon Andrews.

Absent: Joan Bettenburg, Tom Conlin, Michael Fetsch, John Goetz, Ron Graham, Joan Hackel, and Gary Stoneking.

Introductory Business

The draft minutes were reviewed and approved. The draft amendments prepared by Ken Kirwin and the draft Minority View were reviewed. It was suggested that the minority report be revised to state their recommendation clearly. Discussion was held about the materials received from the Washington Legal Foundation encouraging Minnesota to adopt restrictions on lawyer advertising. Discussion was also held about the article by Steve Bergerson in the Star Tribune. Bert Greener reported his conversation with John Murrin and noted that he had invited Mr. Murrin to future meetings if any are held.

It was announced that the committee's report was due April 15 for printing in the May-June issue of the Bench & Bar. The committee's recommendations will go before the Board of Governors on June 25 and the General Assembly on June 26 or 27.

Fee Information

Pat Costello distributed a proposed Rule 7.2(k) based on the Iowa language about fee information. A motion was made and seconded that the amendment be adopted. During discussion, it was noted that the rule may be unnecessary because few lawyers advertise fees, although it was also noted that while fees may not be widely advertised on radio or televison, fees may be "advertised" in client brochures on information sheets handed to clients. It was noted that fee disputes now are commonly sent to district bar fee arbitration panels for resolution and that the proposed amendment might give more guidance to the Office of Lawyers Professional Responsibility. It was also argued, however, that the current rules prohibiting false and misleading advertising would also address the fee issue. The question was called and the motion failed on a five-to-five vote.

Aspirational Goals

Pat Costello suggested that the committee consider adopting aspirational goals to provide guidance for lawyers who advertise. During discussion it was suggested that aspirational standards have limited value since they cannot be used to discipline a lawyer; it was argued, however, that there wasn't a good reason not to adopt the aspirational standards and that they might provide guidance to lawyers intending to advertise. Mary Jo Ruff noted that ABA aspirational standards relating to advertising were brought to the convention a few years ago. She agreed to look into this further to see if aspirational standards had already been adopted by the MSBA. (Note: The ABA draft standards were presented to the MSBA Convention in 1988. After revising, a motion was carried urging the ABA to adopt the standards.) A motion was made and seconded to include the draft aspirational standards in the committee report and to urge the MSBA to adopt them, assuming they had not been previously adopted. During discussion, it was suggested that the preamble be revised so as to be tailored to Minnesota. A motion to amend by deleting item ten was made and seconded. The individual making the motion argued that he disagreed with the premise that lawyer advertising may be designed to "build up client bases so that efficiencies of scale may be achieved." The motion failed on a voice vote. The main motion to adopt the aspirational standard was then carried.

Minority Reports

Discussion followed by various subgroups within the committee about whether they wished to file minority reports. The writers of the draft minority report agreed to revise it to make their recommendation clear. Bert Greener suggested that anyone else wishing to file a minority report keep the April 15 deadline in mind.

Other Items

It was suggested that the report include a recommendation that the committee continue if its recommendations are adopted at the convention, for the purposes of following litigation on the subject throughout the country and to draft comments to be submitted to the Supreme Court. Committee members asked that the minutes reflect their appreciation for the excellent work by the co-chairs and by Ken Kirwin.

There being no further business, the meeting was adjourned.

Lawyer Advertising Committee responses:

Date	MSBA member	Firm
12/26/91	Anonymous	L & M Paralegal
12/27/91	Timothy J. Peterson Lindstrom	AAAC (Miles Lord)
12/27/91	Daniel Young St. Paul	James Schloner (solicitation letter)
01/03/92	Thomas Kelly Rochester	Will Mahler (Rochester ***Post Bulletin*** ad)
01/08/92	Richard Tousignant Minneapolis	Gregory J. Woods (solicitation letter)
01/09/92	Jill Pinkert St. Cloud	Kenneth Holker (***St. Cloud Times*** ad)
/13/92	Mary Kay Klein Bemidji	Duranske & Hazelton Yellow Pages ad

GUIDE

ATTORNEYS

For your convenience, the following attorneys have chosen to list by types of cases they accept. These listings do not necessarily imply that they have limited their practices or are certified specialists in these fields. You are urged to make your own investigation and evaluation.

vorce & Family

N SCHMIDT HASKELL & D'ALBANI PA
7 St Bemidji ——— 751-4060
Fuller Baer Wallner & Rodgers Ltd
midji ——— 751-2223
Please See Advertisement This Page
h Thomas T 115 5 St Bemidji ——— 751-3130

alpractice-Professional

MERNESS WILLIAM D

SIEBEN GROSE
VON HOLTUM
MCCOY & CAREY LTD

MEDICAL
MALPRACTICE
TOLL FREE
1-800-328-4529

(See our ad under attorneys for Sieben, Grose, Von Holtum, McCoy & Carey)

220 Missabe Bldg Duluth ——— 724-6103

-Mediation

KLEIN MARY KAY
403 4 St NW Bemidji ——— 751-0399

-Real Estate

CANN SCHMIDT HASKELL & D'ALBANI PA
205 7 St Bemidji ——— 751-4060
Smith Ralph T 115 5 St Bemidji ——— 751-3130

-Social Security

Kief Fuller Baer Wallner & Rodgers Ltd
See Our Ad Under Attorneys
514 America Av NW Bemidji ——— 751-2221

Tell them where to find you — advertise in the U S WEST Direct Yellow Pages.

-Wills, Estate Planning & Probate

CANN SCHMIDT HASKELL & D'ALBANI PA
205 7 St Bemidji ——— 751-4060
Smith Ralph T 115 5 St Bemidji ——— 751-3130

-Workers' Compensation

Bailey Law Offices Ltd
1331 Anne St NW Bemidji ——— 751-0634
Kief Fuller Baer Wallner & Rodgers Ltd
See Our Ad Under Attorneys
514 America Av NW Bemidji ——— 751-2221

Attorneys' Referral & Information Services

MINNESOTA STATE BAR ASSOCIATION
Toll Free-Dial 1 & Then ——— 800 292-4152

Auctioneers

Selzler Auction Co
1820 Vincent St NW Bemidji ——— 751-1546

Automobile Alarms & Security Systems

Pro-Tech Security
2300 Bemidji Av N Bemidji ——— 759-9045

Automobile Batteries

See Automobile Parts & Supplies-New
Automobile Parts & Supplies-Used & Rebuilt
Automobile Wrecking

U S WEST Direct Yellow Pages — this is the place to tell your customers you want them to give you their business.

Make sure you get your share of business from customers in your neighborhood. Advertise in the U S WEST Direct Yellow Pages. Call 1-800-422-1234 to reach your U S WEST Direct Yellow Pages office. Our advertising experts are glad to help you with information and service.

RINKE-NOONAN

RINKE, NOONAN, GROTE, SMOLEY, DETER, COLOMBO, WIANT, VON KORFF, DEGIOVANNI, AND HOBBS, LTD.
ATTORNEYS AT LAW

Suite 700 Norwest Center Box 1497 St. Cloud, MN 56302
(612) 251-6700 Fax: (612) 251-5114

January 8, 1992

Ms. Mary Jo Ruff
Minnesota State Bar Association
514 Nicollet Mall, Suite 300
Minneapolis, MN 55402

Re: Our File No. M-100

Dear Ms. Ruff:

I understand the MSBA Lawyer Advertising Committee wishes to receive copies of questionable attorney advertisements. Enclosed please find an advertisement which ran in the St. Cloud Times approximately four times.

I found this ad highly objectionable due to Mr. Holker's categorization of attorneys as "predators". Mr. Holker is an attorney from Monticello, Minnesota, who claims to be a certified "Loving Trust" attorney. In 1989, I attended a Loving Trust seminar presented by Mr. Holker in which he exaggerated the evils of probate and the benefits of living trusts.

I attended the 7:00 p.m. seminar on January 7, 1992, after having seen the enclosed advertisement. Despite the fact that this seminar was advertised to be on the subject of the costs of nursing homes, Mr. Holker spent only the final 20 minutes of his two-hour seminar on the subject of nursing home costs and protective planning. The first 1 hour and 40 minutes of the seminar was devoted solely to the topic of Loving Trusts.

Not only do I feel his ad was offensive, I feel it was misleading. Mr. Holker's ad did not mention that the majority of the seminar would be devoted to the topic of Loving Trusts. I feel he used the subject of nursing home planning as a device to get people to attend his seminars on Loving Trusts.

I hope the MSBA Lawyer Advertising Committee finds this advertisement useful.

Sincerely,

RINKE-NOONAN

By Jill A. Pinkert
Jill A. Pinkert

JAP/kh

Enclosure

FREE

LEARN HOW TO PROTECT YOUR LIFE SAVINGS FROM CATASTROPHIC ILLNESS AND NURSING HOMES

3 FREE SEMINARS

Tuesday, January 7, 1992
10:00 a.m., 2:00 p.m., 7:00 p.m.
Holiday Inn
West Division St. at 37th Ave., St. Cloud, MN

Kenneth M. Holker
Attorney At Law

WHAT YOU WILL LEARN

- What the nursing home problem is, and is not.
- How to avoid the problem.
- How to avoid probate.
- How to avoid guardianships.
- How to protect your children's inheritance from lawyers and other predators.

NOT Affiliated With:
Any bank, insurance company or financial planning group.

FREE

This informative and entertaining seminar will show you the right way to provide for yourself and guarantee the future of your loved ones.

LAW OFFICES
SCHWEBEL, GOETZ & SIEBEN, P. A.

DIANE C. HANSON (1948-1985)

JAMES R. SCHWEBEL ••
JOHN C. GOETZ *
WILLIAM R. SIEBEN *
DAVID J. MOSKAL ••
RICHARD L. TOUSIGNANT
WILLIAM A. CRANDALL ••
PAUL E. GODLEWSKI
LARRY E. STERN ••
MARK H. GRUESNER
MICHAEL D. TEWKSBURY •••
MARY C. CADE
MARK L. PFISTER
JAMES G. WEINMEYER

5120 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402-2246

FAX (612) 333-6311
TOLL-FREE (800) 752-4265
TELEPHONE (612) 333-8361

MAX H. HACKER
ROBERT J. SCHMITZ *
RONALD N. SCHUMEISTER
DONALD L. BURKE *
MICHAEL A. ZIMMER ••
ROBERT L. LAZEAR
CANDACE L. DALE
LAURIE J. SIEFF
SHARON L. VAN DYCK
T. JOSEPH CRUMLEY
CHRISTINE D. ZONNEVELD
JAMES S. BALLENTINE

OF COUNSEL
MICHAEL G. SIMON

* ALSO ADMITTED IN WISCONSIN
** ALSO ADMITTED IN NORTH DAKOTA
*** ALSO ADMITTED IN COLORADO
• ALSO ADMITTED IN ARIZONA

January 7, 1992

Ms. Mary Jo Ruff
Minnesota State Bar Association
514 Nicollet Mall, Suite 300
Minneapolis, MN 55402

Dear Ms. Ruff:

I read your ad in the NSBA in brief of December 19, 1991.

As I read the article, a letter which came into my possession recently came to mind. I am enclosing a copy of that letter for your review. You will note that the letter is from the law firm of Kalina, Wills and Woods. I found the letter extremely distasteful. This is the second form letter of this nature I have received through one of my clients. It appears that this law firm sends this form letter to each and every individual that is involved in a motor vehicle accident. I do not believe my client had any contact with these individuals prior to their being involved in a motor vehicle accident.

This is the type of solicitation which gives all lawyers a bad name. You will note that in three different areas of the letter, they type in capital letters and underline, "TIME IS OF THE ESSENCE". It appears that this is placed in the letter to instill some kind of fear in the individual to get them to retain the lawyer.

Number one is also somewhat disturbing since it implies that the "right doctor" can help you with the injury and even possibly your legal needs. I believe this too, is extremely distasteful.

I am sure we all agree that with the changing times, lawyers have had to do a certain amount of marketing in order to keep their practices going. We see that marketing every day in radio and television ads. However, I do not believe that this type of solicitation was what any of us envisioned happening with the current state of the law.

••MEMBER OF THE AMERICAN BOARD OF TRIAL ADVOCATES
*CERTIFIED BY THE NATIONAL BOARD OF TRIAL ADVOCACY AS A CIVIL TRIAL SPECIALIST

If I can be of further assistance on this or, if you have any questions, please don't hesitate to contact me.

Sincerely,

Richard L. Tousignant

RLT/cac
enc.

KALINA, WILLS & WOODS
ATTORNEYS AT LAW
SUITE 200
941 HILLWIND ROAD NORTHEAST
MINNEAPOLIS, MINNESOTA 55432
612/789-9000
TELECOPIER 612/571-2418

RONALD S. KALINA (1944-1991)
JAMES H. WILLS*
GREGGORY J. WOODS

PAUL A. THOMPSON
KELLY L. RUTH
MARK E. GILBERT*
JOHN N. RENCKENS
JOHN R. KALLIGHER

*ADMITTED IN MINNESOTA AND WISCONSIN

12 WEST MARSHALL STREET
RICE LAKE, WISCONSIN 54868
715-234-7400

LEGAL ASSISTANTS:
CARLA M. CHRISTENSON
JILL M. SALES
MARY R. McHALE

*REPLY TO MINNEAPOLIS OFFICE

DECEMBER 24, 1991.

Richard
My client
received this
17 days
after D/A
Carly

SUSAN CALGUIRE
1125 DAYTON AVE
SAINT PAUL PARK, MN 55071

Dear SUSAN:

I am sorry to hear you were injured in a motor vehicle accident. Several things come to mind that may be important to you.

1) You may need the care of a physician, chiropractor, therapist or other health care provider. The emergency room is not the answer. You need someone who understands your injury and can meet your physical, emotional and maybe legal needs. Who you treat with and who pays for the treatment is extremely important. TIME IS OF THE ESSENCE!

2) You may need to file a claim with your own insurance company. You may be entitled to wage loss, medical expenses and other statutory and contract benefits. Dealing with your own insurance company may not be what you think or expect it to be. Be careful. TIME IS OF THE ESSENCE.

3) You may need to investigate your accident. Who is right and who is wrong is not always as simple as it may appear to you. You may need a thorough investigation by a trained professional to protect yourself. This may include witness statements, drawings, photographs and other empirical data. TIME IS OF THE ESSENCE.

Our firm has handled thousands of personal injury claims over the years. We have the staff and the experience to be of assistance to you. There is no fee unless a claim and recovery is made. If you have been injured and need help, do yourself a favor and consult a lawyer. He or she can protect you and preserve your claim.

YOUR CLAIM MAY BE FOREVER BARRED IF NOT BROUGHT WITHIN THE TIME PERIOD SET BY LAW. TIME IS OF THE ESSENCE. If you have any questions, please contact our office at 789-9000.

Very truly yours,

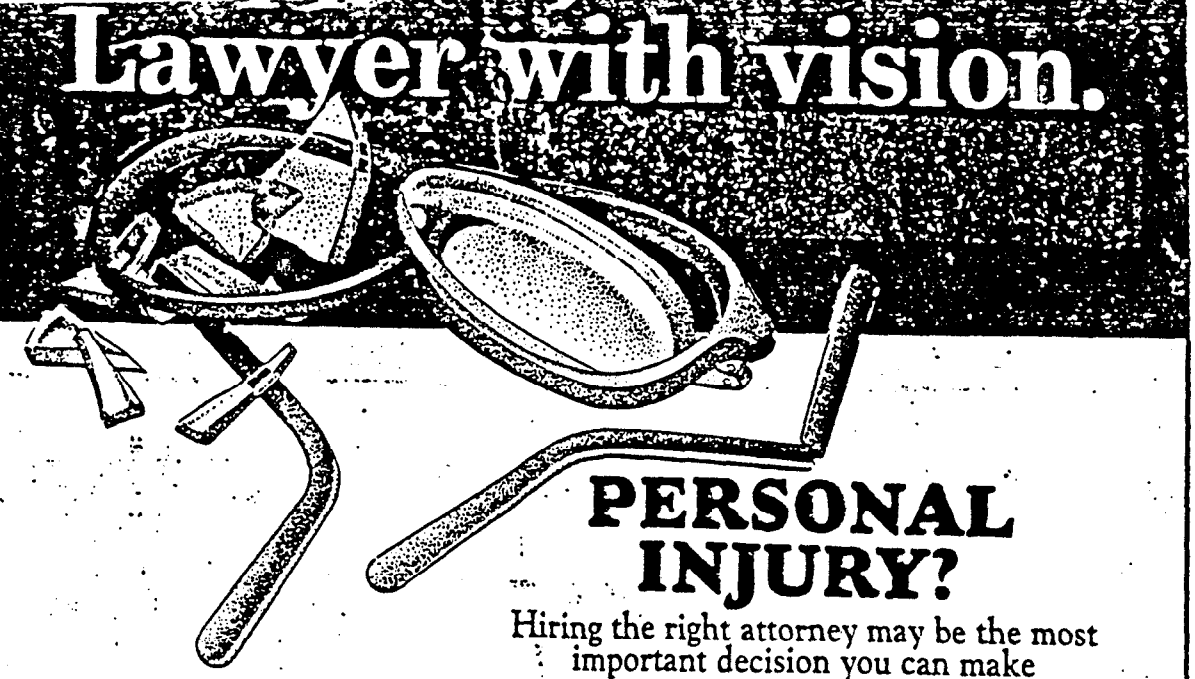
KALINA, WILLS & WOODS

Gregory J. Woods
Gregory J. Woods
Attorney at Law
GJW:jlt

To: Mary Jo Ruff
From: Thomas P. Kelly
Brown & Bins, Rochester
(B) (507) 288-7402
Re: Offensive attorney ads
Date: 12/31/91

As a defense attorney I find Mr. Mahler's statement that he "will not represent any insurance company" to be quite offensive. The rest of the ad does not warm the cockles of my heart either! This ad has appeared in the Rochester Post-Bulletin for the last week. Mahler has a similar ad in the phone

Lawyer with vision.



PERSONAL INJURY?

Hiring the right attorney may be the most important decision you can make

If you are injured in an accident, hire an attorney who will work hard to obtain fair and full compensation for all injury-related losses, including loss of wages, both past and future, and damages for pain and suffering. An injury can affect you for the rest of your life.

Hiring an experienced attorney does not cost more because attorney's fees are based generally on a percentage of the recovery. The larger the settlement or verdict, the more you recover for your injury.

With over 16 years of experience, Will Mahler has helped a great number of injured people receive full compensation for all their injuries. In the vast majority of cases, a good and fair settlement has been promptly achieved without the need for going to trial.

Will Mahler

NOTICE: This law firm represents injured persons! Unlike many law firms, we do not and will not represent any insurance company.

- Settlement of Auto Accident Claims
- Serious Personal Injury
- Farm Accidents
- Wrongful Death

We will be happy to answer any questions about your accident or injury on the telephone at no cost or obligation.

WILL MAHLER 282-7070

A Rochester Native Serving The Community Since 1975

Day, Evening, Weekend and Home Appointments
Suite 301, Ironwood Square, 300 SE Third Ave., Rochester, MN

3726

Dec. 26, 1991

Dear Ms. Ruff:

Enclosed please find a copy of a recent letter I received 2 days after having a slight "fender-bender". There were no injuries and there was only minor damage to my car.

Although I have been admitted to practice for a little more than a year, I find this type of solicitation deplorable and downright demeaning to our profession.

I am writing this letter in response to the recent article in MSBA in brief regarding advertising. Thank you for your attention in this matter.

Sincerely,

Daniel J. Young

James N. Schloner
Attorney at Law
3109 HENNEPIN AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55408
(612) 827-8125

November 21, 1991

Mr. Daniel Young
3843 Sheridan Avenue South
Minneapolis, MN 55410

Dear Mr. Young:

I represent people who have been injured in motor vehicle accidents. I help people like yourself get back on their feet by securing payment for wage loss, medical bills, pain and suffering. I have provided strong, trustworthy representation statewide for the past nine years.

It is a fact that most attorneys charge a fee of 33.3% for personal injury. My percentage is only 25% (for settlement), and there is no fee at all until we win. The difference can mean a savings of thousands of dollars. Now you can have strong, trustworthy representation at a reasonable percentage.

Know your rights! Call me today for a free consultation at 827-8125.

Very truly yours,

James N. Schloner

James N. Schloner

JNS/ph

TIMOTHY J. PETERSON
ATTORNEY AT LAW
P.O. BOX 369
12770 LAKE BLVD.
LINDSTROM, MN 55045
612/257-9249

December 24, 1991

Ms. Mary Jo Ruff
Minnesota State Bar Association
514 Nicollet Mall, Suite 300
Minneapolis, MN 55402

RE: Bad Ads

Dear Ms. Ruff:

In reading my MSBA in Brief Newsletter I received yesterday I ran across your solicitation for copies of bad ads. I have enclosed along with this letter a page out of the Forest Lake yellow pages from this last year.

I am referring to the Miles Lord ad noted in the first space under attorneys. Ever since these yellow pages came out when I saw this ad it really gets my goat. Although it may not be misleading, distasteful or make an unreasonable claim, I feel that ads like this undermine the integrity of the legal profession when an attorney of the status of Miles Lord stoops so low as to call his firm AAAC for the very transparent purpose of getting his own smiling face stuck in the column in front of all the other attorneys striving to make a living in this area (and I might add who do not change their firm's name so as to get their place in front of Mr. Lord's).

Sincerely,

Timothy J. Peterson
Attorney at Law
TJP/mrt
enclosure ✓

Appraisers

See Also Real Estate Appraisers

McKinzie Metro Appraisal
2174 3 St Wh Bear Lk — 426-7144
SEARCH CO REAL ESTATE APPRAISERS THE
Farm-Residential-Commercial-Condemnation Appraisals-
Jerry Olson-Fee Appraiser
148 N Lake Forest Lake — 464-7880

Archery Equipment & Supplies

FOREST LAKE SPORTS & TACKLE
1807 Broadway Av W Frst Lk — 464-1200

Archery Ranges

Sunrise Outfitters
26796 Kettle River Blvd Wyoming — 462-4211

Architects

Brescher Tod K Architect
13 Judd St Marine St Croix — 433-5600
LAMB ARCHITECTS
4225 White Bear Pkwy White Bear Lake — 653-1696
Forest Lake — 464-5248
Morrison/Walijarvi Architects Inc
2189 4 St Wh Bear Lk — 426-3287

Art Galleries, Dealers & Consultants

FRAMING PLACE AND GALLERY THE
1714 Lexington Av Rsvl — 488-0145
GALLERY II 2152 3 St White Bear Lake — 426-9145
IRIS ART GALLERY THE
Hwy 8 & Cty Rd 25 Lindstrom — 257-1120
Nature's Image
280 Broadway Av W Forest Lake — 464-7610
Woodsedge Gallery 20 N Lake St Frst Lk — 464-4888

Artificial Limbs

See Hospital Equipment & Supplies
Orthopedic Appliances

Creative advertising such as that done in newspapers, television and radio makes people want to buy. Directional advertising in the U S WEST Direct Yellow Pages provides the who, where, and when to customers who are ready to buy. It's the final link between sellers and buyers.

Artists' Materials & Supplies

Woodsedge Gallery 20 N Lake St Frst Lk — 464-4888

Asphalt & Asphalt Products

ARCADE ASPHALT INC

ARCADE ASPHALT

- BLACKTOPPING
- PATCHING
- RESURFACING
- SEALCOATING
- BOBCAT GRADING
- CRUSHED ROCK
- DESIGN PAVERS
- LANDSCAPE WALLS

COMMERCIAL RESIDENTIAL
Courteous Free Estimates
359 Koehler Rd Vadnais Heights — 429-7005

BLUHM CONSTRUCTION
Asphalt Seal Coating & Crack Filling
30005 Neal Av Lindstrom — 257-2877
BROCHMAN BLACKTOPPING — 439-5379
Commercial Asphalt Co
10633 Manning Trl N New Scandia Twp — 433-3710
NORTHERN ASPHALT CONSTRUCTION INC
Driveway, Roadways, Blacktop-Seal-Coating
11064 Radisson Rd NE Blaine — 784-1805
SCHIFSKY T A & SONS INC
Wholesale-Retail-Pickup-Delivered Applied
Street-Parking Areas-Driveways-Tennis Courts
2370 Hwy 36 North St Paul — 777-1313
Smooth Paving
See Our Ad Under Paving Contractors
— 433-5792

Assembly & Fabricating Service

Hartzell Manufacturing Assembly Div
St Croix Falls, WI — 462-3139
Shafer Electronics Co Shafer — 257-5332
Shafer Electronics Co Shafer — 462-7171

Associations

Alcoholics Anonymous
156 NW 3 St Forest Lk — 464-9906
Forest Lake Area Chamber Of Commerce
92 S Lake St Forest Lake — 464-3200

Attorney Referral & Information Services

See Attorneys' Referral & Information Services

Compare your advertising in the U S WEST Direct Yellow Pages to your competitors'. What are your competitors offering? Do you offer more? Tell your customers all they need to know in your Yellow Pages ad.

GUIDE — A GUIDE ARRANGED BY TYPES OF CASES ACCEPTED FOLLOWS THIS CLASSIFICATION.

Attorneys

See Also Patent Attorneys

AAAC ACCIDENT ATTORNEYS ADVICE CLINIC

STRONG AND TRUSTWORTHY LEGAL REPRESENTATION

MILES W. LORD
PUT MY EXPERIENCE TO WORK FOR YOU
•PERSONAL INJURY•PRODUCTS LIABILITY
•MALPRACTICE
•FARM•AUTO•PEDESTRIAN•MOTORCYCLE
•CONSTRUCTION•BOAT•AIRPLANE•RAILROAD
•SPORTS•INJURY ON PROPERTY•OR LOSS OF LIFE
•WORKERS COMPENSATION•INSURANCE CLAIMS
•CRIMINAL
333-LORD
— 333-5673

Anderson Joseph W
734 Main St North Branch — 674-4437
Res — 674-6117
APPERT GRIFFEL & DORSHOW
Rosedale Towers Rsvl — 633-1039
Please See Ads Page 16, and 19
Arnason Charles W
101 Judd St Marine On St Croix — 433-5071
BANNIGAN & KELLY PA
409 Midwest Federal Bldg St Paul — 224-3781
Blomquist Barry Law Offices
726 Elm N Brnch — 462-2121
Bloomquist Timothy R Center City — 257-1160
Boyce Law Office
725 Main St North Branch — 674-6259
Please See Advertisement Page 20
Butts Sandberg And Schneider
155 S Lake St Frst Lk — 464-6162
Please See Ad on Next Page
BUTTS STEVE 155 S Lake St Frst Lk — 464-6162
CASTERTON JAMES S
20 N Lake St Forest Lk — 464-7400
CUMMINS GERVAIS & ASSOC
363 S Av N Bayport — 430-2630
Dewan Daniel P
734 Main St North Branch — 674-4437
Res — 674-7250
Donnelly Paige J Ltd
506 Minnesota Bldg St Paul — 222-2797
Please See Advertisement Page 13

(Continued Page 18)

The U S WEST Direct Yellow Pages is always within reach of your customers.

"NOTES"

U S WEST DIRECT

Evening broadcast/

	6:00	6:30	7:00	7:30	8:00	8:30	9:00	9:30	10:00	10:30	11:
(2)	MacNeil/Lehrer (cc) 24065		Nova: The Fine Art of Faking It 3539		Mystery! Campion: Sweet Danger (cc) 3775				Fresh Fields	Being Served?	To b 695
(4)	News 423	Wheel of Fortune	Top Cops (cc) 8607		The Kennedy Center Honors: A Celebration of the Performing Arts (cc)				News 3422510	Edition (10:35)	Silk (11:(
(5)	News 2201	A Current Affair	Entertainers '91: The Top 20 (cc)		FBI: Stories	American Detective	Prime Time Live (cc) 87572		News 2644572	Married (10:40)	H. C 11:
(9)	M*A*S*H 8423	Night Court	Waterloo (1970). Rod Steiger, Christopher Plummer 877268					News 78249.	M*A*S*H 2918171	Arsenio Hall (1((cc) 8727046	
(11)	News (cc)3591	Entertain Tonight	Cosby Show	Different World	Cheers (cc)1268	Wings (cc)5125	L.A. Law (cc) 43152		News 2910539	Cheers (10:35)	The (11:(
(17)	Business Report	Adam Smith	Someth'g Ventured	Manage-ment	Inside Money	American Interests	Future Opportunity In the Pacific Rim		MacNeil/Lehrer (cc) 77713		Prim Ston
(23)	21 Jump Street 22862		The Great Houdinis (1976). Paul Michael Glaser, Sally Struthers 70084				Matlock (cc) 14268		Remington Steele 17355		Paid 528
(29)	Cosby 29152	Different World	Simp-sons	Drexell's Class	Beverly Hills, 90210 (cc) 94442		Street Justice 81978		All in the Family	Star Trek: The Next Generation (10.	

Evening cable/

	6:00	6:30	7:00	7:30	8:00	8:30	9:00	9:30	10:00	10:30	11:
AEN	David Letterman		Dinosaur! (cc)		To be announced		Brute Force 865317		Evening at Improv		Dinc
AMC	The Cocoanuts (1929). 224046				A King in New York (1957). 229591				Frankenstein (1931). 464		
BET	Voices	Screen	Desmond	Video Soul 380065				General	Desmond	Screen	Midr
BRV	Off the Air		South Bank Show		Field of Honor 704355			Fry & Laurie Special		The Begger's O	
CNN	Money	Crossfire	Primenews (cc)		Larry King Live!		World News 403591		Sports	Money	New
COM	SCTV	Line?	Com'dian	Comics	Stand-Up	Access	Saturday Night		Night After Night		Sho
DSC	Monitor	Beer	Hunters	W.W. II	Beyond 2000		Coast to Coast		Natural 873336		Sho
ESN	SpCenter	SpeedWk	American Muscle		Boxing: Mayweather vs. Rodriguez 232065				SportsCenter		NFL
FAM	The Waltons 957997		My Dog	Asked	Father Dowling		The 700 Club		Bordert'n	Pillars of the Sk	
LRN	Learned	Women	Calling Basingstoke		Triumph of the West		Sky Is Gray 395336		Calling Basingstoke		Triu
LIF	China Beach953171		L.A. Law (cc)590626		A Change of Seasons (1980). 570862				Spenser: For Hire		Sh'r
MCN	Main St.	Earth	Zoo	Sportm'n	Univers.	Puzzles	Lovelines 297355		Presents	Entertain	GAZ
MSC	Hockey	News	Rinkside	NHL Hockey: Chicago Blackhawks at St. Louis Blues 720510						Football	New
MTV	Comedy	Comedy	Sat.Night	In Rock	Rock'ry	Rock'ry	Most Wanted		Comedy	Picture	In R
NIK	D. Mouse	Looney	Doug	Superm'n	Van Dyke	G't Smart	Dragnet	Hitchc'ck	Gr. Acres	Mr. Ed	Loo
NOS	Dancin'	One Step	Anthol'gy	J. Benny	Untamed Lands (1979). 286249				Dancin'	One Step	Anti
PSN	Tennis Magazine		NBA	Pro Football Playoff		Hockey	Winter Speed 89572		Grand Prix (1966). James (		
TBS	Addams	Sanford	A Woman Called Moses (7:05) (1978). Cicely Tyson, Will Geer 63668442								Sha
TNN	Video (4)	Be a Star	On Stage	Music Sh.	Nashville Now 142591			Crook	On Stage	Music Sh.	Nas
TNT	Bugs Bunny (5:30)		NBA Basketball: San Antonio at New York 4611626					Take the High Ground (9:20) 8316495			
UNI	Muchachitas 82620		Marquesa de Santos		Al Filo 83794		Fama	Amor	Noticiero	La Movida 888	
USA	MacGyver 313539		Murder, She Wrote		Missing (1982). Jack Lemmon, Sissy Spacek 433336				MacGyver 938		
VH1	Soul of VH-1 718423		Prime Time Music Mix 257997					Spotlight	Spotlight	Sex Symbols 270688	Lat
WGN	Jeannie	Be Told	Amadeus (Part 1) (1984). 980688					News (cc) 669797	Nt. Court	Kojak 127442	
WOR	Gimme	Cosby	Wiseguy 635591		New York at Night			News (cc) 631775	Love Boat 634862		Koj
DIS	Woof! (5:30) (1989). 626404		The Incredible Mr. Limpet (1964). Don Knotts, Carole Cook (cc) 988220					American Teacher Awards (cc) 518607			
HBO	Shag (5:15) 43884152		Play by Play: Sports Television		Reversal of Fortune [R] (1990). Glenn Close, Jeremy Irons (cc) 234423				Inside the NFL 213930		The Con
MAX	To Sleep With Anger (6:15) 86645626		Friday the 13th (1980). Adrienne King 141442				Lethal Woman (1989). Maruta Van Kamp 8964411		Ski School (10:05) (1991). Dean Cameron 3619713		
SHO	Torrents of Spring. (5) 677249		Mermaids [PG-13] (1990). Cher, Winona Ryder (cc) 294065					Steel Magnolias [PG] (1989). Sally Field, Dolly Parton (cc) 495572			Jue 290
TMC	Spaced Invaders (1990). Douglas Barr, Royal Dano 658442				I Come in Peace (1990). Dolph Lundgren 6650959			Loose Cannons (9:35) (1990) Gene Hackman 36071539			Stra Stra

[TNN] **American Music Shop**/Gary Morris; John Anderson; Little Jimmy Dickens. (R) 935978

8:00pm

(2) **Mystery!**/"Campion: Sweet Danger" Albert Campion (Peter Davison) races to find documents proving a family's title to valuable land before an unscrupulous commerce baron finds them. With Lysette Anthony, Iain Cuthbertson. (cc) 3775

(4) **The Kennedy Center Honors: A Celebration of the Performing Arts**/Roy Acuff, composers/performers Betty Comden and Adolph Green, acrobatic dancers Fayard & Harold Nicholas, Gregory Peck and choral director Robert Shaw are honored. Host: Walter Cronkite. (cc) 11/1

(17) **Inside Money**/Tony Bennett discusses investing in art. 13442

(29) **Beverly Hills, 90210**/Dylan must cope with his long-estranged mother's (Stephanie Beecham) return. (R) (cc) 94442

[NIK] **Dick Van Dyke**/Laura does a perfect job of filling in for Sally. 257249

[DSC] **Beyond 2000**/Leprosy vaccine; music prevents illness; high definition television. 883713

[FAM] **Father Dowling Mysteries**/Father Dowling and Sister Steve investigate a film director's murder. (cc) 563572

[LRN] **Triumph of the West**/"Capitulations" Islamic countries which once looked to the West for guidance now learn the price of dependency. (R) 375572

8:30pm

(11) **Wings**/Helen, Brian and Joe crash Faye's Christmas party. (R) (cc) 5125

(17) **American Interests**/"Cars, Quality & Competitiveness" Cadillacs vs Japanese luxury cars. 56779

[NIK] **Get Smart**/A CONTROL agent's unfinished symphony names Mr. Big 269084

9:00pm

(11) **L.A. Law**/Kuzak tries to woo away four attorneys for his firm, prompting McKenzie and Brackman to sue. (R) (cc) 43152

(17) **Seizing Future Opportunities in the Pacific Rim**/Panelists seek a global perspective on the fluctuating international marketplace in 1990. 74626

(23) **Matlock**/Ben defends a rare-coin dealer accused of killing an employee who was stealing inventory. Guest Cindy Morgan. (Part 1 of 2) (cc) 14268

(29) **Street Justice**/Benton suspects a member of his support murders of Vietnamese. (

[NIK] **Dragnet**/Friday search for a missing b 134959

[AEN] **Brute Force**/"E bomber pilots threw gre cockpit. 865317

[COM] **Saturday Night** Modine. Musical guest 67336

[DSC] **America Coa** "Georgia" Jekyll Island Savannah; Atlanta 6702

[DIS] **American Teac** Profiles honor teachers f nation, they, in turn, ho them as the teacher Pantages Theater in Lo 518607

HURWITZ & PADDEN
ATTORNEYS AT LAW
433 South 7th Street
Suite 1923
Minneapolis, Minnesota 55415

Thomas R. Hurwitz
Michael B. Padden

Telephone (612) 333-0052
Fax (612) 334-5681

February 28, 1992

Minnesota State Bar Association
c/o Mr. Robert Monson, President
514 Nicollet Mall
Suite 300
Minneapolis, MN 55402

Re: Attorney Advertising

Dear Mr. Monson:

I have always been a strong advocate for the notion that it is ethical for attorneys to advertise as long as the advertising is done in good taste. I was recently retained by a client through a referral regarding the defense of a DWI and careless driving charge. My client was arrested on 2/24/92, I had my first meeting with him on 2/27/92.

When I met with him, I was too surprised to see that he had already received solicitation letters from no less than 6 attorneys requesting that my client retain them for his recent criminal charges. They must have received information regarding the charges through the police department or some other inside source. I attach copies of these letters for your review. Please note that when I had my secretary photocopy these letters, I had her delete all references to my client on the originals before copying.

This concept of direct attorney solicitation for people facing criminal charges should be stopped in my opinion. I have also seen this process used in motor vehicle accidents. Somehow attorneys get a hold of police reports and correspond with accident victims ad nauseam in the hope of having someone hire them.

I was additionally amazed when my client told me that one of the attorneys that he had contacted, not one of the 6 attached hereto, had quoted him an outrageous fee of $2,500 to represent him in this matter. Please note that this charge is by no means an aggravated DWI, and his record is clean regarding prior alcohol related offenses.

I would appreciate it if this concept of direct solicitation would be addressed in upcoming seminars. As I noted above, I have no problem with actual attorney advertising, but these direct

solicitation letters and other forms of sleazy advertising I believe should be regulated in some fashion. Thank you, and I would appreciate hearing from you regarding the above.

Sincerely,

Michael B. Padden

Michael B. Padden

MBP/keh

Attachments

STEVAN S. YASGUR, P.A.
ATTORNEY AND COUNSELOR AT LAW
SUITE 625
7825 WASHINGTON AVENUE SOUTH
EDINA, MINNESOTA 55439

LEGAL ASSISTANT
CHERILYN J. MAILAND

TELEPHONE
(612) 942-0900

February 25, 1992

CONFIDENTIAL

Minneapolis, Minnesota 55406

booking charge: DUI

Dear [redacted]:

I understand you recently were booked on the above charge. Quite often, people in your situation are unsure of their legal rights and would like to consult an attorney, but don't know where to go.

This is to advise you that, if you have any questions about this matter and would like to speak with an attorney before you go to court, I would be happy to see you.

THERE IS NO FEE FOR THIS CONSULTATION.

At your convenience, I will meet with you in my office and discuss your case for up to half an hour. If that is not convenient for you, other arrangements can be made to discuss your case. You are under no obligation of any kind.

As a former prosecutor, and as a defense attorney, I have dealt with many different crimes and can give you the benefit of both viewpoints. Feel free to call my office and make an appointment. My telephone is answered 24 hours a day.

Sincerely,

STEVAN S. YASGUR, P. A.

Stevan S. Yasgur
SSY:cjm

I also have an office at 245 East Sixth Street in St. Paul.

Robert H. Meier
Attorney at Law

660 Title Insurance Building
400 Second Avenue South
Minneapolis, Minnesota 55401
(612) 339-1517

EMERGENCY ARREST HELP
CALL (612) 339-1517
TWENTY-FOUR HOURS A DAY

Robert H. Meier
Attorney at Law

24-Hour Number
(612) 339-1517

660 Title Insurance Building
400 Second Avenue South
Minneapolis, MN 55401

Dear Minnesota Driver:

An alcohol related traffic violation (D.W.I.) can seriously affect your future. Besides the heavy fine and possible jail sentence, it can raise your insurance rates and even cause employment and credit problems.

You owe it to yourself to know your rights before you appear in court.

Under certain circumstances, a first offender may be eligible for a limited (work) Driver's License during the period of suspension.

Retaining the proper attorney to represent you may help to solve these and other problems.

I charge no fee for the initial conference. If you then feel I can help you, my representation can be arranged on the basis of a reasonable retainer fee and time payments that fit your budget for the balance.

Should you want to talk to me about your arrest, call (612) 339-1517. I can also arrange to meet with you after work or on a Saturday morning.

It may even be possible for me to make the first court appearance in your place. This and other time-saving details can be discussed during your first interview.

Please know that professional legal assistance is available to you at a sensible cost.

Sincerely,

ROBERT H. MEIER
Attorney at Law

TWENTY-FOUR HOUR NUMBER (612) 339-1517 TWENTY-FOUR HOUR NUMBER

WATSON & CARP, P.A.
d/b/a
GREATER MINNESOTA LEGAL CLINIC
828 Norwest Midland Building
Minneapolis, MN 55401

Okay...now you've gone and done it!! You picked one of the most devastating counties in the state to get an alcohol-related driving citation. Current sentencing guidelines call for forty-eight hours for the first offense --- thirty days for the second. Driving privileges may be severely restricted. Don't let anyone kid you, there could be a workhouse sentence on the horizon.

You will need good representation, and that means before, during and after your court appearance. The Greater Minnesota Legal Clinic would like to fully represent and help you in this matter. We are attorneys with experience in this area of the law.

BEFORE -- How should you plead? What special considerations are there in your case? How much will all this cost you?

DURING -- Your court appearance may not be "cut and dried". Many options occur right at the time of the first court appearance. From the beginning you should have an idea of what those options are and how to respond if and when they occur.

AFTER -- We will try our best to keep you out of the workhouse, or to make your stay as brief as possible. Subsequent to your hearing, we will follow up with a letter outlining the disposition of your case so you understand exactly what transpired.

Our office would like to help you before, during and after your upcoming hearing. Contact us at 473-2837 (Dial G-R-E-A-T-E-R) for an initial no-cost, no-obligation interview.

Very truly yours,

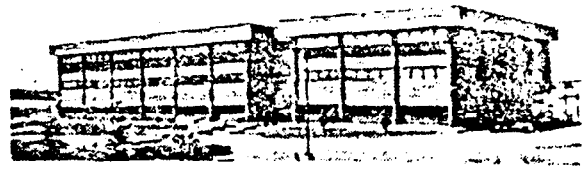
Watson & Carp, P.A., d/b/a

Greater Minnesota Legal Clinic

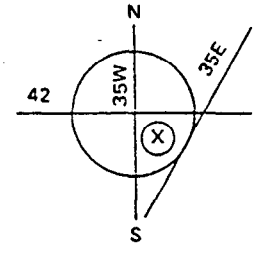
Contact us at 473-2837 (Dial G-R-E-A-T-E-R)

THOMAS M. LOFTUS, *Attorney At Law*

SUITE 113, BURNSVILLE FINANCIAL CENTER • 14300 NICOLLET COURT • BURNSVILLE, MINNESOTA 55337 • (612) 435-6222



IN CRIMINAL LAW PRACTICE SINCE 1974
OVER THREE THOUSAND CLIENTS SERVED



Minneapolis, MN 55406

I am an attorney whose areas of practice include criminal law, misdemeanors, and alcohol related traffic violations. I have represented clients before the Minnesota State and Federal Courts for over 12 years.

It has come to my attention that you have recently been arrested. You will need to appear in court and you have the right to have legal advice regarding the charges pending against you.

It is in your interest to talk to an attorney about your rights, what the court proceedings will involve, and the procedure for reinstatement of your driver's license, if applicable, as soon as possible.

If you do not have an attorney, I would be happy to discuss your case with you. Please call me at my office number during business hours, 435-6222, or at my home number at your convenience, 447-3051. *My attorney fees are fair and take into consideration your ability to pay.* A quote will be given during our first interview.

I look forward to representing you in your legal matter.

Thank you.

Sincerely,

Thomas M. Loftus

77

I WILL NOT BE BEATEN ON PRICE ON HENNEPIN COUNTY CASES

LYNN S. CASTNER
ATTORNEY AT LAW
726 NORWEST MIDLAND BUILDING
401 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55401-2359

Business: (612) 339-0080 Residence: (612) 333-2233

February 25, 1992

DWI and Criminal Defense
All Injuries

LYNN S. CASTNER
ATTORNEY AT LAW

726 NORWEST MIDLAND BUILDING
401 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55401

OFFICE (612) 339-0080
RES. (612) 333-2233
MOBILE (612) 720-7411

MINNEAPOLIS MN 55406

Dear [redacted]:

I am an attorney practicing in the areas of criminal felony law, DWI, and other gross misdemeanors and misdemeanors. I have 28 years of trial experience in state and federal courts.

I am aware that you have recently been arrested and that you will appear in court to answer charges.

Do you know your rights? If you do not have an attorney in this matter, I will answer, without charge, any questions on the telephone you may have concerning your rights, or about the court proceedings you will be going through.

If you wish to consider hiring me as your attorney, I will be happy to discuss my fees with you. Please call me at my office number, 339-0080, at your convenience.

If you have a court appearance before you can reach me at the office, or if you cannot for any other reason call during the day, you may call me at home at 333-2233.

Thank you.

Sincerely,

Mr. Lynn S. Castner
Attorney at Law

78

LYNN S. CASTNER
ATTORNEY AT LAW
SUITE 726, NORWEST MIDLAND BUILDING
401 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55401-2359

Office: (612) 339-0080
Residence: (612) 333-2233

SPECIAL NOTICE OF NEW DWI RIGHTS

The Minnesota Supreme Court ruled on June 7, 1991, that the rights read by police to DWI arrestees must guarantee your right to call a lawyer before you decide whether to take or refuse a chemical alcohol breath, blood, or urine test.

Your recent DWI arrest might be challenged on constitutional grounds by competent legal counsel.

I am experienced in constitutional challenges. Call me for free advice on your DWI arrest.

It may be possible to get your DWI charges thrown out of court.

Lynn Castner
Attorney at Law

James A. Schultz and Associates
ATTORNEYS AT LAW
111 East Cedar Street
Houston, Minnesota 55943
(507-896-3156)
Rushford, Minnesota 55971
(507-864-2889)

James A. Schultz
ATTORNEY AT LAW

Thomas A. Flynn
OF COUNSEL

March 9, 1992

Minnesota State Bar Association
Attention: Advertising Committee
514 Nicollet Mall
Suite 300
Minneapolis, MN 55402

To whom it may concern:

The enclosed ad has been running in the La Crosse, WI paper. Although it is not false, fraudulent, or misleading (I assume every attorney is "a knowledgeable attorney" in one respect or another), I believe the public should at least know the name and address of the so-called knowledgeable attorneys.

No response is necessary, but I assume that the committee is engaged in an ongoing study of this phenomenon.

Sincerely,

James A. Schultz

JAS/ll

SILICONE BREAST IMPLANTS

KNOW YOUR LEGAL RIGHTS

Recent disclosures by the manufacturers of Silicone Breast Implants indicate that these devices may cause serious medical problems.

If you or someone you know has a Silicone Breast Implant, call the toll-free number listed below.

FREE Consultation With A Knowledgeable Attorney

1-800-548-9448

ALDO J. TERRAZAS
ATTORNEY AT LAW
701 FOURTH AVENUE SOUTH, SUITE 500
MINNEAPOLIS, MINNESOTA 55415
(612) 339-8384

March 6, 1992

Advertising Committee
Minnesota State Bar Association
514 Nicollet Avenue
Minneapolis, MN 55401

Dear Chairman:

I am writing on behalf of an extremely upset client who as a result of a recent arrest for DWI received several soliciting letters from attorneys offering their services. My client's situation is peculiar. Although she is an adult, she lives with her mother who would be quite upset to learn about her daughter's DWI. To my client this is a personal matter. Although her arrest is part of the public record, my client's friends and family do not make it a habit to comb the Minneapolis Police Booking Records.

I was not aware that attorneys are permitted to solicit clients by obtaining their names from the police booking records. Some of the letters are extremely distasteful. (I have enclosed one copy.)

Please let me know whether there is anything that can be done to repeal or restrict this type of practice on our fellow members of the bar. A response will be greatly appreciated.

Sincerely,

Aldo J. Terrazas
AJT/wjs
Enc.

WATSON & CARP, P.A.
d/b/a
GREATER MINNESOTA LEGAL CLINIC
828 Norwest Midland Building
Minneapolis, MN 55401

Okay...now you've gone and done it!! You picked one of the most devastating counties in the state to get an alcohol-related driving citation. Current sentencing guidelines call for forty-eight hours for the first offense --- thirty days for the second. Driving privileges may be severely restricted. Don't let anyone kid you, there could be a workhouse sentence on the horizon.

You will need good representation, and that means before, during and after your court appearance. The Greater Minnesota Legal Clinic would like to fully represent and help you in this matter. We are attorneys with experience in this area of the law.

BEFORE -- How should you plead? What special considerations are there in your case? How much will all this cost you?

DURING -- Your court appearance may not be "cut and dried". Many options occur right at the time of the first court appearance. From the beginning you should have an idea of what those options are and how to respond if and when they occur.

AFTER -- We will try our best to keep you out of the workhouse, or to make your stay as brief as possible. Subsequent to your hearing, we will follow up with a letter outlining the disposition of your case so you understand exactly what transpired.

Our office would like to help you before, during and after your upcoming hearing. Contact us at 473-2837 (Dial G-R-E-A-T-E-R) for an initial no-cost, no-obligation interview.

Very truly yours,

Watson & Carp, P.A., d/b/a

Greater Minnesota Legal Clinic

Contact us at 473-2837 (Dial G-R-E-A-T-E-R)

1992

Ban on lawyer advertising would hurt consumers

By Stephen R. Bergerson

A handful of attorneys is silently scheming to silence lawyer advertising.

The ad-ban debate has generated a lot of heat and only a little light within the legal profession. The public, meanwhile, has been kept completely in the dark. And that's where it will stay if the censors have their way.

This spring, a State Bar Association committee will vote on proposals that could mute, muffle or muzzle lawyer advertising. The association would then consider recommending them to the state Supreme Court for adoption.

Lawyers who loath advertising are:

- Outstate lawyers who are losing "their" clients to metro lawyers who advertise in "their" areas;
- Metro lawyers with established practices who want to silence competitors;
- Lawyers who'd rather the public didn't realize that they actually compete for clients (advertising isn't "discreet");
- Lawyers who believe advertising "demeans" the profession;
- And lawyers who would like to advertise, but don't know how.

Since few could admit these reasons without public embarrassment, those who advocate a ban give their arguments a "consumer interest" spin, arguing that the legal profession is obliged to prevent advertising that deceives the public.

Fine. But there isn't a single deceptive practice a lawyer could conceive of that isn't already regulated. The laws and agencies designed to do that have been in place longer than most lawyers have been practicing law. And the Lawyers Professional Responsibility Board itself has had explicit authority to discipline lawyers who use deceptive ads since 1978.

Furthermore, the ad ban is a solution searching for a problem.

Who's complaining about lawyer advertising? Not consumers. They know where to turn when they've been had by an ad. But the phones are silent at the offices of the attorney general, Federal Trade Commission and Better Business Bureau. And of a total of 1,384 complaints received by the Lawyers Board in 1990, seven concerned ads. And lawyers *themselves* filed virtually all of them! In 1992, an orchestrated effort by a group of lawyers managed to increase the ad-related complaints to 33.

The censors rely on two arguments. Both are elitist, Neanderthal and self-serving.

The first portrays advertising as inherently manipulative and consumers as unguarded and gullible. It is an outdated view held by a cultural elite. The censors consider the public incapable — unlike themselves — of dealing with advertising.

They mistrust the public and are troubled by its standards of taste and behavior. Since these standards differ from how the censors think people should behave, they blame advertising for tricking the public into making the "wrong" choices. What *really* troubles them, though, is that advertising shifts market power from those who think they know what's best for everyone to the individual consumers of legal services themselves.

Secondly, those who support an ad ban argue that advertising increases the costs of legal services. Experience and intuition both tell us otherwise.

Have they forgotten what happened when bans on price advertising by pharmacists, lawyers and other professionals were ruled unconstitutional in the mid-1970s? Prices went down and the quality of services went up.

Advertising informs consumers of the availability, costs and benefits of legal services. It encourages competition and helps consumers make comparisons and choices. That's exactly what most of the censors *don't* want.

What they *do* want is to protect their turf and preserve what's left of the status quo. And an ad ban is the single best way to avoid competition, maintain mystique and dictate taste.

"But," the censors say, "we don't want to *ban* advertising, only 'restrict' it." That's the assassin saying he wants only to "restrict" his target's movement.

When censors train their sights on advertising's ability to attract attention, inform or persuade, they aim at the ad's effectiveness, not its deceptiveness. The censor's sagacious mission is to make advertising so meaningless it won't work. It's the censor's equivalent of the neutron bomb.

They would, for example, prohibit advertising from making "self-laudatory" statements, or from making claims regarding "the quality of legal services." Others wouldn't allow the use of voice talent or "background sound" in TV spots, or would ban the use of "dramatizations" and testimonials. One proposal would restrict advertising to the lawyer's own "geographical area."

That's advertising?

Many censors want all ads to state that "choosing a lawyer is an important decision and should not be based solely on information contained in an ad." Others insist that every ad explicitly "disclose" that "This is a paid advertisement."

That's consumer protection?

Those who advocate an ad ban spend a lot of time analyzing whether their "restrictions" will withstand a certain constitutional challenge. Their focus is so fixed on constitutional conundrums that they are overlooking a fundamental American attribute: letting people decide for themselves.

Stifling speech also suffocates a fundamental human attribute: the ability to communicate.

Ad bans are not antiadvertising; they are anticonsumer. They do not serve the public interest; they serve the censor's interest.

Minnesota native and U.S. Supreme Court Justice Harry Blackmun had it right when he said censorship is "a covert attempt to manipulate choices, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice . . ."

From the public's perspective, an ad ban is a bomb. And it's the bomb that should be banned.

About the author

Stephen R. Bergerson practices advertising law with the Minneapolis law firm Fredrikson & Byron in Minneapolis and is a former ad agency account executive. He is chairman of the American Advertising Federation's Self-Regulation Committee, is a director of the Better Business Bureau and a past president of the Minnesota Advertising Review Council. He has directed the creation of many award-winning legal ads.

LAW OFFICES

SCHWEBEL, GOETZ, SIEBEN & MOSKAL, P. A.

5120 IDS CENTER

80 SOUTH EIGHTH STREET

MINNEAPOLIS, MINNESOTA 55402-2246

FAX (612) 333-6311

TOLL-FREE (800) 752-4265

TELEPHONE (612) 333-8361

DIANE C. HANSON (1948-1985)

JAMES R. SCHWEBEL ††
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DAVID J. MOSKAL ‡‡
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WILLIAM A. CRANDALL ‡†
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RONALD N. SCHUMEISTER
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LAURIE J. SIEFF
SHARON L. VAN DYCK
T. JOSEPH CRUMLEY
CHRISTINE D. ZONNEVELD
JAMES S. BALLENTINE

OF COUNSEL
MICHAEL G. SIMON

‡ALSO ADMITTED IN WISCONSIN
‡‡ ALSO ADMITTED IN NORTH DAKOTA
‡‡‡ ALSO ADMITTED IN COLORADO
† ALSO ADMITTED IN ARIZONA

April 15, 1993

Clerk of Appellate Courts
Minnesota Supreme Court
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

In Re: Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct
Court File No. C8-84-1650

Dear Clerk:

Enclosed herein for filing is our original Affidavit of Personal Service on Attorney David F. Herr. Our original documents were filed with the court on April 9, 1993.

Thank you.

Very truly yours,

Mary C. Cade

Mary C. Cade

MCC:mpn
enclosure

AFFIDAVIT OF PERSONAL SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kosta N. Leaskas of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn upon oath, says that on the 9th day of April, 1993, he personally served a copy of the following documents on David F. Herr, Attorney at Law, 3300 Norwest Center, Minneapolis, MN 55402:

1. Request to Make Oral Presentation;
2. Statement of Position of Schwebel, Goetz, Sieben & Moskal, P.A. Regarding Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct; and
3. Appendix.

directed to said attorney at the above address, the last known address of said attorney, by handing to and leaving with Julie Steman true and correct copies thereof.

Kosta N. Leaskas

Subscribed and sworn to before me this 9th day of April, 1993.

Mary Nygaard
Notary Public

MARY NYGAARD
NOTARY PUBLIC-MINNESOTA
SCOTT COUNTY
My Commission Expires July 20, 1998

DORSEY & WHITNEY

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

350 PARK AVENUE
NEW YORK, NEW YORK 10022
(212) 415-9200

1330 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036
(202) 857-0700

3 GRACECHURCH STREET
LONDON EC3V 0AT, ENGLAND
44-71-929-3334

36, RUE TRONCHET
75009 PARIS, FRANCE
33-1-42-66-59-49

35 SQUARE DE MEEÛS
B-1040 BRUSSELS, BELGIUM
32-2-504-46-11

220 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402-1498
(612) 340-2600
TELEX 29-0605
FAX (612) 340-2868

STEVEN C. NELSON
(612) 340-2942

201 FIRST AVENUE, S. W., SUITE 340
ROCHESTER, MINNESOTA 55902
(507) 288-3156

1200 FIRST INTERSTATE CENTER
BILLINGS, MONTANA 59103
(406) 252-3800

507 DAVIDSON BUILDING
GREAT FALLS, MONTANA 59401
(406) 727-3632

127 EAST FRONT STREET
MISSOULA, MONTANA 59802
(406) 721-6025

801 GRAND, SUITE 3900
DES MOINES, IOWA 50309
(515) 283-1000

April 9, 1993

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Dear Mr. Grittner:

Pursuant to the Order of the Supreme Court of Minnesota dated February 22, 1993, I hereby request the opportunity to make an oral presentation at the hearing to be held at 9:00 am on Monday, April 12, 1993 on the subject of the recommendation of the State Board of Law Examiners to amend the Rules of the Supreme Court for Admission to the Bar to Include a Foreign Legal Consultant Rule.

Enclosed herewith, in accordance with the aforementioned Order, please find 12 copies of the material I intend to present.

Very truly yours,

Steven C. Nelson

Steven C. Nelson

SCN/kmp

Enclosures

STATEMENT OF STEVEN C. NELSON

before the

SUPREME COURT OF MINNESOTA

April 12, 1993

MAY IT PLEASE THE COURT:

My name is Steven C. Nelson. I practice law in the Minneapolis office of the firm of Dorsey & Whitney, where I specialize in international commercial law. In 1988-89 I served as Chairman of the American Bar Association's Section of International Law and Practice, which has a current membership of some 15,000 lawyers from all over the United States and a number of foreign countries. Since 1991 I have been Chairman of that Section's Committee on Transnational Legal Practice, which is responsible for, among other things, the development of the Section's positions on matters relating to the licensing and regulation of the practice of law in countries other than that in which a lawyer is admitted to practice.

Before proceeding with the substance of my presentation, I want to make it clear that I appear before you in my personal capacity and that my views do not represent policy positions that have been approved by the governing bodies of the American Bar Association. The Section of International Law and Practice has approved for submission to the House of Delegates a draft Model Rule on the Licensing of Legal Consultants which, however, will not be approved prior to the ABA Annual Meeting in August of this year. Accordingly, while the following comments will reflect the considerable thought, analysis and expertise that the ABA

Section of International Law and Practice has devoted to the subject matter before you, it should not be taken as established ABA policy.

I have submitted to the Court along with my statement a copy of the draft Report and Recommendation of the Section of International Law and Practice concerning the proposed Model Rule on the Licensing of Legal Consultants.1/ The Report contains a detailed articulation of the reasons that the Section considers it necessary and timely for the American Bar Association to adopt, and to urge state judicial and professional regulatory authorities to adhere to, a standardized rule on the licensing of foreign lawyers to practice within their jurisdictions as legal consultants, as well as a detailed explanation of the rationale for the approaches taken in the Model Rule itself. It is the purpose of my appearance here today to urge that this Court adopt, as a substitute for the Rule on the Licensing of Foreign Legal Consultants proposed by the Minnesota State Board of Law Examiners, a rule conforming in all essential respects to the Model Rule set forth in the Recommendation adopted by the ABA Section of International Law and Practice.

I hasten to add that I make this submission with the greatest of respect for, and deference to, the capable and dedicated members of our profession who serve with distinction on the State Board of Law Examiners. They face, on a day-to-day basis, some of the most difficult and least appealing aspects of governing and

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1/ The text of the proposed Model Rule is contained in the Recommendation of the ABA Section of International Law and Practice which is the first part of the Report and Recommendation attached as Exhibit A hereto, and it is hereinafter cited as the "Model Rule." The second portion, which is the explanatory Report to accompany the Recommendation, is hereinafter cited as the "Report."

regulating our profession, and it is altogether understandable that they would have a pre-occupation with the possibility for abuse of a type of rule with which they have had no practical experience. At the same time, it is my view that these concerns have resulted in the inclusion of undue restrictions which, while conceived in unquestioned good faith and having no other purpose than that of protecting the public against potential abuses, have had the perverse effect of creating a rule which would be among the most restrictive of those thus far adopted in the United States -- in some respects surpassing all other existing rules in this respect -- and which would tend to defeat the purposes of adopting such a rule in the first place.

It is useful to focus first on the reasons for the adoption of a legal consultant rule in Minnesota. They are essentially twofold. First, such a rule would make it possible for law firms and their clients here in Minnesota to have access locally to lawyers trained and qualified in foreign legal systems. Most of these lawyers would probably be integrated within existing Minnesota law firms or companies, although some might be members of foreign law firms who might eventually decide to open offices here to serve Minnesota clients or foreign clients with interests in Minnesota and elsewhere in the Upper Midwest. In either case, their presence here would be greatly contribute to the enhancement of Minnesota's role as a regional center for international business.

Second, the adoption of a legal consultant rule in Minnesota would help American lawyers and law firms seeking to carry on a practice abroad to meet the increasing demand of foreign governments and legal professions for reciprocal

rights as a condition to permitting our lawyers to practice in their countries. From the narrowest perspective, such a rule would enable Minnesota lawyers and law firms seeking to establish practices in, for example, Germany or Japan to assert that our state affords the reciprocity required under the statutes recently adopted in those countries to deal with the issue of practice by foreign lawyers. Taking a broader view, adoption of such a rule would also add further weight to the arguments now being made in a number of international *fora* by both the American Bar Association and the United States government to the effect that foreign lawyers in fact enjoy broad and expanding rights of practice in all important commercial centers in the United States.

It is in the latter context that the more restrictive provisions included in the rule proposed by the State Board of Law Examiners would produce their most profound and adverse effects. To put this point into proper perspective, I must first summarize the various negotiations and discussions on this subject that are currently in progress around the world.

As is explained in some detail in the Report,2/ the United States government has been heavily involved in negotiations with foreign governments on the subject of access by lawyers to foreign markets. These negotiations have taken place over the course of several years of intensive and politically-difficult bilateral negotiations with the Japanese government relating to access by American enterprises to the Japanese market; during the last two or three years as part of the Uruguay Round of

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2/ *See* Report at 7-11.

trade negotiations within the framework of the General Agreement on Tariffs and Trade (GATT) at Geneva;3/ and over the past year or so in the negotiations with Canada and Mexico on the proposed North American Free Trade Agreement (NAFTA). Our government has stressed the liberalization of rules permitting the practice of law by American lawyers in foreign countries, not because that practice is important in and of itself as an element of our overall balance of trade, but because the availability in foreign countries of American legal services is perceived as a means of facilitating the opening up of markets for other American enterprises, including those providing services such as financial services that require intensive legal advice and assistance, which *are* important to that trade balance.

The American Bar Association, through the Committee that I chair, has consulted closely with the Office of the United States Trade Representative, the Department of Commerce and the Department of State in the development of positions for these intergovernmental negotiations. We have also, over the last few years, pursued increasingly intensive, and in some cases fruitful, direct discussions with the Council of the Bars and Law Societies of the European Communities, which is in some respects the analog of the American Bar Association within the European Community, and with national bar organizations and governmental authorities in France, Germany, Belgium, Japan, Canada and Mexico.

3/ In this connection, *see* letter of December 6, 1991 from Peter Allgeier, Assistant U.S. Trade Representative, and Linda F. Powers, Deputy Assistant Secretary of Commerce for Services, to Talbot D'Alemberte, President of the American Bar Association, included as Exhibit B-1 hereto.

A common denominator of all of these discussions has been that foreign resistance to the liberalization sought by both the United States government and the American Bar Association has been based in large measure on two arguments: first, that not all of our states have legal consultant rules, so that most of the United States is still closed to foreign lawyers; and second, that many of the rules that do exist contain restrictions, not found in the New York rule,4/ which was the first, and is still the least restrictive, legal consultant rule in the United States.5/ In discussions with European and Japanese officials, our government negotiators, as well as the Association's representatives, have been repeatedly confronted with examples of restrictions in various state legal consultant rules that conflict with the positions we have asked foreign governments and legal professions to accept.6/

New York, which adopted its legal consultant rule in 1974 and is the single most interesting jurisdiction for foreign law firms, has had far and away the most extensive experience with the operation of such rules.7/ Our discussions with the

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4/ New York Rules of Court, Rules of the Court of Appeals, Pt. 521.

5/ For the history of the New York rule and those that followed, *see* Report at 3-7.

6/ For the second time in three years, the Japanese Ministry of Justice is currently conducting a "study" of the operation of United States legal consultant rules; a copy of pertinent correspondence from the Ministry is attached as Exhibit C to this statement. Based on past experience, it is believed that a principal objective of the study, at least from the perspective of the Japan Federation of Bar Associations (*Nichibenren*) is to compile a "laundry list" of restrictive provisions found in the various state rules in order to define a "lowest common denominator" to the liberality of American rules.

7/ Of the just over 200 legal consultants who have been licensed in the fifteen United States jurisdictions which have adopted rules permitting such licensing, some 170 have been licensed in New York and another 20 in the District of Columbia. *See* Report at 4-5. While New York's experience of nearly two decades is brief in relation to the history of the common law, it is

Association of the Bar of the City of New York, as well as the New York State Bar Association, have revealed no significant problems with the operation of the rule in New York and a strong sense on the part of the New York bar that the rule has been beneficial to the development of New York as an international legal center. It is ironic, to say the least, that the effort to obtain adoption of legal consultant rules in other jurisdictions has resulted in rules that have departed the liberal approach of the New York rule, notwithstanding the demonstrated success of that rule in achieving its original objectives. It is unfortunate that the salutary model of openness that the New York rule affords to the rest of the world is being eroded by the adoption of restrictive rules in other states of far less commercial importance, without careful analysis of the rationale of the New York rule or of experience under that rule. It is highly regrettable that these rules have proved to be more of a hindrance than a help in achieving a more open international system.

The decision of the Section of International Law and Practice to develop and propose a Model Rule on the Licensing of Legal Consultants stemmed, not only from a sense that the proliferation of more restrictive rules was becoming counter-productive, but from a strong belief that the increasing interdependence of the global economy necessitates a new approach to the regulation of the legal profession at the international level, one reflecting mutual recognition of legal professions in

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nonetheless an adequate basis for some general conclusions as to the nature and extent of the practical problems that may be expected to arise in policing the operation of a rule of this sort. It is noteworthy that the overwhelming majority of the foreign lawyers licensed in New York City, which has a very large immigrant population, have been partners or associates in, or of counsel to, well-established New York or foreign law firms with strong international practices.

other countries based on common standards of regulation and discipline. The participants in the international economy need legal services that cross national boundaries and effectively integrate different legal systems. The legal profession, and its regulators, have been remiss in failing to adapt existing regulatory structures to these new economic realities. All of this has tended to undermine the ability of the legal profession to serve the public as well as it can and should.

Against the foregoing background, I turn now to an analysis of the most important differences between the provisions of the proposed Minnesota rule (the "Proposed Rule") and the Model Rule.

Section A of the Proposed Rule requires as a condition of licensing that the applicant have been "admitted to practice in a foreign country as an attorney or counselor at law." This formulation is consistent with the corresponding provisions of most of the rules in force in the fifteen other jurisdictions that currently have them. The Model Rule contains a more detailed provision requiring that the applicant be

> ... a member in good standing of a *recognized legal profession* in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent *and are subject to effective regulation and discipline by a duly constituted professional body or a public authority* 8/

The italicized language in the Model Rule makes express the mutual-recognition approach to the licensing of foreign lawyers that is merely implicit in existing rules. Under that approach, the licensing authority relies to a significant extent on the fact

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8/ Model Rule, § 1(a) (italics supplied).

that the foreign lawyer not only has been admitted in another jurisdiction but that he or she is subject to continuing regulation and discipline by the appropriate authorities in that jurisdiction. It is therefore an essential condition of licensing that the licensing authority be satisfied, not only that the applicant is a member in good standing of a foreign legal profession, but also that that profession is entitled to recognition as one the members of which are subject to effective regulation and discipline.9/

Subsection B(2) of the Proposed Rule would require that the applicant have been engaged, for five out of the last seven years immediately prior to the application, in the practice of law *of* the country in which he or she is admitted to practice and that such practice have taken place *in* that country. Eight of the fifteen jurisdictions with existing legal consultant rules require that the applicant's practice have been *in* the country of admission.10/ All the others require only that the applicant have practiced the law *of* that country for the requisite period. None require both. The Model Rule, like the New York rule, requires only that the lawyer have practiced the law *of* the jurisdiction of admission for the requisite period.11/ For reasons more fully set forth in the Report, we believe a requirement tied to the *place* where the applicant has practiced, rather than the *law* that he or she has practiced, is unduly restrictive and ill-suited to the realities of a modern international commercial

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9/ *See* Report at 12.

10/ *See* Report at 13-14.

11/ Model Rule § 1(b).

practice, which involves frequent rotations and reassignments of lawyers to other countries without changing the fundamental legal subject matter of their practices.12/

Subsection B(3) of the Proposed Rule would require that the applicant have remained in good standing in his or her home legal profession throughout the period of his or her practice. The Model Rule requires only that the applicant have been in good standing for the period of the experience requirement, *i.e.* five of the seven years immediately preceding his or her application.13/ This is an aspect of the mutual-recognition approach; if the cognizant regulatory and disciplinary bodies have seen fit to restore an applicant to good standing in his own country under a system that is effective and recognized, the licensing authority should accept that judgment without prejudice, of course, to the application of character and fitness standards in accordance with Subsection B(4) of the Proposed Rule.

Subsection B(6) of the Proposed Rule would require that the applicant currently maintain an office within the state for the rendering of services as a foreign legal consultant. This creates an impossible situation, since the applicant obviously cannot render such services until after the license has been issued. Only four of the jurisdictions having legal consultant rules require current *resi-dence,*14/ and this requirement appears not to have been enforced in light of the practical

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12/ *See* Report at 13-14.

13/ Model Rule § 1(b).

14/ *See* Report at 15-16 esp. nn. 43-46.

impossibility of compliance and possible constitutional difficulties.15/ Florida is the only jurisdiction requiring that the applicant maintain an *office* in the state at the time of the application.16/ The Model Rule would require that the applicant *intend* "to practice as a legal consultant in this State and to maintain an office in this State for that purpose."17/ It is believed that this is more consistent with the practicalities of establishing foreign offices and less likely to create a prece-dent that may serve as a pretext for mischief in other countries where American lawyers want to establish offices.18/

Subsection C(3) of the Proposed Rule would require the applicant to submit, as part of the application, a document to be issued by an undefined authority indicating whether any charge or complaint has ever been filed against the applicant with such authority and, if so, the disposition of that charge or complaint. It is not clear whether the authority referred to is supposed to be a professional regulatory body or a law enforcement authority. The principal difficulty with this requirement, apart from the fact that it appears to duplicate the requirement of Subsection C(2) and is therefore likely to be seen as bureaucratic excess, is that there may be no authority which can, either legally or practically, issue a document fulfilling this requirement.

15/ *See* Report at 15 n.45.

16/ *Id.* at 15 n.44.

17/ Model Rule § 1(e).

18/ *See* Report at 15-16.

The Model Rule contains no requirement of this kind,19/ although it would permit the licensing authority, in the exercise of its sound discretion,20/ to require additional evidence of the applicant's character and fitness and of his or her compliance with the eligibility criteria in appropriate cases.21/ The State Board of Law Examiners would have similar authority, presumably to be exercised in its sound discretion, under Section D of the Proposed Rule.

Subsection C(7) of the Proposed Rule would require that the applicant submit notarized letters of recommendation from at least two members of the Minnesota Bar. This provision is a bit like the residency requirement, in that an applicant might not have long-standing acquaintances with Minnesota lawyers prior to his or her establishment of an office in Minnesota, which could not as a practical matter be accomplished prior to the issuance of a license. It is also subject to challenge and imitation as a protectionist measure. If American lawyers seeking to establish in, for example, Japan had to meet this kind of requirement, the Japan Federation of Bar Associations could effectively prevent them from qualifying simply by forbidding its members from giving such a letter of recommendation. The Model Rule contains no comparable requirement.

Subsection C(9) of the Proposed Rule would impose an application fee of $1,000, apparently making Minnesota the second most expensive jurisdiction in

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19/ *But see* Model Rule § 2(a).

20/ *See* Report at 11.

21/ Model Rule § 2(d).

which to apply for a license as a legal consultant.22/ The Model Rule would limit application fees for legal consultants to the amounts applicable to lawyers from other United States jurisdictions applying for admission to the bar of the licensing state.23/ The principal reason for the inclusion of this limitation was to ensure that excessive fees were not used as a device for the creation of barriers to entry, as has been done in at least one foreign country of importance to American lawyers.24/

Under Section E of the Proposed Rule, the practice of a legal consultant would be limited to advice and services "regarding the laws of the country in which such person is admitted to practice." The legal consultant would be specifically precluded from practicing the "law of the United States, the State of Minnesota, or that of any other state, commonwealth or territory of the United States or the District of Columbia" and, lest there be any doubt, from rendering any of a series of enumerated services. The Model Rule, on the other hand, follows the New York Rule,25/ providing that the licensed legal consultant shall not appear for another person as an attorney in any court, other than upon admission *pro hac vice,* and further that he or she shall not:

> ... render professional legal advice on the law of this State or the United States of America (whether rendered incident to the preparation of legal

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22/ Georgia, which imposes a fee of $3,000, appears to have the honors in this respect. *See* Report at 26 n. 71.

23/ Model Rule § 7.

24/ *See* Report at 26-27.

25/ For a summary of the pertinent provisions of the New York Rule, *see* Report at 4 n.4.

instruments or otherwise) *except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State; ...* .26/

The difference between the restrictive approach of the Proposed Rule, on the one hand, and the liberal one of the New York Rule and the Model Rule, on the other, is of fundamental importance. For reasons set forth at length in the Report,27/ it is as a practical matter impossible for a lawyer in international practice to confine his or her advice to any one legal system; it is the essence of international practice to address the interaction of the various legal systems that may have a bearing on a given matter. The fact is that lawyers advise on transactions and disputes, not on legal systems. Accordingly, the approach taken in the New York rule, and followed in the Model Rule, is believed to be the only realistic one, and we have repeatedly urged the adoption of the same standard by foreign countries.28/ As a practical matter, considerations of professional liability will afford a far more effective deterrent to practice outside the legal consultant's field of competence than will the language of the rule.29/

26/ Model Rule § 4(b) (italics supplied).

27/ *See* Report at 18-22.

28/ *See* Letter of December 13, 1993 from ABA President Talbot d'Alembert to Ambassador Carla Hills, United States Special Trade Representative, attached as Exhibit B-2 hereto.

29/ It should be noted in this connection that Model Rule § 6(a)(ii)(B) would require an applicant to provide appropriate evidence of professional liability insurance in such amount as the licensing authority may prescribe.

Subsection E(2) of the Proposed Rule sets forth one of the specific exclusions from the permitted scope of practice of a legal consultant, whom it prohibits from "provid[ing] legal advice in connection with the preparation of any deed, mortgage, assignment, discharge, lease, agreement of sale or any other instrument affecting title to" property, real or personal, in the United States." As is noted in the Report,30/ this kind of provision suffers from overbreadth, as it could apply, for example to an agreement for the acquisition abroad of a multinational company which, either directly or through subsidiaries, owns property in the United States as well as other countries. This kind of restriction, if applied literally, in the reverse situation, to American lawyers abroad, would bring many an existing international corporate and commercial law practice to an abrupt halt. To the extent that it serves a legitimate end, it is entirely duplicative of the basic prohibition against rendering advice on local law; to the extent that it goes beyond that prohibition, it is *ipso facto* overly broad.

Subsection E(6) of the Proposed Rule reiterates the fundamental prohibition against rendering legal advice on the law of the United States, the State of Minnesota, or that of any other state, commonwealth or territory of the United States or the District of Columbia. It is subject to the same objections as those to the basic scope of practice provision just referred to.

Subsection E(7) of the Proposed Rule would require the legal consultant to include in his or her title the words "Not Admitted to Practice Law in Minnesota."

30/ *See* Report at 22 n.62.

This phrase cannot help but create confusion in the minds of members of the public, who are likely to have difficulty understanding why a legal consultant licensed "to render services as a foreign legal consultant" under the terms of Section A of the Proposed Rule is not engaged in the "practice of law" in this State. Indeed, if the rendering of services as a legal consultant does not constitute the practice of law, albeit subject to limitations, then no license would be required in the first place. The Model Rule simply prohibits the legal consultant from "holding himself or herself out as a member of the bar of this State." 31/

Subsection E(8) of the Proposed Rule requires the legal consultant to use a written retainer agreement in which, *inter alia*, all of the restrictions on his or her right to practice are recited. The *content* of the required agreement is subject to the objections set forth above relating to the scope of practice; the *existence* of the requirement is subject to the further objection that it is an unnecessary burden on the legal consultant. Only one other jurisdiction has perceived the need to impose a similar requirement.32/ A general prohibition against holding oneself out as a member of the bar of the licensing state, as set forth in the Model Rule,33/ affords ample legal basis for disciplinary action if clients are misled as to the status of the legal consultant. The imposition of unnecessary procedural requirements such as a particular form of retainer letter can only further complicate the efforts of American

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31/ Model Rule § 4(c).

32/ Rules of the Florida Supreme Court Relating to Admission to the Bar, Ch. 16, Rule 16-1.3(b).

33/ Model Rule § 4(c).

lawyers to obtain reasonable and workable practice rights abroad, without producing a commensurate benefit in terms of protection of the public.

Finally, Section G of the Proposed Rule would require *dual* renewals and renewal fees; the legal consultant would be required *both* to submit a biennial renewal request, together with a fee of $300, to the State Board of Law Examiners *and* to renew his or her registration annually with the Minnesota Attorney Registration Office. This dual requirement, which is not found in any of the existing rules in other jurisdictions, is a manifestly unnecessary regulatory and financial burden. The Model Rule would limit renewal fees to those imposed upon members of the bar.34/ There is no apparent reason not to treat legal consultants in the same manner as members of the bar for these purposes, and a discriminatory approach can only be expected to be imitated abroad to the detriment of American lawyers practicing in foreign countries.

Apart from the provisions of the Proposed Rule that conflict with what I believe to be the better approach of the Model Rule, there are certain provisions of the Model Rule which find no counterpart in the Proposed Rule. Principal among these are the provisions setting forth the professional rights and obligations of legal consultants, which make it clear that, consistent with their status as members of recognized foreign bars, legal consultants are to be treated as lawyers for all purposes, subject only to the limitations set forth in the rule.35/ This means that, among other

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34/ Model Rule § 7.

35/ Model Rule § 5.

things, they may be affiliated with law firms, whether as partners or otherwise, in the same manner as other lawyers, and they are entitled and subject to the rights and privileges of members of the bar with respect to attorney-client privilege, work product privilege and similar professional privileges.36/ While these points should go without saying, they have been called into question abroad, and it is extremely helpful to have them stated affirmatively.37/

If it please the Court, I will conclude my submission with the statement that, in my view, the interests of the State of Minnesota, including the strength of its economy and the resultant well-being of its people, as well as those of the legal profession itself, will be better served if Minnesota joins New York, the District of Columbia and other jurisdictions, such as Ohio, that have taken a liberal approach to the licensing of legal consultants. Experience with those rules has demonstrated that they provide ample protection to the public. In this connection, it is important to bear in mind that the persons who would be eligible for licensing would not be new and unknown entrants to the legal profession but seasoned practitioners who, under the provisions of the Model Rule, would have to be found by the State Board of Law Examiners to be members of recognized foreign legal professions the members of which are subject to effective professional regulation and discipline.

Moreover important national interests will be affected by this Court's action in respect of the Proposed Rule. The ability of the United States government, as well

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36/ *Id.*, § 5(b).

37/ *See* Report at 23-25.

as the United States legal profession, to maintain and expand existing opportunities for American lawyers and law firms to provide services in foreign countries, and thus assist United States businesses to penetrate foreign markets, is critically dependent upon the willingness of state regulatory and judicial authorities in this country to recognize the need for a coherent and consistent approach to the licensing of foreign lawyers as legal consultants.

Minnesota's great industrial and commercial enterprises have for decades led the nation in the development of international business, and they continue to do so today. Minnesota's lawyers should be permitted fully to participate in that leadership through the adoption of a rule that would help, rather than hinder, the evolution of a truly international legal profession equipped to meet the needs of an international economy. Those ends would best be served by the adoption of a legal consultant rule conforming to the Model Rule, which I respectfully commend to this Court's careful consideration.

Thank you very much for giving me this opportunity to present my views.

Exhibits:

A Report and Recommendation of the ABA Section of International Law and Practice to the ABA House of Delegates Concerning a Model Rule for the Licensing of Legal Consultants, dated January 1993

B Exchange of Correspondence between ABA President Talbot D'Alembert and U.S. Government Agencies Concerning Legal Services in the Uruguay Round

C Letter from Japanese Ministry of Justice and Legal Consultant Questionnaire

Exhibit A

AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW AND PRACTICE

Draft Report and Recommendation Concerning a

MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS

January 1993

Caution: **This draft Report and Recommendation is a proposal only and does not represent the current policy of the American Bar Association.**

AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW AND PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association adopts the "Model Rule for the Licensing of Legal Consultants" consisting of nine sections as set forth below;

BE IT FURTHER RESOLVED, that the American Bar Association recommends that each State not presently having a rule for the licensing of legal consultants adopt such a rule conforming to the Model Rule and that those States and the District of Columbia having such rules conform them to the Model Rule; and

BE IT FURTHER RESOLVED, that the text of the Model Rule shall read as follows:

MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS

§ 1. General Regulation as to Licensing

In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:

(a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or

counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;

(c) possesses the good moral character and general fitness requisite for a member of the bar of this State;

(d) is at least twenty-six years of age; and

(e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

§ 2. Proof Required

An applicant under this Rule shall file with the clerk of the [name of court]:

(a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;

(b) a letter of recommendation from one of the members of the executive body of such authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and

(d) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the [name of court] may require.

§ 3. Reciprocal Treatment of Members of the Bar of this State

In considering whether to license an applicant to practice as a legal consultant, the [name of court] may in its discretion take into account whether a member of the bar of this State would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the bar who is seeking or has sought to establish an office in that country may request the court to consider the matter, or the [name of court] may do so *sua sponte*.

§ 4. Scope of Practice

A person licensed to practice as a legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

(a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to [citation of applicable rule]);

(b) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State;

(c) be, or in any way hold himself or herself out as, a member of the bar of this State; or

(d) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:

(i) his or her own name;

(ii) the name of the law firm with which he or she is affiliated;

(iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

(iv) the title "legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]".

§ 5. Rights and Obligations

Subject to the limitations set forth in Section 4 of this Rule, a person licensed as a legal consultant under this Rule shall be considered a lawyer affiliated with the bar of this State and shall be entitled and subject to:

(a) the rights and obligations set forth in the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] or arising from the other conditions and requirements that apply to a member of the bar of this State under the [rules of court governing members of the bar]; and

(b) the rights and obligations of a member of the bar of this State with respect to:

(i) affiliation in the same law firm with one or more members of the bar of this State, including by:

(A) employing one or more members of the bar of this State;

(B) being employed by one or more members of the bar of this State or by any partnership [or professional corporation] which includes members of the bar of this State or which maintains an office in this State; and

(C) being a partner in any partnership [or shareholder in any professional corporation] which includes members of the bar of this State or which maintains an office in this State; and

(ii) attorney-client privilege, work-product privilege and similar professional privileges.

§ 6. Disciplinary Provisions

A person licensed to practice as a legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State and to this end:

(a) Every person licensed to practice as a legal consultant under these Rules:

(i) shall be subject to control by the [name of court] and to censure, suspension, removal or revocation of his or her license to practice by the [name of court] and shall otherwise be governed by [citation of applicable statutory provisions]; and

(ii) shall execute and file with the [name of court], in such form and manner as such court may prescribe:

(A) his or her commitment to observe the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] and the [rules of court governing members of the bar] to the extent applicable to the legal services authorized under Section 4 of this Rule;

(B) appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;

(C) a written undertaking to notify the court of any change in such person's good standing as a member of the foreign legal profession referred to in Section 1(a) of this Rule and of any final action of the professional body or public authority referred to in Section 2(a) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person; and

(D) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the clerk of such court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such clerk by means of a duly acknowledged supplemental instrument in writing.

(b) Service of process on such clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of $10. Service of process shall be complete when such clerk has been so served. Such clerk shall promptly send one of such copies to the legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such legal consultant at the address specified by him or her as aforesaid.

§ 7. Application and Renewal Fees

An applicant for a license as a legal consultant under this Rule shall pay an application fee which shall be equal to the fee required to be paid by a person applying for admission as a member of the bar of this State under [rules of court governing admission without examination of persons admitted to practice in other States]. A person licensed as a legal consultant shall pay renewal fees which shall be equal to the fees required to be paid by a member of the bar of this State for renewal of his or her license to engage in the practice of law in this State.

§ 8. Revocation of License

In the event that the [name of court] determines that a person licensed as a legal consultant under this Rule no longer meets any of the requirements for licensure

set forth in Section 1(a) or Section 1(c) of this Rule, it shall revoke the license granted to such person hereunder.

§ 9. Application for Waiver of Provisions

The [name of court], upon application, may in its discretion vary the application of or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

REPORT

I. Executive Summary

The Recommendation accompanying this Report, if adopted by the House of Delegates, will make it the policy of the American Bar Association to encourage the cognizant administrative, legislative and/or judicial authorities in each state to adopt rules for the licensing as legal consultants of lawyers who are admitted to practice in foreign countries, provided that they meet certain other criteria for such licensing, and to recommend to those state authorities, as a basis for such rules, the Model Rule for the Licensing of Legal Consultants set forth in the accompanying Recommendation.

The first American rule for the licensing of foreign lawyers as legal consultants was adopted in New York in 1974. Its principal purpose was to preserve and develop the position of New York as an international legal center. That experiment proved so successful that thirteen other states and the District of Columbia have now adopted such rules, and a number of other states are known actively to be considering them. The primary reason for the broadened interest in having such rules is the felt need for local access to foreign lawyers, whether practicing independently, in branches of their own firms or in association with indigenous firms, as a means of delivering competent legal advice and services to clients who require assistance in dealing with the burgeoning volume of international transactions, investments and disputes. A secondary reason is the desire of lawyers admitted in those jurisdictions to be in a position to benefit from similar regimes in foreign countries, eligibility for which is in some cases conditioned on reciprocal treatment of foreign lawyers in the jurisdiction in which the lawyer is admitted to practice.

While the adoption of legal consultant rules by a large number of jurisdictions is helpful, and indeed vital, to the creation of an open system of international legal practice, not all of the rules adopted in other jurisdictions have adhered to the liberal pattern established in New York. Some of the rules contain provisions which tend either to create unwarranted obstacles to the obtaining of a license as a legal consultant or to restrict the manner in which the legal consultant is permitted to carry on his or her practice as such. These restrictive provisions are readily seized upon by protectionist elements in foreign countries as a pretext for the imposition of similar restrictions on American lawyers, including those admitted in jurisdictions having liberal rules. There is thus a need both for coherence and for uniformity in rules for the licensing of legal consultants.

This need takes on particular urgency in light of the rapid evolution of the rules governing international practice elsewhere in the world. The legal professions and governments of many countries have awakened to the importance of legal services in transnational commerce and investment. As a result, the provision of transborder legal services has been the subject of extensive discussion in various *fora*, notably within the institutions of the European Community, in the Uruguay

Round negotiations within the GATT, and in the negotiations among Canada, Mexico and the United States leading to the recently-signed North American Free Trade Agreement. Although the Association has from time to time been asked for, and has provided, its views on issues arising in these various discussions, the House of Delegates has not until now addressed them in a systematic way. The Recommendation accompanying this Report would be the first step in that process and would provide a firmer footing for the Association in its efforts to preserve and enhance the right of American lawyers to practice abroad.

It should be noted that, while adoption of this Recommendation would mark the first occasion on which the Association has formulated a comprehensive policy on the subject of legal consultant rules, it has previously spoken on the subject. In April, 1985 the Board of Governors adopted a resolution endorsing the legal consultant rule that was then under consideration in the District of Columbia and that was adopted in March, 1986 by the District of Columbia Court of Appeals. Shortly thereafter, in August, 1986, the House of Delegates adopted a resolution urging the Japanese government to eliminate certain restrictive conditions affecting the registration and activities of foreign lawyers, including American lawyers, under the then newly-adopted Japanese law concerning the practice of law by foreign lawyers in Japan. Among the provisions in that law to which the Association did *not* object was a reciprocity provision, under which it is a necessary condition to the licensing of a foreign lawyer to practice as a legal consultant in Japan that the jurisdiction in which the lawyer is admitted must have in force a legal consultant rule pursuant to which Japanese lawyers are accorded substantially equivalent rights in that jurisdiction. Thus, by necessary implication, the Association has recognized both that the rights of American lawyers to carry on international practice in foreign countries are important to the vitality and future of our profession as a whole and that such rights are frequently granted only on condition of reciprocity.

The Model Rule is intended as a step toward the achievement of uniform standards for the licensing of legal consultants in a manner which affords to members of recognized legal professions of foreign countries a reasonable and practical opportunity to carry on an international legal practice in a United States jurisdiction while at the same time ensuring that the public interest is fully protected. Measures to the latter end include regulation of the basis on which legal consultants may give advice involving the law of the licensing jurisdiction, as well as subjecting legal consultants to the applicable code of professional conduct and disciplinary authorities of that jurisdiction. Based on experience to date, it is expected that only a limited number of qualified foreign lawyers will be licensed under legal consultant rules (referred to in the remainder of this Report simply as "Rules") in this country but that their adoption will be extremely helpful in strengthening the ability of the United States legal profession to participate in the rapidly-expanding transnational legal practice. There is no known opposition to the proposal.

II. The Need for Legal Consultant Rules

The last several years have witnessed an explosive growth in the volume of international economic activity, and more particularly in the transnational flow of goods, services, labor and investment. It is a familiar cliché that the United States now finds itself in a relationship of global interdependence with the rest of the world. This has, not surprisingly, been reflected in a corresponding increase in the volume of transnational legal issues and problems, resulting in a need for more effective means of delivering legal services across national boundaries and for better means of integrating lawyers trained in different legal systems into the same law firms.

Beginning in the early part of this century, a small number of American law firms, most of them based in New York, began to establish offices abroad, principally but not exclusively in London and Paris, with a view to providing better service to their clients carrying on business outside the United States. In so doing, they benefitted from relatively open systems of professional regulation which did not confer upon members of the bar, to use American terminology, a monopoly on the giving of legal advice. During the three decades following the end of the Second World War, the number of American lawyers and law firms carrying on practice in foreign countries increased at a steady pace.

In the early 1970's, foreign lawyers began to call attention to the fact that, while American lawyers enjoyed broad rights of practice in their respective countries, the reverse was not true. Even after the decision of the United States Supreme Court in *In re Griffiths*,1/ the only way in which a foreign lawyer could engage in the practice of law in the United States, even if limited to the giving of advice on the law of his or her own country, was, with certain limited exceptions, to attend an accredited American law school, sit for the bar examination and become a full member of the bar.2/

As a result of these developments, and principally with a view to ensuring New York's position as an international legal center, in 1974 the New York legislature authorized and the New York Court of Appeals adopted a rule proposed by the

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1/ 413 U.S. 717 (1973). In *Griffiths*, the Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a Connecticut court rule under which only citizens of the United States could be admitted to the practice of law in Connecticut.

2/ The New York rules for admission upon examination permit persons who have satisfied the educational requirements for admission to the practice of law in a foreign country to qualify to take the New York State bar examination, provided that the foreign country is one whose jurisprudence is based upon the principles of the English Common Law or that the applicant has completed a program consisting of 24 semester hours of credit at an approved law school in the United States. New York Rules of Court, Rules of the Court of Appeals, § 520.5.

New York State Bar Association, the New York County Lawyers' Association and the Association of the Bar of the City of New York under which, for the first time, members of foreign legal professions could be licensed without examination to engage in the practice of law in New York, subject to certain restrictions.3/ In concept, the New York Rule is very similar to the rule for admission on motion of lawyers admitted in other jurisdictions of the United States. Thus, it requires that the applicant have completed a certain number of years practicing the law of the jurisdiction in which he or she is admitted to practice and meet the criteria of good moral character and general fitness required of a member of the bar of New York. Once licensed, legal consultants are fully subject to professional discipline by the cognizant New York authorities, including censure, suspension, removal or revocation of license. The principal differences between a legal consultant in New York and a lawyer admitted to the New York bar are that the legal consultant is subject to certain restrictions on the scope of his or her practice of law4/ and may not hold himself or herself out as a member of the bar of New York or use any title other than those of "legal consultant" and his or her authorized title in the country of admission.5/ Where the legal consultant is affiliated with a foreign law firm, he or she may also use the name of the firm.

It is fair to say that the system established under the New York Rule has operated successfully and without significant problems since its inception over 18 years ago. There are now some 170 foreign lawyers registered as legal consultants in the State of New York, almost all of them concentrated in New York City and many of them representing large foreign firms. Many New York practitioners have found that the possibility of local access to foreign lawyers, either as independent counsel or as associates or partners in their own firms, has enhanced their ability to render

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3/ New York Rules of Court, Rules of the Court of Appeals, Pt. 521 [hereinafter cited as the "NEW YORK RULE"].

4/ Under the New York Rule, a legal consultant may not: (a) appear for a person other than himself or herself as an attorney in any court, or before any magistrate or other judicial officer, other than upon admission *pro hac vice*, or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any such court or before any such judicial officer; (b) prepare any deed, mortgage, assignment, discharge, lease or other instrument affecting title to real estate within the United States; (c) prepare (i) any will or trust instrument effecting the disposition on death of any property located in the United States and owned by a resident of the United States or (ii) any instrument relating to the administration of a decedent's estate in the United States; (d) prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States or the custody or care of the children of such a resident; (e) render professional legal advice on the law of the State of New York, or on United States federal law, except on the basis of advice from a person duly qualified and entitled (other than by reason of having been licensed under the Rule) to render professional legal advice in the State of New York. NEW YORK RULE, § 521.3(a)-(e).

5/ NEW YORK RULE, § 521.3(f), (g).

effective legal services to their clients in connection with the burgeoning volume of international transactions and disputes and has resulted in a strengthening of New York as a center of international legal practice, to the benefit of all concerned.

Throughout the late 1970's and the 1980's, as the need for access to foreign legal expertise increased and became more widespread geographically, other jurisdictions began to consider and adopt Rules. The first of these was the District of Columbia which, as noted above, adopted in 1986 a Rule that was patterned closely on the New York Rule.6/ The District was followed in relatively short order by California,7/ Hawaii,8/ Michigan9/ and Texas,10/ some of which states appear to have been moved to action at least partially by the reciprocity requirement imposed under a 1986 Japanese law which, for the first time, permitted practice by foreign legal consultants in Japan.11/ Rules have since been adopted in Alaska,12/ Connecticut,13/

6/ District of Columbia Rules of Court, Rules of the Court of Appeals, R. 46 (1986) [hereinafter cited as the "DISTRICT OF COLUMBIA RULE"].

7/ California Rules of Court, R. 988 (1987) [hereinafter cited as the "CALIFORNIA RULE"].

8/ Rules of the Supreme Court of the State of Hawaii, R. 14 (1986) [hereinafter cited as the "HAWAII RULE"].

9/ Rules of the Michigan Board of Bar Examiners, R. 5(E) (1986) [hereinafter cited as the "MICHIGAN RULE"].

10/ Rules Governing Admission to the Bar of Texas, Rule XVI (1988) [hereinafter cited as the "TEXAS RULE"].

11/ *Gaikoku Bengoshi niyoru Horitsujimu no Toriatsukai ni kansuru Tokubetsusochi Ho* (Law Providing Special Measures for the Handling of Legal Business by Foreign Lawyers), Law No. 66 of 1986. The Law requires only that Japanese lawyers, or *bengoshi*, be accorded "substantially similar treatment in the foreign country" in which the applicant is admitted to practice. *Id.*, § 10.2. This was, however, interpreted administratively to mean, in the case of a lawyer admitted to practice in the United States, not only that the jurisdiction of his or her admission must accord such reciprocity but also that reciprocity must be accorded by the five United States jurisdictions that the Japanese purportedly viewed as being of greatest importance to them, namely, New York, the District of Columbia, Michigan, California and Hawaii.

12/ Rules of the Alaska Bar Association, R. 44.1 (1989) [hereinafter cited as the "ALASKA RULE"].

13/ Connecticut Practice Book 1978, Rules for the Superior Court §§ 24B-24E (1991) [hereinafter cited as the "CONNECTICUT RULE"].

Florida,14/ Georgia,15/ Illinois,16/ New Jersey,17/ Ohio,18/ Oregon,19/ and Washington,20/ bringing to fifteen the total number of United States jurisdictions with Rules in force.

With the proliferation of Rules has come an increasing variety of conditions and restrictions that have departed from the liberal spirit of the original New York Rule. Some of these restrictions are intended to deal with practical problems that the drafters of the Rules appear to have anticipated, or at least feared, in their administration, notwithstanding the absence of any evidence of such difficulties in New York or in any of the other states having Rules, while other restrictions appear to be essentially protectionist in nature. Whatever their underlying motivations, these restrictions have tended to undermine the effectiveness of some of the Rules in achieving their original objective, which was to afford to foreign lawyers a reasonable and practical opportunity to carry on an international legal practice in the United States and, in doing so, to grant to them the functional equivalent of the rights sought by United States lawyers in other countries. Regrettably, unnecessary restrictions in Rules adopted by some United States jurisdictions have been seized upon as justification for the inclusion of similar restrictions in foreign laws and rules. This "mirror image" phenomenon has become increasingly evident as the importance of legal services to United States foreign trade has come to be understood and as the United States government has joined the United States legal profession itself in pushing for access to additional geographic markets.

Of equal importance is the fact that many of the restrictions that have been included in Rules adopted by some states, while generally well-intentioned, have the unintended effect of interfering with the development of smooth and effective professional interaction between legal consultants and members of the bar in the

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14/ Rules of the Florida Supreme Court Relating to Admission to the Bar, Ch. 16 (1992) [hereinafter cited as the "FLORIDA RULE"].

15/ Supreme Court of Georgia, Rules Governing Admission to the Practice of Law, Pt. D (1992) [hereinafter cited as the "GEORGIA RULE"].

16/ Illinois Supreme Court Rules, Rules on Admission and Discipline of Attorneys, R. 712 (1990) [hereinafter cited as the "ILLINOIS RULE"].

17/ New Jersey Rules of Court, Rules of General Application, R. 1:21-9 (1989) [hereinafter cited as the "NEW JERSEY RULE"].

18/ Supreme Court Rules for the Government of the Bar of Ohio, R. XI (1989) [hereinafter cited as the "OHIO RULE"].

19/ Oregon State Bar Rules of Admission, R. 10.05 (1990) [hereinafter cited as the "OREGON RULE"].

20/ Washington Rules of Court, Admission to Practice Rules, R. 14 (1990) [hereinafter cited as the "WASHINGTON RULE"].

provision of services to clients. At a time when the legal profession is under the most extreme pressure to achieve efficiencies in the delivery of services, artificial and unnecessary restrictions can only impair the ability of American lawyers to remain responsive to the requirements of the international economy.

III. The Context: Ongoing Developments and Discussions Relating to Transborder Legal Services

The enactment of the 1986 Japanese law permitting the licensing of legal consultants resulted in large part from overtures by the United States government in the context of United States-Japan trade negotiations.21/ The United States government made legal services a priority in those negotiations, not because the volume of trade involved was perceived as financially important in itself, but because the availability in Japan of United States lawyers who are also knowledgeable about the law and business culture of Japan was considered critical in enabling United States providers of *other* kinds of services, particularly in such sectors as financial services which are especially law-intensive, to enter the Japanese market.22/

The Japanese law came into effect in 1987. Since then, neither the continued negotiations between the governments nor the occasional inter-bar discussions that have taken place have resulted in the removal of restrictions put into the law, evidently at the urging of the Japanese Federation of Bar Associations, *Nichibenren*, that are manifestly unnecessary and irrelevant to the legitimate purposes of professional regulation.23/ In defense of the restrictions in the Japanese law, Japanese bar representatives and government negotiators have been assiduous in identifying all of the most restrictive features of the legal consultant rules adopted in the various states of the United States, relying on them as justification for what amounts to a "lowest common denominator" approach to the regulation of legal consultants.

American lawyers have more recently encountered similar problems in France, where laws that once permitted American and other foreign lawyers to qualify as legal consultants with relative ease have now been completely changed to

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21/ *See* R. Goebel, *Professional Qualifications and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TULANE L. REV. 443, 483 (1989).

22/ For a discussion of this role of the international lawyer, *see id.* at 444-54; *and see* Warren, Monahan & Duhot, *Role of the Lawyer in International Business Transactions*, 58 A.B.A.J. 181 (1972).

23/ In our view, those purposes are twofold: first, the protection of the public, as consumers of legal services, against the risks of unknowingly relying upon legal advice rendered by those who are not competent to render such advice and, second, the preservation of the integrity of, and public respect for, the legal profession as a whole.

require foreign lawyers who wish to establish in France to be admitted to full membership in the French bar, subject to examination and other requirements to be established on the basis of reciprocity;24/ in Germany, where a new law permits foreign lawyers to be licensed as foreign legal consultants provided that their home jurisdictions accord reciprocal treatment to German lawyers;25/ and in the negotiation of the North American Free Trade Agreement, where the Mexican government insisted that United States lawyers establishing in Mexico be subject to the same conditions and restrictions as would apply to Mexican lawyers qualifying as legal consultants under the rule of the United States jurisdiction in which such lawyers are admitted to practice.26/ In each case, elements of the indigenous legal profession that fear the competition of American firms have used restrictive provisions in the Rules of some American states as a justification for similar restrictions upon United States lawyers and law firms wishing to establish a practice in their countries.

The inherent difficulty in applying absolute reciprocity requirements to dissimilar situations is aggravated when the increasing diversity of legal consultant rules is combined with the fact that large law firms increasingly include lawyers admitted to practice in several different United States jurisdictions. This raises the possibility of lawyers in the same overseas office of an American firm having to operate under different rules or, what is worse, in some of the firm's lawyers being disqualified altogether from working in such an office because their jurisdictions of admission have no legal consultant rules or have rules that are, at least arguably, less favorable than those of the country in which the office is located.

The problems inherent in the lack of uniformity of legal consultant rules in the United States have presented themselves in bold relief in the context of the ongoing Uruguay Round of trade negotiations under the *aegis* of the General Agreement on Tariffs and Trade (the "GATT"). In those negotiations, the United States government has attempted, among other things, to broaden the coverage of the GATT to include services as well as goods. Among the services our government has sought to bring into the GATT are legal services. The GATT negotiating process involves a procedure of "offer and request" whereby the governments offer to "bind" or freeze tariffs or restrictions on goods and services at their present levels and request "bindings" or other measures on the part of other countries. In order to comply with this procedure with respect to legal services, the United States government has had to identify the restrictions imposed by the legal consultant rules of the various states and offer to "bind" them at their present levels, state by state. This, of

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24/ *See* R. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L. J. 556, 563 (1992).

25/ *Id.* at 562-63.

26/ North American Free Trade Agreement, Final Draft, Annex VI, Schedule of Mexico, Description ¶ 1(a).

course, has simply highlighted the patchwork and, in many cases, restrictive nature of the legal consultant rules in the United States and stimulated demands, primarily from the Commission of the European Community (the "EC"), for geographically broader, as well as less restrictive, rights of access to legal markets in the United States as the tradeoff for more effective access by American lawyers to those of the key countries in the EC.

The final contextual element for consideration of this issue is the on-going evolution of the rules relating to the integration of the legal profession within the EC itself. The Treaty of Rome, which is the fundamental charter of the EC, contains provisions guaranteeing the free flow of goods, services, and persons within the common market.27/ Pursuant to those provisions, the EC Commission promulgated in 1977 a directive28/ under which a lawyer admitted to practice in any EC member state must be given broad rights of practice in any other member state, including the right to appear before administrative and judicial authorities provided only that he or she does so "in conjunction" with a lawyer admitted in the second member state. As it has been construed by the European Court of Justice,29/ this directive accords

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27/ Of particular relevance in the present context are Article 52 of the Treaty, which provides for the abolition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, and Article 59, which provides for the progressive abolition of restrictions on the provision of services by nationals of Member States who are established in a Member State other than that of the person for whom the services are provided. 2 CCH COM. MKT. REP. ¶¶ 1302, 1502.

28/ Directive to Facilitate the Exercise by Lawyers of Freedom to Provide Services, Council Directive 77/249, 20 O. J. L78/17 (1977) [hereinafter referred to as the "Legal Services Directive"].

29/ In *Commission v. Federal Republic of Germany*, Case No. 427/85, [1989] 2 CEC 522, the EC Commission challenged certain features of the German legislation implementing the Legal Services Directive. The Court upheld the Commission's contention that the German legislation violated the provisions of Articles 59 and 60 of the Treaty of Rome in three respects:

First, the legislation required that a lawyer of another Member State appearing as a representative or counsel in a German proceeding always act in conjunction with a German lawyer. Although this was generally consistent with the language of Article 5 of the Legal Services Directive, the Court held it exceeded the intent of the Directive insofar as it imposed the requirement in cases where, under German law, representation by a non-lawyer was not prohibited.

Second, the Court found that the legislation, in requiring (i) that the German lawyer also be given full powers as representative or counsel of the client, (ii) that the non-German lawyer not participate in hearings unless accompanied by the German lawyer, (iii) that proof of involvement of the German lawyer be given in all written submissions, and (iv) that all correspondence with a detained criminal defendant take place only through the German lawyer, also exceeded what was permissible under Article 5 of the Legal Services Directive.

rights that go well beyond that of a United States lawyer admitted in one jurisdiction to be admitted *pro hac vice* in another.30/

For the last 14 years an organization of the European legal professions known as the Council of the Bars and Law Societies of the European Community (and more generally referred to as the "CCBE," an acronym for the French version of the name by which it was originally known) has been working on, among other things, a draft of a new "Directive on the Right of Establishment for Lawyers" to be issued by the EC Commission. At its semi-annual meeting in late October, 1992, the CCBE finally adopted the draft directive, which has now been forwarded to the Commission for its review and action. In light of the extended period of gestation of the CCBE draft and the fact that the CCBE has consulted frequently with the Commission in the course of its development, it is not expected to take the Commission long to act on the CCBE proposal. Once adopted, the directive would require the twelve member states of the European Community, as well as those new members whose admission is expected within the next few years, to accord to members of the legal professions of other member states an automatic right to establish in their territories and to carry on practice as "registered lawyers," *i.e.*, as foreign lawyers entitled to carry on the practice of law subject only to restrictions similar to, but less stringent than, those proposed in the recommended Model Rule.

The promulgation by the EC Commission of a directive based on the CCBE draft will confront the United States legal profession very squarely with a potentially

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Third, the Court agreed with the Commission that, by subjecting non-German lawyers to the requirement that all lawyers appearing before certain courts be admitted to practice before those courts, thus extending to lawyers from other Member States the geographical restrictions applicable to German lawyers, the German legislation also violated the requirements of Articles 59 and 60 of the Treaty of Rome. The Court drew a distinction between the regulation of German lawyers, based on the place where they maintained chambers in Germany, and the regulation of non-German lawyers, temporarily providing services in Germany, who by definition had no establishment in that country.

See also Commission v. France, Case C-294/89 (Eur. Ct. J. July 10, 1991) (not yet reported).

30/ There is another existing Directive pertaining to legal services which should be mentioned for the sake of completeness. The Directive on the Mutual Recognition of Diplomas, Council Directive No. 89/48, O. J. L19/16 (1989), establishes procedures whereby lawyers who have completed degree and other requirements for admission to practice in one member state can be admitted to full membership in the legal profession of another member state upon satisfaction of a requirement of "adaptation" which may be met either through an abbreviated period of practical training or through the satisfactory completion of a limited examination designed to cover those areas in which the laws of the two countries differ so materially that the lawyer's original training can be said to be "deficient" in those areas. While the precise contours of this requirement will be developed only through years of practice and, possibly, court decisions, it is clearly the intent that lawyers be enabled to move with relative ease throughout the EC, and be readily admitted to full membership in the legal professions of other member states, notwithstanding the substantial differences in legal systems.

serious problem, because lawyers admitted to practice in countries other than EC member states will not automatically enjoy the benefit of the liberal rules of the directive. What this means is that, unless we find some way of achieving an agreement with the Europeans which accords to United States lawyers substantially equivalent treatment, American lawyers and law firms are at risk of being put in a position of significant competitive disadvantage *vis-á-vis* British and other European firms, both within Europe and globally. There have been indications from the CCBE and from the Commission itself that there is indeed room for an agreement. However, they have made it clear that this will necessarily entail some liberalization on the American side, particularly the elimination of the more restrictive provisions in the legal consultant rules of some states. The Association's proposed endorsement of the Model Rule, and active efforts on its part to encourage adoption of that rule by state regulatory authorities, would respond to the legitimate concerns of the European legal professions and strengthen our ability to negotiate favorable treatment in the EC member states and elsewhere.

IV. The Model Rule

The proposed Model Rule follows the New York Rule very closely. The following summary identifies those few areas in which it departs from the New York Rule, as well as from certain of the provisions contained in Rules adopted in other states, and sets forth the policy reasons for the approaches taken.

A. General Regulation as to Licensing

Section 1 of the Model Rule makes it discretionary with the court responsible for licensing whether or not to license an applicant to practice as a legal consultant, without examination. This does not mean that the discretion may be exercised in arbitrarily -- like all other judicial discretion, it must be exercised soundly -- but merely reflects the fact that the criteria for licensing, and the evidence of compliance therewith, are of such a nature as inevitably to call for the exercise of the court's judgment based on a fair appreciation of all the circumstances. Given the wide variety of individual cases that may arise, it is considered essential that legal consultant rules be cast in broad terms allowing wide latitude to the licensing authority in the exercise of such discretion, rather than attempting to provide in detail for every circumstance that may conceivably arise.31/

31/ This discretionary approach is followed in all of the existing Rules; *see* ALASKA RULE, R. 44.1(b)(1)(A); CALIFORNIA RULE, R. 988(a)(1); CONNECTICUT RULE, § 24B(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(1); FLORIDA RULE, R. 16-1.2(a), (b); GEORGIA RULE, § 3(a); HAWAII RULE, R. 14.1(a)(1); ILLINOIS RULE, R. 712(a)(1); MICHIGAN RULE, R. 5(E)(a)(1); NEW JERSEY RULE, R. 1:21-9(b)(1); NEW YORK RULE, § 521.1(a); OHIO RULE, § 1(A); OREGON RULE, R. 10.05(2)(a)(i); TEXAS RULE, R. XVI(a)(1); WASHINGTON RULE, R. 14(b)(1)(i).

1. Foreign Admission

Subsection 1(a) requires that an applicant for a license to practice as a legal consultant be a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority. This is a somewhat more elaborate requirement than that utilized in the New York Rule and most other existing Rules, which generally require that the applicant have been "admitted to practice and [be] in good standing as an attorney or counselor at law or the equivalent in a foreign country."[32/] The reason for the Model Rule's elaboration upon this usage is to make it clear that there are certain aspects of the applicant's legal profession that are essential prerequisites to his or her licensing as a legal consultant, namely, that it be recognized as a legal profession and that it be subject to effective professional regulation and discipline.[33/] The licensing of foreign lawyers as legal consultants presupposes, not only that they have the necessary knowledge, but also that they are generally subject to the same kinds of ethical and legal requirements and professional discipline as members of the legal profession in the United States.

2. Experience Requirement

Subsection 1(b) sets forth a minimum experience requirement under which the applicant for licensing under the Model Rule must have been qualified as a member of a recognized legal profession of a foreign country for at least five of the seven years immediately preceding his or her application for such licensing. This requirement is substantially the same as the experience requirement set forth in the New York Rule, where it was used in order to conform the legal consultant rule to the parallel rule in New York for the admission on motion of lawyers from other United States jurisdictions[34/] and even from common-law jurisdictions outside the

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32/ *See* NEW YORK RULE, § 521.1(a); *see also* ALASKA RULE, R. 44.1(b)(1)(A); CALIFORNIA RULE, R. 988(a)(1); CONNECTICUT RULE, § 24B(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(1); FLORIDA RULE, R. 16-1.2(a),(b); GEORGIA RULE, § 3(a); HAWAII RULE, R. 14.1(a)(1); ILLINOIS RULE, R. 712(a)(1); MICHIGAN RULE, R. 5(E)(a)(1); NEW JERSEY RULE, R. 1:21-9(b)(1); OHIO RULE, § 1(A); OREGON RULE, R. 10.05(2)(a)(i); TEXAS RULE, R. XVI(a)(1); WASHINGTON RULE, R. 14(b)(1)(i).

33/ While the Rules of other jurisdictions assume that the legal profession to which the applicant is admitted has a system of professional discipline comparable to those in the United States, the Florida Rule is unique in requiring that an applicant for licensing as a legal consultant be "admitted to practice in a foreign country whose professional disciplinary system for attorneys is generally consistent with that of the Florida Bar." FLORIDA RULE, R. 16-1.2(c).

34/ *See* New York Rules of Court, Rules of the Court of Appeals § 520.9(a)(1).

United States.35/ The experience requirement imposed upon sister-state and foreign lawyers applying for admission to the bar on motion is a substitute for the evidence of legal expertise otherwise afforded by the bar examination. As incorporated in the Model Rule, it is not intended to discriminate against younger foreign lawyers who, having achieved the level of experience required for admission to their own legal professions, are by definition fully entitled to advise on the law of the jurisdiction in which they are qualified. Rather, it reflects the relatively broader scope of practice that would be permitted under Section 4 of the Model Rule and the particular importance of experience as an element of the international lawyer's training.

The Rules of some jurisdictions require not only that the applicant have practiced the *law* of his or her jurisdiction of admission but also that he or she have practiced *within* that jurisdiction for the requisite period.36/ Here again, the drafters of the Rules have drawn on the rules for admission on motion of lawyers admitted in other United States jurisdictions.37/ In this case, however, the appearance of analogy is misleading, because in an international commercial practice it is entirely conceivable that, for example, a New York lawyer might practice for years in one or more foreign offices of a New York firm without ever practicing in New York or, for that matter, anywhere else in the United States. American law firms have objected to geographic restrictions on experience qualifications imposed by certain foreign rules on precisely these grounds. At the same time, notwithstanding the fact that a modern international practice requires a broad knowledge of, and involves the rendering of advice concerning or affected by, the laws of many countries as well as international law, it is recognized that an experience requirement of the kind embodied in the New York Rule, if it is to be meaningful, should ensure that the applicant has in fact devoted a substantial part of his or her time to the rendering of advice regarding the law of the jurisdiction in which he or she is admitted to practice. Accordingly, Section 1(b) of the Model Rule requires that the applicant have been engaged in a "practice of law substantially involving or relating to the rendering of

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35/ *See ibid.*, which also provides for the admission on motion, as full members of the bar of New York, of lawyers who are admitted to practice in foreign jurisdictions whose jurisprudence is based on the English Common Law.

36/ *See* ALASKA RULE, R. 44.1(b)(1); CONNECTICUT RULE, § 24B(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(1); HAWAII RULE, R. 14.1(a)(2); TEXAS RULE, R. XVI(a)(1); MICHIGAN RULE, R. 5(E)(a)(1); NEW JERSEY RULE, R. 1:21-9(b)(1); OREGON RULE, R. 10.05(2)(a)(ii); *cf.* WASHINGTON RULE, R. 14(b)(1)(i) (applicant must be admitted to practice in a foreign jurisdiction and have five years' practice in a foreign jurisdiction).

37/ *See, e.g.*, New York Rules of Court, Rules of the Court of Appeals § 520.9(a)(2)(i).

advice or the provision of legal services concerning the law of the . . . foreign country [in which the applicant is qualified as a member of a legal profession]."38/

3. Character and Fitness Requirement

Subsection 1(c) of the Model Rule incorporates *verbatim* the requirement of the New York Rule, which is mirrored in nearly all of the other Rules, that the applicant possess the good moral character and general fitness requisite of a member of the bar of the State in which the application is made.39/ This provision is similar to provisions relating to the admission of lawyers from other United States jurisdictions40/ and in effect incorporates by reference the applicable provisions of the laws of each State relating to the character and fitness of members of the bar. It is not believed that there has been any problem in the application of this provision to foreign lawyers applying for licensing as legal consultants or, conversely, in the application of corresponding provisions to United States lawyers seeking to practice abroad.

4. Minimum Age Requirement

The New York Rule, as well as the Rules of several other jurisdictions, establishes a minimum age for legal consultants of 26 years.41/ This minimum, which

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38/ The New York Rule, which has been followed in this respect by a number of other jurisdictions, requires that the applicant, while admitted to the practice of law in a foreign country, have "practiced *the law of* such country." *See* NEW YORK RULE, § 521.1(a); *see also* CALIFORNIA RULE, R. 988(b)(1); FLORIDA RULE, R. 16-1.2(b); GEORGIA RULE, § 3(b); ILLINOIS RULE, R. 712(a)(1). The language of the Model Rule is believed to incorporate the substance and intent of the New York, California, Florida, Georgia and Illinois Rules in a formulation that will be more readily understood abroad.

39/ NEW YORK RULE, § 521.1(b); *see also* CALIFORNIA RULE, R. 988(b)(2); CONNECTICUT RULE, §24B(b); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(2); GEORGIA RULE, § 3(b); HAWAII RULE, R. 14.1(b); ILLINOIS RULE, R. 712(a)(2); MICHIGAN RULE, R. 5(E)(a)(2); NEW JERSEY RULE, R. 1:21-9(b)(2); OHIO RULE, § 1(B); OREGON RULE, R. 10.05(2)(b); TEXAS RULE, R. XVI(a)(2); WASHINGTON RULE, R. 14(b)(1)(ii); *cf.* ALASKA RULE, R. 44.1(b)(2).

40/ For example, § 520.10 (a) of the Rules of the New York Court of Appeals provides in pertinent part as follows:

> Every applicant for admission to practice must file with a committee on character and fitness appointed by the Appellate Division of the Supreme Court affidavits of reputable persons that applicant possesses the good moral character and general fitness requisite for an attorney- and counselor-at-law as required by section 90 of the Judiciary Law. ...

41/ *See* NEW YORK RULE, § 521.1(d); *and see* CONNECTICUT RULE, § 24B(c); DISTRICT OF COLUMBIA RULE; R. 46 (4)(A)(4); FLORIDA RULE, R. 16-1.2(h); HAWAII RULE, R. 14.1(d); MICHIGAN RULE, R. 5(E)(a)(2); TEXAS RULE, R. XVI(a)(4); *cf.* OHIO RULE, § 1(E) (21 years); OREGON RULE, R. 10.05(2)(d) (18 years).

has been carried over from the rules governing admission on motion from other United States jurisdictions, is related to the five-year experience requirement, which was also carried over from those rules. Subsection 1(d) of the Model Rule adopts the 26-year rule, but with the intent that it be optional for each jurisdiction to determine whether to include a minimum age requirement of any sort.42/

5. **Residence Requirement**

The New York Rule contains a requirement, echoed in the Rules of a few other jurisdictions, that the applicant must be "an actual resident of this State."43/ Several other jurisdictions, however, have adopted a less stringent requirement that the applicant have a prospective intent to practice as a legal consultant in the jurisdiction and to maintain an office within the jurisdiction for that purpose.44/ Whether or not a residency requirement in this context is constitutionally valid,45/ a requirement that a foreign lawyer actually establish residence before he or she can apply for licensing, with the attendant delay before the license can be granted and the lawyer can in fact begin to practice, imposes a hardship which is unreasonable in relation to any arguable purpose of such a requirement.46/ Many foreign law firms maintaining offices in the United States rotate their personnel frequently from their home offices, as do American firms with offices abroad, and a current-residency

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42/ The Rules adopted in Alaska, California, Illinois, Georgia, New Jersey and Washington contain no minimum-age requirements.

43/ *See* NEW YORK RULE, § 521.1(c); *see also* TEXAS RULE, R. XVI(a)(3); WASHINGTON RULE, R. 14(b)(1)(iii); *cf.* MICHIGAN RULE, R. 5(E)(a)(4) (applicant must be a resident of the United States).

44/ *See* ALASKA RULE, R. 44.1(b)(3); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(3); HAWAII RULE, R. 14.1(c); ILLINOIS RULE, R. 712(a)(4); OHIO RULE, § 1(D); NEW JERSEY RULE, R. 1:21-9(b)(3); *cf.* FLORIDA RULE, R. 16-1.2(i) (applicant must currently maintain an office in Florida); OREGON RULE, R. 10.05(2)(c) (applicant must intend to practice as a legal consultant in Oregon). The Rules of California, Connecticut, and Georgia contain no requirements as to residence or offices, either actual or intended.

45/ The United States Supreme Court has held that residency requirements for admission to the bar violate the Privileges and Immunities Clause of Art. IV, § 2 of the federal constitution, *see Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). While the direct applicability of the Privileges and Immunities Clause to foreign nationals is doubtful, the principles enunciated in *Griffiths, supra* note 1, taken together with those underpinning *Friedman* and *Piper*, might produce a similar result in relation to foreign nationals.

46/ The residency requirement, like the age and experience requirements, appears to have been borrowed from rules for admission on motion from other United States jurisdictions. However, no counterpart of the residency requirement, as set forth in the New York Rule, now remains in that State's rule regarding admission on motion. *Compare* NEW YORK RULE, § 521.1(c) *and* New York Rules of Court, Rules of the New York Court of Appeals, § 520.9(a).

requirement obviously complicates this process without any commensurate benefit. It was thus considered preferable to adopt the approach of those jurisdictions that require only that the applicant intend to practice as a legal consultant and to maintain an office within the jurisdiction for that purpose, and Subsection 1(e) of the Model Rule provides accordingly. It is believed that the cognizant court can, in the sound exercise of its discretion, require such evidence of *bona fide* intent as it may consider necessary in order to deal with any potential abuses that might arise in respect of residency or lack thereof.

B. Proof Required

Section 2 of the Model Rule specifies the documentation that an applicant will normally be required to produce as a means of satisfying the court as to the qualifications and good standing of the applicant as a member of a recognized legal profession of a foreign country and as to his or her character and fitness. These requirements do not vary materially from one Rule to the next and are substantially similar to the documentation required for admission on motion of an applicant who is a member of the bar of another United States jurisdiction.47/

C. Reciprocity

Section 3 of the Model Rule *permits* the court, in deciding whether to license an applicant as a legal consultant, to take into account *in its discretion* whether a member of the bar of the state in which the court sits would have a "reasonable and practical" opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. This provision is patterned after the District of Columbia Rule;48/ identical or highly similar provisions are also included in the Rules of six other jurisdictions.49/ The New York Rule contains no provision relating to the reciprocal treatment accorded New York lawyers in the applicant's country of admission, nor do the Rules of California, Connecticut, Florida, Georgia, New Jersey and Washington. At the other extreme, the Texas Rule until recently contained a provision50/ under which it was an absolute condition of licensure that

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47/ *See* NEW YORK RULE, § 521.2(a); *see also* ALASKA RULE, R. 44.1(c); CALIFORNIA RULE, R. 988(c); CONNECTICUT RULE, § 24C(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(B)(1); FLORIDA RULE, R. 16-1.4(a); GEORGIA RULE, § 4(a); HAWAII RULE, R. 14.2(b); ILLINOIS RULE, R. 712(c); MICHIGAN RULE, R. 5(E)(c)(1); NEW JERSEY RULE, R. 1:21-9(c)(2); OHIO RULE, § 2(A); OREGON RULE, R. 10.05(3)(b); TEXAS RULE, R. XVI(b); WASHINGTON RULE, R. 14(b)(1)(v)-(vii).

48/ DISTRICT OF COLUMBIA RULE, R. 46(c)(4)(C).

49/ ALASKA RULE, R. 44.1(c)(4); HAWAII RULE, R. 14.2(d); ILLINOIS RULE, R. 712(b); MICHIGAN RULE, R. 5(E)(b); OHIO RULE, § 4; OREGON RULE, R. 10.05(3)(d).

50/ TEXAS RULE, R. XVI(a)(7).

the foreign jurisdiction in which the applicant is admitted allow a member of the bar of the state in which the application is made to render services as a legal consultant under the same circumstances as are provided for under the applicable Rule; however, this provision was recently removed from the Rule.

The strict, or non-discretionary, form of reciprocity requirement has created significant problems in the intergovernmental negotiations relating to trade in legal services, to the point that the United States Trade Representative, Ambassador Carla Hills, wrote to the Supreme Courts of Texas and Florida in December, 1991 urging them to drop such requirements from their Rules, which they subsequently did. The approach taken by the Model Rule, which, in addition to being discretionary, utilizes the "reasonable and practical" standard rather than strict reciprocity, is less objectionable from an international trade standpoint.51/ It focuses, not on the the question whether complete symmetry exists between the two countries in question, but on whether it is reasonable and practical, from both the economic and the professional standpoints, for a lawyer or law firm to establish an office and carry on a practice as international legal advisors. A strict reciprocity standard creates unwarranted obstacles to such practice based on immaterial differences in systems of professional regulation, as well as in the detailed provisions of rules relating specifically to practice by foreign lawyers, which may result in relatively minor dissimilarities in treatment but do not substantially impair the ability of lawyers and law firms to carry on their practices in either of the jurisdictions involved. The principal objective of legal consultant rules is to foster an open system which makes the conduct of a transnational practice possible *as a reasonable and practical matter*, and a strict reciprocity requirement is neither necessary nor useful to the achievement of that end.

On the other hand, the inclusion of discretionary reciprocity provisions in Rules adopted in the District of Columbia and elsewhere reflects a recognition that such provisions may provide the most effective incentive to foreign jurisdictions to participate in such an open system. As foreign law firms have begun to develop substantial international practices of their own, either alone or, particularly in the European Community, through transborder mergers, they have become much more interested in establishing offices in New York and elsewhere in the United States. Given the increasingly competitive nature of international law practice and the corresponding need to preserve a "level playing field," it has been considered appropriate to include the proposed reciprocity provision in the Model Rule.

51/ The principal objection to reciprocity provisions, from the standpoint of trade policy, is that they are inconsistent with a fundamental tenet of international trade law under the GATT, namely the principle that each GATT Contracting State must accord to the products (and, assuming the success of the Uruguay Round, services) of the other Contracting Parties treatment known as "unconditional most-favored-nation" treatment. This means the United States cannot in principle discriminate among the sellers of goods or providers of services from various other Contracting States even on grounds of reciprocity, *i.e.* where the treatment accorded by those Contracting States to United States firms is widely divergent.

D. Scope of Practice

Section 4 of the Model Rule defines the permitted scope of the legal practice in which licensed legal consultants may engage. It is this set of provisions which principally distinguishes legal consultants from members of the bar of the licensing jurisdiction.

1. Court Appearances

Subsection 4(a) prohibits a licensed legal consultant from appearing for any person other than himself or herself or as an attorney before any court, magistrate or judicial officer, other than upon admission *pro hac vice* pursuant to the applicable rule of the courts of the licensing jurisdiction. The effect of this provision is to put legal consultants on the same footing as lawyers admitted in other United States jurisdictions for purposes of any involvement in judicial proceedings. The exception permitting admission *pro hac vice* is not only consistent with current practice but reflects the increasing need for participation by foreign-trained lawyers in cases before United States courts which involve significant issues or elements of foreign law. Since matters of foreign law are now regarded as questions of law and not of fact,[52/] it is no longer sufficient or appropriate for foreign counsel in such cases to participate solely as expert witnesses.

2. Advice on Matters of Local Law

Subsection 4(b) prohibits a legal consultant from advising on the law of the licensing state or on federal law except on the basis of advice from a person duly qualified and entitled to render such advice in the licensing jurisdiction. It follows almost *verbatim* the language of the New York Rule.[53/] Other Rules follow the general approach of the New York Rule, prohibiting the giving of advice on the law of the licensing jurisdiction as well as federal law *except* on the basis of advice from a person duly qualified to give same and extending that prohibition to the giving of advice on the law of any other United States jurisdiction as well, but then go further to require that, where advice on such law is given on the basis of the advice of a person qualified to give such advice, that person must have been consulted in the particular matter at hand and have been identified to the client by name.[54/] The

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52/ *See* R. 44.1, Fed. R. Civ. Proc.; *and see* A. Wright & A. Miller, 9 FEDERAL PRACTICE AND PROCEDURE § 2443 (1971); H. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1978).

53/ NEW YORK RULE, § 521.3(e).

54/ *See* DISTRICT OF COLUMBIA RULE, R. 46 (c)(4)(D)(5); HAWAII RULE, R. 14.4(e); NEW JERSEY RULE, R. 1:21-9(e)(5); OHIO RULE, § 5(C); OREGON RULE, R. 10.05(5)(f).

most restrictive Rules provide that the legal consultant may render legal advice only on the law of the foreign country in which he or she is admitted to practice.55/ Still other Rules impose more idiosyncratic restrictions.56/

The scope of practice is a critical issue for American lawyers practicing abroad. Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions, as well as by the growing body of international law that applies directly to private transactions and legal relationships. As a practical matter, it is simply not feasible to break that advice down into independent elements to be advised upon separately by different lawyers. Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experience and qualifications in dealing with the various bodies of law that are actually or potentially involved. Lawyers advise on transactions and disputes, not on laws in the abstract; indeed, part of the task of the international practitioner is the determination as to which country's (or countries') laws will in fact apply to a given matter. Thus, when the Japanese government in its 1986 law concerning practice by foreign lawyers in Japan limited the scope of practice of such lawyers to the giving of advice on the laws of the jurisdictions in which they were admitted to practice,57/ the Association registered its strong opposition to that restriction. In this and other contexts, the Association has generally taken the position that foreign lawyers

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55/ *See* ALASKA RULE, R. 44.1(e)(5); CALIFORNIA RULE, R. 988(o)(5); CONNECTICUT RULE, § 24D; FLORIDA RULE, R. 16-1.3(a)(1); GEORGIA RULE, § 2; TEXAS RULE, R. XVI(f); *cf.* MICHIGAN RULE, R. 5(E)(d). The Illinois Rule, after restricting the legal consultant to the rendering of legal advice only on the law of the country in which the legal consultant is admitted to practice, then somewhat inconsistently prohibits the legal consultant in giving such advice from quoting from or summarizing advice concerning the law of Illinois *or any other jurisdiction* by an attorney licensed under the laws of the State of Illinois or *any other jurisdiction, domestic or foreign; see* ILLINOIS RULE, R. 712(e).

56/ *See* ALASKA RULE, R. 44.1(e)(5) (where matter requires legal advice from a person admitted to practice in any jurisdiction (not limited to United States jurisdictions) other than that in which legal consultant is admitted to practice, legal consultant is required to consult an attorney or counselor at law in such jurisdiction on the particular matter and to obtain written legal advice and transmit same to the client); FLORIDA RULE, R. 16-1.3(a)(2)(F) (legal consultant required to utilize a written retainer agreement specifying in bold type that the legal consultant is not admitted to practice in the state of Florida or licensed to advise on the laws of the United States or any political subdivision thereof and is limited to the laws of the foreign country where the legal consultant is admitted to practice); WASHINGTON RULE, R. 14(d)(5) (legal consultant not permitted to advise on the laws of Washington, or of any other state or territory of the United States or the District of Columbia, or of the United States, even where such advice is based on advice of a person admitted to practice in such jurisdiction).

57/ The Japanese law afforded a striking example of the way in which this kind of restriction can operate to the disadvantage of American lawyers; the law was initially interpreted as meaning that the practice of American lawyers in Japan was to be limited to the giving of advice on the laws of the *respective American states in which they were admitted to practice.*

should be entitled to advise on international law, as well as the law of the jurisdiction of their admission.58/ It has also argued that foreign lawyers should not be subject to prohibitions concerning the rendition of advice on the law of third countries except if and to the extent that members of the local legal profession are so restricted. There is no self-evident policy reason for discrimination in this respect between local and foreign lawyers, particularly where the foreign lawyer is required to satisfy certain experience requirements before being licensed as a legal consultant.

The foregoing having been said, it must be recognized that certain restrictions upon the scope of practice permitted to legal consultants are necessary and appropriate for the protection of the public against the risks of being advised on matters of law by persons not qualified to render such advice. At the same time, it is important to bear in mind that legal advice is frequently rendered by lawyers practicing in firms and other cooperative relationships in which it is neither necessary nor practicable to segregate the different elements of the advice being given or even to identify the original author of many of such elements. Particularly in the context of international transactions, the advice thus rendered takes on the aspect of a seamless web, extending over several months and involving many lawyers and client personnel. For this reason, a requirement, like that contained in several of the Rules of the various States, that the advice be based on the advice of a qualified local lawyer who is consulted in the particular matter at hand and identified to the client by name is, as a practical matter, unworkable.

Moreover, such a far-reaching requirement is unnecessarily restrictive. The need for protection of the public against incompetent advice on matters of local law is effectively met by a requirement that a legal consultant rendering advice on matters which may be affected by the laws of a United States jurisdiction do so only on the basis of advice from a person properly qualified to render such advice in the jurisdiction in which the legal consultant is so licensed. As a general proposition, considerations of professional liability would afford so powerful an incentive to seek local advice that even this requirement is probably unnecessary as a practical

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58/ There is a special problem in this connection with respect to advice concerning the laws of the European Community. American firms, many of whom have invested substantial resources over the years in the development of expertise in this area and are in some cases well ahead of most European firms in this regard, view EC law as international law, since it flows from the rights and obligations of the member states under the Treaty of Rome. Some European firms, having themselves, albeit somewhat belatedly, also made a substantial commitment of resources to this area, now argue that EC law is analogous to federal law in the United States and should therefore be off-limits to American firms. While the example is unique, it illustrates both the difficulty of coming up with useful "bright line" tests for the delineation of permitted areas of practice and the point that transnational law is essentially a seamless web.

matter.59/ Moreover, under Sections 5(a) and 6(a)(ii)(A) of the Model Rule, as under nearly all of the existing Rules,60/ the legal consultant is bound by rules of professional responsibility which, among other things, prohibit the giving of legal advice outside the lawyer's area of professional competence. However, it is recognized that there is always a potential for abuse of any right, and the inclusion of a provision of the kind that is contained in the New York Rule provides a well-defined basis for intervention by professional regulatory bodies in the event that the status of legal consultant were ever abused in this respect.

The New York Rule, and most of the Rules adopted by other jurisdictions, also contain lists of specific activities in which a legal consultant may not engage. The proscribed activities range from the preparation of pleadings in any action or proceeding to the preparation of wills or trust instruments affecting the disposition of property in the United States.61/ Without exception, these are areas in which no foreign lawyer would consider rendering advice in the United States without the

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59/ It seems clear from discussions with foreign lawyers carrying on practice in New York and elsewhere in the United States that the principal limitation on the scope of the advice they are prepared to give is that of the professional liability potentially attendant upon giving advice outside their respective fields of competence. In this connection, it should be noted that the Model Rule, like most of the Rules currently in existence, requires that the applicant provide appropriate evidence of adequate professional liability insurance. *See* Model Rule, § 6(a)(ii)(B); *see also* ALASKA RULE, R. 44.1(f)(2)(B); CALIFORNIA RULE, R. 988(p)(3)(ii); CONNECTICUT RULE, § 24E(a)(2)(ii); DISTRICT OF COLUMBIA RULE, R. 46(4)(E)(1)(b)(ii); HAWAII RULE, R. 14.5(b)(2); ILLINOIS RULE, R. 712(f)(3); NEW YORK RULE, § 521.4(a)(2)(ii); OHIO RULE, § 7(A)(2); OREGON RULE, R. 10.05(6)(b)(ii); TEXAS RULE, R. XVI(b)(7); *cf.* FLORIDA RULE, R. 16-1.3(b) (legal consultant must advise clients in writing of the extent of professional liability insurance coverage). The imposition of such a requirement has been objected to on the grounds that coverage in a significant amount may be impossible for a foreign lawyer not practicing in a substantial firm to obtain; while this may be an appropriate issue for consideration by the licensing court or authority in the exercise of its discretion, it is believed that this requirement is an appropriate trade-off for the relatively non-restrictive scope-of-practice provisions.

60/ *See* ALASKA RULE, R. 44.1(f)(1); CALIFORNIA RULE, R. 988(p)(1); CONNECTICUT RULE, § 24E(a)(1); DISTRICT OF COLUMBIA RULE, R. 46(4)(E)(1)(a); FLORIDA RULE, R. 16-1.6(a); GEORGIA RULE, § 7(a); HAWAII RULE, R. 14.5(a); ILLINOIS RULE, R. 712(f)(1); NEW JERSEY RULE, R. 1:21-9(f)(1); NEW YORK RULE, § 521.4(a)(2)(i); OHIO RULE, § 7(A)(1); OREGON RULE, R. 10.05(6)(a); TEXAS RULE, R. XVI(d)(3); WASHINGTON RULE, R. 14(e). Only the Michigan Rule contains no provision to this effect.

61/ NEW YORK RULE, § 521.3(b)-(e); *see* note 4 *supra*. *See also* CALIFORNIA RULE, R. 988(o)(2)-(4); DISTRICT OF COLUMBIA RULE, R. 46(4)(D)(2), (3); FLORIDA RULE, R. 16-1.3(a)(2)(B)-(D); GEORGIA RULE, § 2; HAWAII RULE, R. 14.4(b), (c); NEW JERSEY RULE, R. 1:21-9(e); OHIO RULE, § 5(B); OREGON RULE, § 10.05(5); TEXAS RULE, R. XVI(f)(2)-(4); *cf.* ILLINOIS RULE, R. 712(e)(2)-(8) (list of prohibited activities includes rendering of professional legal advice with respect to a personal injury occurring within the United States or with respect to United States immigration, customs and trade laws).

assistance of qualified American counsel, to the extent that they involve questions of United States state or federal law, and the specific exclusions of such matters from the scope of practice of the legal consultant therefore add nothing of substance to the general prohibition against rendering advice on such law except on the basis of advice from a member of the bar. It has not been considered desirable to incorporate specific exclusions of this kind in the Model Rule on several grounds: first, that, properly construed, the list of prohibited activities adds nothing to the general prohibition against advising on local law otherwise than on the basis of advice from a member of the bar; second, such a listing may be thought to create a "safe haven" for other activities which are not enumerated; third, the enumerated exclusions are generally, and unavoidably, overbroad;62/ and fourth, the inclusion of such artificial and unnecessary restrictions invites, through application of the "mirror image" principle, the imposition of equally ill-defined restrictions upon American lawyers practicing abroad.

3. Holding Oneself Out as a Member of the Bar

Consistent with the foregoing discussion, Section 4(c) strictly prohibits legal consultants from holding themselves out as members of the bar of the licensing jurisdiction. The need to protect the public against unqualified purveyors of legal advice clearly militates in favor of such a provision. There is no reason whatever that legal consultants should have the right to misrepresent their professional status or qualifications. It as an essential premise of all of the Rules that legal consultants make clear in their use of stationery and business cards, and in all other means through which they hold themselves out to the public, that their status is a special one, distinct from that of members of the local bar.

4. Use of Firm Names and Titles

Closely related to the "holding out" problem is the issue of the names and title under which a legal consultant may practice. Section 4(d) prohibits the use of any name or title other than the individual's name, the name of the law firm with

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62/ Perhaps the most obvious example is the prohibition contained in the New York Rule, and followed in essentially all of the other Rules, against the legal consultant's "preparing any deed, mortgage, assignment, discharge, lease *or any other instrument affecting title to real estate* located in the United States." NEW YORK RULE, § 521.3(b) (emphasis added). Apart from the fact that documents of these kinds are routinely prepared by legal assistants and other non-lawyers in law firms and real estate agencies all over the United States, the italicized language could be read, for example, to preclude a foreign lawyer from drafting, and perhaps even from negotiating, a corporate acquisition agreement involving a multinational group of companies under which United States real estate would be among the assets being acquired. While this is neither the intendment nor the effect of the provision quoted, the fact that it is susceptible to possible misinterpretation is a potential source of inspiration for the adoption by other countries of restrictions that might not be so narrowly construed.

which he or she is affiliated, his or her authorized title in the foreign country in which he or she is admitted to the practice of law, and the title "legal consultant."

The specific authorization to legal consultants to practice under the name of their law firms, while no longer controversial in this country, is extremely important on a "mirror image" basis to United States law firms established abroad, where foreign governments and bars have in some cases attempted to prohibit the carrying on of their practice under any name other than that or those of the lawyers resident in the foreign office.63/ Such a requirement manifestly goes beyond what is objectively justified to achieve the only apparent purpose of such a requirement, namely that of ensuring that consumers of legal services can readily determine the identity of the lawyers in the branch office. While a requirement for disclosure of that information is reasonably related to protection of the public, that objective can be achieved just as effectively, and possibly more so, in other ways which do not create the possibility of confusion in the public mind as to whether the firm's foreign branch offices are in fact part of the same firm or separate entities.

Name recognition is an extremely important asset of firms which carry on an international practice, and from the standpoint of consumers of legal services certainty as to the identity of the firm with which they are dealing, and knowledge that the responsibility of the entire firm is engaged, may well be at least as material to a potential client as the identity of the individuals involved. Indeed, it may be seriously misleading to the public to create confusion as to the relationship between a firm and its own branch offices.

E. Rights and Obligations

The intent of the Model Rule, which reflects current practice under existing Rules, is that licensed legal consultants have all rights and obligations of members of the bar, subject only to the limitations and restrictions set forth in the Rule. This recognition of their status as members of the legal profession is appropriate in light of the fact that they are, by definition, admitted to practice in a foreign country and is in all respects parallel to the treatment accorded by United States jurisdictions to lawyers admitted in other United States jurisdictions. Section 5 of the Model Rule makes this intent explicit.

1. Partnership and Employment

A specific issue relating to the status of foreign lawyers which has been a significant bone of contention in the effort to open foreign countries to American and other non-indigenous lawyers and law firms has been the imposition, either on

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63/ This was one of the restrictions in the Japanese Law to which the Association objected in its resolution of August, 1986.

the foreign lawyers themselves or on the members of the local bar, of prohibitions against the employment by foreign lawyers of members of the bar and against the entry of members of the bar into partnership in a foreign law firm. This has proven to be perhaps the most serious obstacle to the creation of foreign offices and law firms with truly multinational capabilities.

While the rules of professional conduct in most states generally prohibit members of the bar from carrying on the practice of law in partnership with persons who are not members of the bar,[64/] this has not been interpreted as prohibiting interstate partnerships, nor is it believed that such rules have ever been invoked to challenge the admission of duly qualified foreign lawyers to partnership in an American law firm, notwithstanding evidence to the effect that there are in fact many such partners. There are no prohibitions in the United States upon the employment of members of the bar by non-lawyers or *vice versa*.

Accordingly, Section 5(b)(i) of the Model Rule would produce no substantive change in American law or practice. It is, however, extremely important that the principle be stated in this affirmative fashion in order to demonstrate unambiguously to the rest of the world that neither employment of members of the bar by foreign lawyers nor their entry into law partnership with foreign lawyers is prohibited or in any way restricted in this country.

2. Attorney-Client Privilege

Another issue which has arisen abroad but not in the United States is that of the applicability of attorney-client and work-product privilege to lawyers not admitted to practice in the jurisdiction in which privilege is claimed.[65/] The most notorious example of the problems encountered by American lawyers abroad in this res-

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64/ Rule 5.4 of the Model Rules of Professional Conduct provides, *inter alia*, that a lawyer or law firm shall not share fees with a non-lawyer, with certain exceptions; that a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership shall consist of the practice of law; and that a lawyer shall not practice with or in the form of a professional corporation authorized to practice law for profit, if a non-lawyer owns any interest therein. It has been authoritatively determined by at least one Committee on Professional Ethics that a duly-qualified foreign lawyer is not a "non-lawyer" within the meaning of this rule, and there is no known precedent to the contrary; nor is there any valid policy reason for a contrary interpretation so long as the foreign lawyer is subject to professional regulation and discipline comparable to those imposed upon members of the bar of the jurisdiction in question. This would, of course, automatically be true of all legal consultants licensed in that jurisdiction under a Rule conforming to the Model Rule.

65/ There is no reason to believe that this is not in fact the case in any jurisdiction in the United States. Of the existing Rules, however, only that of California explicitly recognizes that professional privileges apply to legal consultants as well as members of the bar; *see* CALIFORNIA RULE, R. 988(p)(2).

pect is the decision of the European Court of Justice in *AM & S Europe Ltd. v. Commission*,66/ wherein it was held that attorney-client privilege applied only to communications with members of the legal professions of the member states of the European Community. Future efforts to persuade the European Community institutions, as well as foreign governments, to take a more global view of the legal profession will be strengthened by an express recognition in the Model Rule that foreign lawyers are covered by professional privilege to the same extent as other United States lawyers.

Accordingly, Section 5(c) of the Model Rule makes it clear that the attorney-client privilege, and the related work-product doctrine, apply to communications between legal consultants and their clients, and to the work product of legal consultants, respectively. These aspects of privilege are fundamental to the attorney-client relationship. The privilege belongs to the client, and there is no reason whatever to exclude from the operation of that privilege communications with, or the work product of, a licensed legal consultant. By application of the rules of professional conduct of the licensing jurisdiction, as well as under the corresponding rules of the foreign legal profession of which he or she is a member, the legal consultant will have a corresponding duty to preserve the confidentiality of client communications and information.

F. Disciplinary Provisions

Section 6 of the Model Rule makes it clear that a person licensed to practice as a legal consultant will be subject to professional discipline in the same manner and to the same extent as members of the bar. Section 6(a)(i) provides that a legal consultant shall be subject to the control of the court having responsibility for attorney discipline and, in particular, to censure, suspension, removal or revocation of his or her license. Subsection 6(a)(ii) requires the legal consultant to file with the court a written undertaking to observe the applicable rules of professional conduct, appropriate evidence of professional liability insurance in such amount as the court shall prescribe, a written undertaking to advise the court of any change in circumstances affecting the legal consultant's eligibility for licensure as such and a duly acknowledged instrument designating the clerk of such court as his or her agent upon whom process may be served. Section 6(b) contains detailed provisions for service upon the clerk.

Taken together, the provisions of Section 6 are designed to ensure that the legal consultant will be subject not only to the disciplinary powers of the court having responsibility for same but also to private civil suit in a United States court for any failure to observe established standards of professional responsibility. These

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66/ Case No. 155/79, [1982] ECR 1575, [1982] CMLR 264 (ECJ).

provisions are, of course, supplemental to the foreign rules of professional conduct which apply to the legal consultant as a member of a foreign legal profession.

G. Application and Renewal Fees

Rules adopted in most jurisdictions contain no provisions regulating fees to be paid at the time of application for a license as a legal consultant or upon renewal, annual or otherwise, of a legal consultant's license, leaving the determination of such fees in the discretion of various authorities or entities, named or unnamed.[67] Of those which address the amount of the fee, some specify a particular amount[68] and others establish the fee by reference to those paid by applicants for admission to practice,[69] in the case of application fees, and those paid by members of the bar of the licensing state, in the case of renewal fees.[70] While most of these are reasonable, at least one state has established multiple fees that appear far higher than would ap-pear to be required to cover any conceivable processing costs and bearing no relation to the fees charged to persons applying for admission to the bar or renewing their licenses as such.[71]

This kind of provision undermines the ability of United States lawyers to object to the establishment of excessive fees for registration as a legal consultant, which is one device that has been used to deter American lawyers from seeking

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67/ The California Rule, for example, leaves the determination of renewal fees for determination by the State Bar; *see* CALIFORNIA RULE, R. 988(i).

68/ *See* CONNECTICUT RULE, § 24C(a)(2) (application fee of $500); DISTRICT OF COLUMBIA RULE, R. 46(c)(4)(B)(1)(b) (application fee of $350); OHIO RULE, § 2(A)(1) (application fee of $500); TEXAS RULE, R. XVI(e)(1), (2) (application and renewal fees equal to amounts charged by jurisdiction of admission of applicant for Texas lawyers in reverse situation, but in no event less than $700 for application and $150 for renewal).

69/ *See* WASHINGTON RULE, R. 14(b)(1)(viii) (admission fee equal to that paid by person applying to take bar exam). The Hawaii Rule provides simply that the cost of a report or character investigation, if any, shall be borne by the applicant; *see* HAWAII RULE, R. 14.2(a).

70/ *See* FLORIDA RULE, R. 16-1.4(b) (legal consultant required to pay annual renewal fee equivalent to annual dues paid by members of the Florida Bar); WASHINGTON RULE, R. 14(c)(1)(ii), (f)(2) (legal consultants required to pay annual dues to the integrated Washington Bar at the rate applicable to members having practiced more than 3 years).

71/ *See* GEORGIA RULE, § 4(b) (application fee for character and fitness determination to be established by Fitness Board but in no event less than $3,000); *id.*, § 5(b) (application fee for license to be established by Board of Bar Examiners but in no event less than $75); *id.*, § 6(b) (license to be issued upon payment of the "usual fee" to the clerk of the superior court).

foreign practice rights.72/ To make it clear what is expected by way of reciprocity in this regard, Section 7 of the Model Rule makes it clear that application fees to be paid by individual foreign lawyers are not to exceed those paid by lawyers from other States seeking admission on motion, while renewal fees are to be no greater than those paid by members of the bar of the licensing State.

H. Revocation of License

Rules adopted in some jurisdictions have required regular renewal of the licenses of legal consultants.73/ To the extent that such a renewal is a purely ministerial requirement created for administrative purposes, it is not in principle objectionable. However, it would be unduly burdensome to require legal consultants to demonstrate repeatedly that they qualify for licensure under Section 1 of the Model Rule. Accordingly, the Model Rule requires that the applicant must establish his or her qualifications to the satisfaction of the court only once, at the time of initial application, and not in connection with any renewals.

Section 8 of the Model Rule is included to make it clear, nonetheless, that the license may, and indeed must, be revoked if the court determines that a legal consultant no longer meets the requirements for licensure set forth in Section 1(a) or Section 1(c), even if there are no grounds for disciplinary action in the licensing jurisdiction. This is appropriate and necessary because the licensee's qualification as a legal consultant is derivative from his or her status as a member in good standing of a foreign legal profession, and any change in that status *ipso facto* removes the basis for his or her licensure as a legal consultant. The legal consultant would be affirmatively required by reason of the undertaking referred to in Section 6(a)(ii)(C) to advise the court of any such change.

I. Application for Waiver of the Rules

Section 9 of the Model Rule permits the court responsible for licensing of legal consultants, upon application and in its discretion, to vary the application of or waive any provision of the Rule where strict compliance would cause undue hardship to the applicant. This again reflects the need for flexibility in the face of the

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72/ In the United Kingdom there are no fees to be paid in connection with the obtaining of the consent of the Law Society to the issuance of the class of visa required to enable a United States lawyer to establish professional residence in London; however, if the law firm with which the United States lawyer is affiliated wishes to add a partner who is an English solicitor, *all* partners in the firm, regardless of location, must register with the Law Society and pay a substantial registration fee. The result can be annual fees for the law firm in excess of $100,000.

73/ *See* CALIFORNIA RULE, R. 988(i); GEORGIA RULE, § 5(d); OHIO RULE, § 8; TEXAS RULE, R. XVI(d)(1).

broad range of factual circumstances that may conceivably arise, regulated by the court in the exercise of its sound discretion.

V. Conclusion

A Model Rule for the Licensing of Legal Consultants is sorely needed, not only to provide considered guidance to those states that are now considering or may in the future consider the adoption of such Rules, but to enhance the opportunity for American lawyers and law firms to develop transnational practices on the basis of broad reciprocity and mutual respect for the qualifications of members of recognized foreign legal professions. The way in which foreign lawyers are regulated in this country has a dual impact on the competitive position of American lawyers and law firms in a global economy. First, it directly affects the ability of American firms to add to their ranks lawyers qualified to practice in other jurisdictions, which is a pre-requisite to the establishment and expansion of truly multinational practices. Second, it produces an indirect effect through the "mirror image" phenomenon by which arbitrary and unnecessary restrictions in the Rules adopted by various states are seized upon as an excuse for the imposition of similar, or even more stringent, restrictions on American lawyers abroad. In order to obtain fair treatment abroad, we must be in a position to accord to foreign lawyers and law firms the possibility of carrying on their practices in the United States, subject to the same scrutiny, regulation and discipline as members of the bars of the United States but unencumbered by unnecessary and even protectionist restrictions, on a basis of full reciprocity.

The proposed Model Rule follows closely a Rule that has been in effect in New York for nearly twenty years, the operation of which has resulted in no significant problems and considerable benefit to the development of New York as a center of international legal activity. Under the Resolution, the Association would urge all United States jurisdictions to consider the adoption of rules for the licensing of legal consultants and would commend to their use the Model Rule incorporated in the Recomendation that this Report accompanies. We believe that this is an issue upon which uniformity of approach among the states is of critical importance. We further believe that the interests of the United States legal profession are not and should not be conflicting.

After years and even decades of relative inaction and inertia on the part of the legal profession in the face of rapid changes in the structure of the global economy, the face of the legal profession is now being altered at a stunning pace, not only in the European Community but elsewhere throughout the world. We have a small window of opportunity to influence that change. If we fail to do so, the process will unquestionably go forward without us, to the great detriment of the American legal profession, which has long been the world's leader in the transnational practice of law, and to the disadvantage of United States economic interests as well as of consumers of international legal services worldwide. It is thus not only appropriate,

but indeed essential, that the Association take the lead in establishing a coherent and forward-looking model for the regulation of foreign lawyers in this country.

Respectfully submitted,

Louis B. Sohn, Chair
Section of International
Law and Practice

January 1993

Exhibit B(1)

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

VIA FACSIMILE

December 6, 1991

Mr. Talbot D'Alemberte
President
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611

Dear Mr. D'Alemberte:

Under legislation France enacted last year, future access to the French legal services market for U.S. lawyers will be restricted. U.S. Government agencies have considered various responses to advance U.S. interests and we would welcome ABA comments on the proposal outlined below.

In the past, U.S. lawyers in France who wished to advise on U.S. and international law could do so by registering to practice as conseils juridiques. Under the new legislation, such U.S. lawyers will have to be qualified to practice French law as French avocats. The legislation "grandfathers" as (new) avocats U.S. lawyers who are registered as conseils juridiques as of December 31, 1991.

Lawyers not now registered as conseils juridiques will be admitted into the new profession of avocat on the basis of reciprocity, which is not satisfied by jurisdictions in the United States. U.S. lawyers will be required to either (a) affiliate themselves as a collaborateur ("collaborator") under the supervision of an avocat or (b) successfully complete the final examination portion of the certificat d'aptitude a la profession d'avocat (the "CAPA") to be qualified as a new avocat. These requirements are tantamount to the exclusion of non-established U.S. lawyers from the foreign legal consultant market in France.

Various options could be pursued to advance U.S. interests in light of the French legislation. We propose, for the time being, to seek resolution of this issue by placing increased emphasis on it in negotiations with the European Community in the Uruguay Round.

Prior to this fall, the Community showed little interest in trade obligations regarding foreign legal consultants. Recently, however, the Community submitted a Uruguay Round services offer which includes coverage of foreign legal consultants (albeit with

reservations which may sustain France's new legislation). In addition, the Community has requested increased access to the United States for European lawyers to advise on their home country and international law.

This change in the Community's posture may open an avenue for resolving questions of access to France, as well as other EC member states. In return for concessions the Community may provide us, we would have to be prepared to consider increased access for European foreign legal consultants to the United States. This may involve expanding the number of U.S. jurisdictions beyond the twelve that currently provide for foreign legal consultants as well as providing increased access to certain U.S. tribunals (such as the Court of International Trade.)

Our primary interest now is to secure market access for U.S. lawyers to practice U.S. and international law, including European Community law. Our proposed strategy does not preclude recourse to other alternatives if the Uruguay Round negotiations are not successful. Nor does it preclude additional efforts to secure access for the practice of domestic law in Europe by U.S. law firms.

We have bilateral Uruguay Round consultations with the Community scheduled for December 16. ABA comments would be welcome at any time, but would be especially helpful if received before December 13. In particular, we want to know the ABA's views on:

- the adequacy of our proposed Uruguay Round actions to address your concerns;
- the feasibility of increasing the number of U.S. jurisdictions with foreign legal consultant rules; and
- the expansion of non-U.S. lawyers' access to federal legal tribunals, such as the Court of International Trade.

Most importantly, we would appreciate knowing whether the ABA would support a strategy which calls for increasing the number of jurisdictions with foreign legal consultant rules.

Sincerely,

Peter Allgeier
Assistant U.S. Trade Representative

Linda F. Powers
Deputy Assistant Secretary of Commerce for Services

HARD COPY

Exhibiy B(2)

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
TALBOT D'ALEMBERTE
AMERICAN BAR CENTER
750 N. LAKE SHORE DRIVE
CHICAGO, ILLINOIS 60611
TELEPHONE: 312/988-5109
ABA/NET: ABA DALEMBERTE.T

December 13, 1991

Ms. Linda F. Powers
Deputy Assistant Secretary of
Commerce for Services
United States Department of Commerce
Washington, DC 20230

Mr. Peter Allgeier
Assistant U.S. Trade Representative
Office of the United States Trade Representative
Washington, DC 20506

Dear Ms. Powers and Mr. Allgeier:

Thank you for your letter of December 6, 1991, requesting the views of the American Bar Association concerning the proposed positions and approaches of the United States Government to the treatment of legal services in the Uruguay Round of the GATT.

As you will no doubt appreciate, it has not been possible within the relatively short time available prior to your requested response date of December 13, 1991 for the Association to make any sort of formal determinations as to its position regarding the precise points raised in your letter, which are not specifically addressed in any previously-adopted policies of the Association. However, I believe the Association has in recent years taken a relatively consistent approach in various contexts to the general questions that are involved, and I accordingly believe it is possible to extrapolate from the history and policies of the Association to give you a relatively clear sense of the Association's position.

The Association has consistently supported efforts to promote market access for legal services at the international level, and we have expressed our concerns about protectionism in the regulation of the practice of law on various occasions. In a resolution adopted in August, 1990, the Association affirmed its support for the European Community (EC) program for the development of a Single Internal Market but at the same time cautioned that the Community should not impose or permit restrictions upon the delivery of legal services that are not objectively required for the protection of the public. I believe it is fair to say that the recent French legislation to which your letter refers, which effectively eliminates the long-standing possibility of practice by U.S. lawyers as legal consultants, goes beyond anything that is objectively required for the protection of the public.

The French government argues that the new law is in fact more liberal than a legal consultant rule in that it permits foreign lawyers to become full members of the French bar. However, as you have noted in your letter, it seems likely that the examination that U.S. lawyers will be required to take to qualify for admission may have the effect of excluding U.S. lawyers who seek in the future to establish in France, while lawyers from other EC member states will, under the EC directive on the recognition of diplomas and other professional qualifications, be subjected to much less demanding requirements. Although the Association has not in the past taken any position regarding the legitimacy of requirements for admission to full status in a foreign bar, we do strongly oppose, and would urge the United States government to continue strongly to oppose, the imposition by France or any other EC country of conditions to the admission of U.S. lawyers to the legal profession of that country which are more onerous than those applicable to members of the legal professions of other EC countries. Any differences in such admission requirements should, in our view, be limited to those that are objectively required for the protection of the public.

As we understand it, what you now propose to do is essentially to deal with this issue indirectly, in the context of the Uruguay Round, by urging the adoption of measures which would afford to U.S. lawyers the right to practice within the EC countries, including France, as legal consultants. Assuming that this does not mean that the United States government would in any way be acceding to the imposition of discriminatory standards for the admission of U.S. lawyers to full membership in the French or other EC legal professions, I foresee no difficulty in the Association's supporting your proposed approach.

In 1985, the Board of Governors of the Association, on the basis of over a decade of experience with legal consultant rules in New York, expressly supported similar rules that were then being considered by, and were subsequently adopted by, the District of Columbia. Another recent indication of the Association's approach is to be found in the resolution adopted by the Association's House of Delegates in August, 1986 concerning the implementation of the then newly-adopted Japanese law on foreign legal consultants. In that resolution, the Association welcomed the adoption of the law but urged the Japanese government to minimize or eliminate by regulation certain of the more restrictive features of the law, and the United States government has for several years adhered to the same position in negotiations with the Japanese government.

As you know, our mutual efforts vis-a-vis the Japanese have met with only partial success. However, based upon our experience in that difficult situation, I feel I can say with considerable confidence that the Association will support an approach to market access in the Uruguay Round based on the legal consultant model, provided that the following five issues are satisfactorily resolved: (i) the scope of practice permitted to U.S. lawyers; (ii) the ability of U.S. law firms to establish and operate local offices under their firm names; (iii) their ability to operate those offices as branches of the firms themselves, rather than through separate entities; (iv) the ability of U.S. firms to employ local lawyers; and (v) the ability of U.S. firms to admit local lawyers as partners. In addition, the foregoing presupposes a satisfactory resolution of the matter of access by U.S. lawyers to full membership in the legal professions of EC member states on a basis no less favorable than that accorded lawyers and firms from other EC member states.

With respect to the scope-of-practice issue, we will be particularly sensitive to the fact that international practice frequently involves the giving of advice on matters which may be affected by more than one legal system. We would certainly strongly concur with your position that U.S. lawyers should have the right to advise on matters of European Community law as well as U.S. law and international law. I believe we would probably go further and say that U.S. lawyers should be restricted in the giving of advice on the law of third countries, i.e. countries other than the United States or the host country, only if and to the extent that lawyers admitted to practice in the host state are similarly restricted. There is no identifiable public interest which is served by discrimination between local and foreign lawyers in this regard, and there are good reasons grounded in the practical requirements of international practice to resist any rule that would unnecessarily subject U.S. lawyers to disciplinary measures or even criminal penalties for giving advice as to matters on which third country law may have a bearing. We, of course, recognize the legitimacy of reasonable restrictions on the giving of advice on the law of the host state so long as they are reasonably related to the public interest in ensuring that domestic consumers of legal services receive advice having proper professional competence as its source. In our view, a reasonable restriction is a requirement that such advice be based on the advice of a lawyer qualified to practice in the host state.

As to the feasibility of increasing the number of U.S. jurisdictions that have legal consultant rules, the recent indications are that a number of additional states are becoming interested in adopting such rules as international legal practice becomes more prevalent throughout this country. The Association is currently working on the development

of a Model Rule for Legal Consultants which would take into account the provisions of the legal consultant rules of the twelve United States jurisdictions now having such rules and which, if adopted by the governing bodies of the Association, would be commended to the consideration of state bar associations. My sense of the current situation is that the reason many states have not yet adopted legal consultant rules is not that there is any identifiable resistance but rather that there has been no perceived demand either from foreign lawyers or from indigenous law firms for the adoption of such rules outside the principal business centers. This does not, of course, mean that opposition might not develop in some jurisdictions if efforts were in fact initiated to obtain adoption of legal consultant rules, but recent experience suggests that this is unlikely to be the case in many states or in any of the states in which one can imagine foreign lawyers having a serious interest in establishing practices as legal consultants. In any event, I feel certain that, if a workable legal services agreement could be concluded with the European Community, whether in the Uruguay Round or otherwise, the Association would actively encourage and assist the states to adopt rules that would comply with such an agreement, and I believe that a large number of the states would respond favorably, including those with existing rules which might not strictly comply with all the requirements of the agreement.

Finally, with respect to the question of access by foreign lawyers to additional federal legal and administrative tribunals, I suspect the position would tend to vary with the nature of the tribunal and the subject matter of its work. As you may be aware, the Association adopted a resolution in August, 1990 in which it recommended that the rules of the Federal Trade Commission (FTC) be amended to permit foreign lawyers to practice before that agency on a basis of reciprocity, and the FTC has indeed adopted a rule change along those lines. Your letter mentions, as an example of another tribunal to which the same approach might be taken, the Court of International Trade (CIT). I am not entirely sure that admission to practice before the CIT would be of great interest to foreign lawyers, but on the other hand I do believe there would be considerable interest in the possibility of practice before the International Trade Commission (ITC) and the International Trade Administration of the Department of Commerce (DOC) in such matters as anti-dumping and countervailing duty cases. The argument for permitting foreign lawyers to appear before the ITC and the DOC in such proceedings is at least as strong as in the case of the FTC; the subject matter is regulated in large part by international agreements, and at the same time the parties are generally sophisticated commercial entities, many of them foreign companies, who do not require special protection as consumers of legal services. Indeed, I am advised that one of our committees is currently developing a position in support of such an amendment to the rules of the ITC. On the other hand, I can imagine that there would be fairly strong resistance, at least at the present time, to permitting

foreign lawyers to appear before the Immigration and Naturalization Service, to pick one obvious example, given the nature of the clientele and the concomitant risk of abuses. Subject to this caveat, however, I believe you will find the Association generally supportive of initiatives along these lines.

I want to emphasize again that the Association has taken no formal position on the precise questions you have raised, and they are of sufficient importance that approval of the House of Delegates would be required if it were to do so. Nonetheless, I believe the various positions the Association has taken in respect of slightly different but analogous questions affords a reasonably reliable indication as to the Association's general policies relating to these questions. In any event, I hope you will find this response useful in providing a general sense of the Association's overall attitude toward these questions and of the particular aspects with which the Association will be most deeply concerned.

We very much appreciate your soliciting our views on this important subject and hope you will not hesitate to let us know how we can be of help as your work progresses.

Yours very truly,

Talbot D'Alemberte

Talbot D'Alemberte

Steve Nelson
20
Karen P.

Ministry of Justice
Judicial System and Research Department
Gaikokuho-Jimu-Bengoshi Qualifications Examination Section
1-1, Kasumigaseki 1-Chome, Chiyoda-ku
Tokyo 100, JAPAN
Telephone: (03)3580-4111 Ext. 2351
FAX : (03)5511-7205

Exhibit C(1)

January 6, 1993

Mr. Steven C. Nelson
Past Section Chair, Council Member, Chair,
Transnational Legal Practice Committee
Dorsey & Whitney
2200 First Bank Place East
Minneapolice, MN 55402

Re: Speaker for the Study Commission on Foreign Lawyers Issue

Dear Mr. Nelson

As you know well, Japanese Ministry of Justice and Japan Federation of Bar Associations established the Study Commission on Foreign Lawyers Issue last summer and have had four meetings on once a month basis so far.

This Study Commission is scheduled to submit a final report with regard to the five requests raised by the U.S.A. as well as EC so as to help MOJ and JFBA find a solution to this difficult problem. Needless to say, we understand that what are particularly being concerned about are the prohibition on foreign lawyers hiring Japanese lawyers, or forming partnerships with them.

On the 27th of January will the next meeting (the fifth meeting) be held

at which we are hoping some clients or prospective clients for a foreign legal consultant (Gaikokuho-Jimu Bengoshi) will present their views toward this foreign lawyers issue. Following the next meeting, we will have the sixth meeting on the 23th of February and the seventh meeting in March. We are planning to ask some Gaikokuho-Jimu Bengoshis or those foreign lawyers who are not Gaikokuho-Jimu Bengoshis from both the U.S.A. and EC to present their views on this issue at either the sixth meeting or the seventh meeting. .

We would deeply appreciate it if you would kindly recommend some appropriate representatives from U.S. lawyers (whether or not Gaikokuho-Jimu Bengoshis) to us for one or two prospective speakers who will be able to present their complaints, requests and views of the U.S. lawyers' side most persuasively to the members of the Study Commission.

Since we have not so much time to prepare for the sixth meeting or the seventh meeting, we would like you to try to contact some appropriate persons as soon as possible.

Besides, written submissions from U.S. lawyers on this issue are also welcomed by the members of the Study Commission.

Lastly allow me to add that Mrs. Janow, Deputy Assistant US Trade Representative for Japan and China suggested to us that we should contact you for this purpose. If you have any questions, please do not hesitate to ask me.

Sincerely yours,

Nobuhisa Toda

Nobuhisa Toda

Chief

Exhibit C(2)

EMBASSY OF JAPAN
2520 MASSACHUSETTS AVENUE, N.W.
WASHINGTON D.C. 20008-2869, U.S.A.
TEL : (202)939-6700
FAX : (202)265-9497

TO : Mr. Peter D. Ehrenhaft

FAX NO. : 508-6200

SECTION OR NAME :

FROM : SECTION Political NAME Kunihiko Sakai

DATE : January 27, 1992 TIME : 2:42PM

NUMBER OF PAGES : 7 (INCLUDING THIS COVER PAGE)

SUBJECT :

REMARKS : Enclosed please find a questionnaire.

The Ministry of Justice and Japan Federation of Bar Association are now discussing the change of their itinerary and I will let you know as soon as I hear from them.

Thank you for your kind assistance.

Kunihiko Sakai

Questionnaire

1. Whether or not a foreign lawyer licensed to practice as a foreign legal consultant in the State is permitted to form a partnership with a local lawyer of the State

On the assumption that such partnership is not permissible, is a foreign lawyer who is licensed to practice as a foreign legal consultant in the State also prohibited from sharing the fees or other profits which a particular lawyer of the State gains for the practice of legal business ? What about office sharing or business collaboration ?

On the assumption that such partnership is permissible, please answer the following questions which relate to the limitations imposed on it.

Is the local lawyer of the State (or DC) who has entered into partnership with a foreign lawyer licensed to practice as a foreign legal consultant in the State permitted to handle the legal business concerning the laws of the State ? If that is permissible, aren't there any limitations imposed on it ?

For example, isn't there such limitation that the lawyer of the State is not permitted to provide legal service directly to clients ?

2. Whether or not a foreign lawyer licensed to practice as a foreign legal consultant in the State is permitted to employ a local lawyer of the State

Assuming that such employment is permissible, please notify us whether a foreign lawyer admitted as a foreign legal consultant is permitted to employ a local lawyer of the State even when the foreign lawyer is practicing by himself (or only with other foreign lawyers) or only when he is practicing in partnership with a local lawyer of the State, on the assumption that such partnership is permissible.

Granted that the employment of a lawyer of the State is permissible, is the State lawyer thus employed permitted to handle the legal business concerning the laws of the State ? And if that is permissible, isn't there any limitation imposed on it ? Also, when the local lawyer of the State employed by the foreign lawyer can and do handle the legal business concerning the laws of the State, isn't there such limitation that the foreign lawyer who is his employer is not allowed to direct or supervise the State lawyer (that is, when the State lawyer who is employed handles

the laws of the State, only another local lawyer of the State who is the partner of the foreign lawyer is permitted to direct and supervise the State lawyer employed)?

3. Limitation on the places where a foreign lawyer should have the experience of legal business to be admitted to practice as a foreign legal consultant in the State

As regards the experience of legal business, which is one of the requirements for a foreign lawyer to be admitted to practice as a foreign legal consultant in the State, are there any limitations on the places where he had such experience?

In other words, is the number of years of his experience in a country other than his home country or in the United States countable? (that is, as for a Japanese lawyer, is the number of years of his experience outside Japan countable or is it not?) If so, what is the maximum number of years of such experience that is countable?

4. Limitation imposed on a foreign lawyer (regardless of whether he has the qualification of practicing as a foreign legal consultant in the State) representing a client in arbitration procedure in the State

(Please see the questions in the attached paper)

5. Please notify us of the number of the foreign lawyers who have been licensed to practice as a foreign legal consultant in the State with their nationality and the names of the countries where they were qualified as lawyers.

When there actually exists any law firm or law office where a foreign lawyer licensed to practice in the State or DC (as a foreign legal consultant) has formed a partnership with or employed a lawyer of the State (DC):

How are the foreign lawyer and the State lawyer handling their business actually ?

If the limitations as mentioned in 1 or 2 of the Questionnaire are imposed, what are they doing to comply with such limitations?

Effects (merits and demerits), if any, caused by a foreign lawyer being a partner

Whether or not there exists any system whereby to ensure that a foreign lawyer does not handle federal laws or the laws of the State where he is licensed to practice

Additonal questions

1. Recent trends of professional ethics of practicing attorneys

(a) Are there any changes seen in the moral sense of practicing attorneys which once prevailed pursuant to the frequent occurrence of M & A in particular, in the days of President Reagan and Bush?

(b) Whether or not it is permissible to provide services beyond the scope of the field in which they specialize.

2. Actual contition of pro bono publico at law firms or law offices

3. Plans, if any, of laws firms (law offices) to establish their branches in areas other than Japan in particular, in Europe, and the actual condition of the activities being done by law firms (law offices) at the branches which they have already established.

4. Recent movement of ABA changing the system of foreign legal consultant.

(a) The reasons why ABA adopts "Modal Rules for the Licensing of Legal Consultants"

(b) Are there any possibility that the Rules be adopted by the respective states?

5. The reasons why the foreign legal consultant rules which are enforced in some states require the practicing experience that is for at least five of the seven years immediately preceding one's application

Representation of clients in arbitration procedure

Reasons for making this inquiry

In Japan, under Article 72 of the Bengoshi Law (Practicing Attorney Law), no person other than a bengoshi (practicing attorney) is permitted to engage in the practice of law by giving legal advice, providing legal representation, arbitrating, settling disputes amicably or performing any like acts for other persons in regard to legal cases, for payment and as an occupation (in a repeated and continuous manner), and the representation of clients in arbitration procedure is within the scope of this prohibition. Therefore, no person other than a bengoshi is allowed to do it for the purpose of receiving remuneration with intention to do it repeatedly and/or continuously.

However, under the Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers, a foreign lawyer licensed by the Minister of Justice as a gaikokuho-jimu-bengoshi and registered with the Japan Federation of Bar Associations is not subject to the application of the provisions of Article 72 of the Bengoshi Law (Practicing Attorney Law) under Article 5 Paragraph 2 of the same law, so he is permitted to represent clients in arbitration procedure for the purpose of receiving remuneration as part of his businesswhen the laws of the country of his primary qualification (Article 2 Item (5) of the Special Measures Law mentioned above) or designated laws (Article 2 Item (8) of the same law) are the basic laws (laws designated by private international law and applied to specific international legal relations) for making that particular arbitration.

In this regard, the Ministry of Justice would like to be informed of the following matters in several States of the U.S.A.

questions

1. Is there such limitation that no person other than a practicing attorney is allowed to represent clients ? Is a foreign lawyer permitted to represent clients ?

Is it true that whether or not a foreign lawyer is permitted to represent clients in arbitration procedure depends upon whether or not he is licensed to practice under the State regulations concerning foreign legal consultants in the State and registered as such lawyer ?

Also, is it true that whether or not a foreign lawyer is permitted to represent clients in arbitration procedure depends upon the laws on which the procedure is based, that is, it depends upon whether such basic laws are the laws of the country of his primary qualification or the laws of the United States (country where the arbitration is made) or those of a third country ?

2. What about representing a client in arbitration procedure as a business or as an occupation (for the purpose of receiving remuneration in a repeated and continuous manner) ? As to this point, is a foreign lawyer treated differently from a citizen in general ?

3. Incidentally, as regards (1) and (2) above, is there any difference, according as whether it is an international arbitration or a domestic one? If so, please explain how they are classified or defined.

4. Also, supposing that, basically, a citizen in general or a foreign lawyer is permitted to represent clients in arbitration procedure, is there such limitation that they cannot represent clients when the arbitrator of a certain arbitration procedure does not approve it ? Also, supposing that a citizen in general or a foreign lawyer is permitted to represent a client, is there any limitation on the scope of the activities which they can perform as a representative ? In other words, is there such limitation that a foreign lawyer admitted to represent a client in an arbitration procedure is not allowed to give legal advice on the laws of the United States (country where a case is referred to arbitration) or on the laws of any other country than the country of his primary qualification ?

5. Are these matters mentioned above prescribed in laws or regulations or rules ?

Also, what sanctions are imposed on a person who violates the provisions of prohibition ?