STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 15, 1995 at 2:00 p.m., to consider the petition of the Minnesota State Bar Association to amend the Rules of Professional Conduct. A copy of the petition containing the proposed amendments is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 10, 1995 and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before November 10, 1995.

Dated: September 20, 1995

BY THE COURT:

A.M. Keith
Chief Justice

No. C8-84-1650
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Amendment of the Rules of
Professional Conduct

Petition of Minnesota State Bar Association

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully petitions this Honorable Court to amend the Minnesota Rules of Professional Conduct ("Rules") to:

1. Modify the rules governing advertising of a legal specialty;

2. Adopt a rule permitting the sale of a law practice; and

3. Modify the aspirational rule regarding voluntary pro bono service.

In support of this Petition, MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys authorized to practice before this Honorable Court and the other courts of the state.

2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish the standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05 (1992).

3. This Honorable Court has adopted the Rules of Professional Conduct, effective September 1, 1985, as the standard of professional responsibility for lawyers admitted to practice in Minnesota. This Honorable Court has since amended those rules from time to time.

Advertisement of Specialization

4. Lawyers' advertisement of specialization has been a topic of discussion within the bar for a number of years. In 1990 the United States Supreme Court issued its decision in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 S. Ct. 2281 (1990), holding that Illinois could not discipline a lawyer for truthfully advertising certification as a specialist by a national organization despite the Illinois rule explicitly prohibiting such advertising. Following the decision in *Peel*, the American Bar Association adopted an amendment to Rule 7.4 of the ABA Model Rules of Professional Conduct. The MSBA Rules of Professional Conduct Committee has considered these issues, beginning with a December 3, 1992, proposal of one of its members, Prof. Kenneth Kirwin, to adopt the ABA Model Rule change. The MSBA committee, while declining to recommend adoption of certain elements to the new ABA Model Rule, thereafter considered various alternative rule revisions, and at the MSBA House of Delegates meeting held on January 28, 1995, the MSBA voted to recommend the adoption of changes to the Minnesota rules. This Petition was authorized and endorsed at that time.

5. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 7.4 of the Minnesota Rules of Professional Conduct as follows:

7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature or limitations.

(b) ~~Except as provided in this rule,~~ A lawyer shall not state ~~or imply~~ that the lawyer is a specialist in a field of law unless the lawyer is currently certified or approved as a specialist in that field by an organization that ~~a board or other entity which~~ is approved by the State Board of Legal Certification. ~~Among the criteria to be considered by the Board in determining upon application whether to approve a board or entity as an agency which may certify lawyers practicing in this state as being specialists shall be the requirement that the board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such qualification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competency, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.~~

(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

(d) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(e) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

Sale of a Law Practice

6. A recurring problem involving potential discipline of lawyers relates to the sale of a law practice, usually upon the death or retirement of a lawyer. The ABA Model Rules of Professional Conduct had no provision for dealing with these problems when they were initially adopted. In 1990 the ABA added a Rule 1.17 and related commentary. The ABA Model Rule 1.17 is attached to this Petition as Exhibit A for the Court's convenience.

7. Petitioner believes it is appropriate and in the interest of the public to permit the orderly sale of an entire law practice for various reasons, including, but not limited to, circumstances where a lawyer dies, becomes disabled, seeks to retire from the practice of law or seeks to relocate. The current Rules do not serve the best interests of clients or lawyers. For example, under the current Rules, an attorney who wishes to relocate, or is appointed to the Bench, is unable to arrange for an orderly transfer of the practice and client files. Under the current Rules, various methods are used to effectuate a sale of a law practice, such as the sale of only the "assets" of the practice as opposed to a sale of the files and assets. In other instances, a new partner or shareholder becomes involved in the practice and within weeks or months this partner or shareholder in effect buys out the other person's partnership or corporate interest.

8. Under the proposed Rule 1.17, these arrangements would be avoided, and the practice could be sold in an orderly manner. The proposed Rule requires the purchasing firm or attorney to accept all active files which that attorney is qualified to handle. This specifically includes pro bono matters and reduced fee matters. This protection is not provided under the

present system in which attorneys frequently sell only the assets, and in effect, leave the active files and clients to fend for themselves. The Rule as proposed also protects the clients from dramatic increases in the fee structure relating to their file for a period of one year after the practice is sold.

9. This recommended amendment, the adoption of a new Rule 1.17, was considered by the House of Delegates of the MSBA at its mid-year meeting on January 28, 1995, and was approved at that time.

10. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 1 of the Rules of Professional Conduct to add a new Rule 1.17 as follows:

Rule 1.17 SALE OF LAW PRACTICE

(a) A lawyer shall not sell or buy a law practice unless:

(1) The seller sells the practice as an entirety, as defined in paragraph (c) of this Rule, to a lawyer or firm of lawyers licensed to practice law in Minnesota;

(2) The seller sends a written notification that complies with paragraph (d) of this Rule to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers.

(b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a *pro bono publico* basis or for a reduced fee.

(c) For purposes of this Rule, a practice is sold as an entirety if the buying lawyer or firm of lawyers assumes responsibility for at least all of the currently active files except those that deal with matters that the buying lawyer or firm of lawyers would not be

competent to handle, those that the buying lawyer or firm of lawyers would be barred from handling because of a conflict of interest, or those from which the selling lawyer is denied permission to withdraw by a tribunal in a matter subject to Rule 1.16(c).

(d) The written notification that the seller lawyer must send pursuant to paragraph (a)(2) of this Rule must include at a minimum:

(1) A statement that the law practice of the selling lawyer has been sold to the buying lawyer or law firm;

(2) A summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buying lawyer or members of the buying law firm has been in practice;

(3) A statement that the client has the right to continue to retain the buying lawyer under the same fee arrangement as the client had with the selling lawyer or to have the client's complete file sent to the client or to another lawyer of the client's choice.

(e) If the written notification described in paragraph (d) has actually reached the client through personal service or by certified mail, the notification may include a provision that states that if the client does not respond to the buying lawyer by ninety days from the date that the client receives the notification, the client's silence shall be deemed to be the client's waiver of confidentiality and the client's consent to the buying lawyer's representing the client in the matter that was the subject of the selling lawyer's representation. The client's failure to respond within that time shall be such a waiver and consent.

(f) The transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time.

(g) The selling lawyer shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice.

(h) For purposes of this Rule, the term "lawyer" means an individual lawyer or a law firm that buys or sells a law practice.

MSBA Committee Comment

[1] A representative of a deceased, disabled or disappeared lawyer may sell the lawyer's law practice under the same restrictions as imposed by this Rule. See Rule 5.4(a)(4).

[2] Rule 1.6 on Confidentiality of Information limits the amount and type of information that the selling lawyer may give to the potential buying lawyer during negotiations. Before the prospective buyer could see the client files the selling lawyer would be required to obtain from the affected client a waiver of confidentiality.

[3] The selling lawyer should consider extending malpractice insurance for some reasonable period of time following the sale to insure against losses arising from errors that might come to light after the sale.

11. If the foregoing amendment to Rule 1 is made, and Rule 1.17 is adopted, the following amendments to Rules 7.2(c) & 5.4 should also be made for the sake of consistency of the rules:

Rule 7.2 ADVERTISING AND WRITTEN COMMUNICATION

* * *

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule, and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization~~.~~, and may pay for a law practice that is sold in accordance with Rule 1.17.

Rule 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a)

* * *

(4) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

Rule 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

[No rule change proposed. An additional comment is recommended].

MSBA Committee Comment

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Voluntary Pro Bono Service

12. The legal profession has a long tradition of providing uncompensated legal services to people who cannot afford them and expects attorneys to provide those services as part of their conduct as members of the profession. This tradition is based in part on the unique and exclusive role of lawyers in our justice system and the recognition that meaningful access to our system of justice requires the assistance of a lawyer. This portion of this petition is brought to further this tradition by establishing a specific, aspirational goal of 50 hours of donated service per year as part of the rules of conduct governing all lawyers in the State of Minnesota.

13. The American Bar Association proposed amendments to the ABA Model Rules of Professional Conduct in 1993 to modify Rule 6.1 to include a nonmandatory, aspirational standard for pro bono legal services. The ABA model rule has formed the central foundation for the proposal set forth in this petition. Petitioner MSBA has studied the issues relating to model rule 6.1, and its Legal Assistance to the Disadvantaged Committee recommended to it adoption of the rule set forth below. In early 1995, the Hennepin County Bar Association and the Ramsey County Bar Association adopted resolutions supporting and encouraging the MSBA to petition this Honorable Court to amend Rule 6.1. The MSBA General Assembly of Petitioners voted in favor of a change in the rule at its June 23, 1995, meeting.

14. There is a significant unmet need of legal services available to the disadvantaged. The American Bar Association conducted a study in 1993 entitled *Comprehensive Legal Needs Study*. This study concluded that approximately half of all low-income households had one or more legal needs at any point in time and that nearly three-fourths of those legal needs are not finding their way into the justice system. In 1989, a study by the MSBA Legal Assistance to the Disadvantaged Committee entitled *Family Law: A Survey of the Unmet Need for Low-Income Legal Assistance* concluded that Minnesota legal services providers were able to provide full representation to only 27% of the persons contacting them for assistance with family law problems. Based on this survey's results, which the MSBA believes to be reasonably representative or even unduly optimistic of the current situation, nearly 10,000 individuals who are eligible are unable to obtain needed family law representation each year. Both this Court's Gender Fairness and Racial Bias Task Forces have also identified the unmet need for legal services as a serious problem in Minnesota. Petitioner MSBA is aware of efforts in Congress and elsewhere that would further curtail funding for legal services for the disadvantaged.

15. Despite the long history of lawyers providing pro bono legal services, petitioner MSBA believes that an amendment of Rule 6.1 to provide a nonmandatory, aspirational goal of 50 hours of service per year, with a clear definition of pro bono which focuses on legal services to persons of limited means, will encourage the legal profession of Minnesota to meet the public service expectations of the profession and provide more legal services to the disadvantaged. Petitioner believes this will enhance the administration of justice and the delivery of legal services for all Minnesotans.

16. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 6.1 of the Rules of Professional Conduct as follows:

6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

~~A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons or limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.~~

A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect the civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

MSBA Committee Comment

~~Every practicing lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and~~

personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. All practicing lawyers should aspire to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer than 50 hours but during the course of a legal career, each lawyer should aspire to render on average of 50 hours of service per year. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually be furnished to the disadvantaged without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means and otherwise contributing legal talents. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation

in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

17. Without endorsing or adopting the MSBA Committee Comments, Petitioner respectfully suggests that the Court include them in any amendments adopted pursuant to this Petition for the reason that they are likely to be of value to lawyers facing the situations governed by the rules.

WHEREFORE, Petitioner MSBA respectfully petitions this Court to:

1. Amend Rule 7.4 of the Minnesota Rules of Professional Conduct as set forth in paragraph 5 above.

2. Amend Rule 1 of the Minnesota Rules of Professional Conduct to adopt a new Rule 1.17 as set forth in paragraph 10 above, and adopt the companion amendments to Rules 7.2 & 5.4 of the Minnesota Rules of Professional Conduct as set forth in paragraph 11 above.

3. Amend Rule 6.1 of the Minnesota Rules of Professional Conduct, replacing the existing Rule 6.1, as set forth in paragraph 16 above.

Dated: August 22, 1995.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
Lewis A. Remele, Jr.
Its President

MASLON EDELMAN BORMAN & BRAND
A Professional Limited Liability Partnership

By _____
David F. Herr (#44441)
3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8350

ATTORNEYS FOR PETITIONER

RULE 1.7 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or to take possession of the file; and

(4) the fact that the client's consent to the sale will be prepared if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

Exhibit A
ABA Model Rule 1.7

Shields Legal Services, P.A.
ATTORNEYS AT LAW

33 Tenth Avenue South #110
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(612) 935-0666 Fax: 935-8956

November 9, 1995

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

RE: November 15 Hearing

Dear Mr. Grittner:

Enclosed please find an original and 12 copies of the Statement of Volunteer Lawyers Network, Ltd., in support of the MSBA petition to amend the Minnesota Rules of Professional Conduct.

As the former chair of Volunteer Lawyers Network (formerly known as Legal Advice Clinics), I would also like to make an oral presentation at the hearing scheduled for November 15, 1995, at 2:00 p.m. to speak in favor of the Model Rule 6.1.

Thank you.

Timothy J. Shields, Esq.

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

In Re:

The Petition of the Minnesota State Bar Association to amend the Rules of Professional Conduct

STATEMENT OF VOLUNTEER LAWYERS NETWORK

On behalf of the Volunteer Lawyers Network, Ltd., the undersigned submits this statement in support of the proposed amendments to the Minnesota Rules of Professional conduct. The undersigned is the immediate past Chairman of the Board of Volunteer Lawyers Network.

Volunteer Lawyers Network, is one of the nation's oldest and largest free-standing providers of pro bono legal services. The goal of the organization is to match indigent clients with volunteer lawyers from the private Bar. No lawyers are paid: It is true pro bono work, in the highest tradition of public service by legal professionals.

In Minnesota, VLN is an affiliate of the Hennepin County Bar Association, coordinating pro bono functions for the Bar and its 6500 member attorneys. Each year, VLN offers many varied opportunities for lawyers to do pro bono work ranging from telephone advice and clinic appointments, to representing clients in family and housing court hearings and trials.

VLN's funding comes from a variety of sources, but principally from the private Bar, including the Bar Association, law firms, foundations, corporations, and individual contributions. Less than Five-Percent of VLN's annual budget comes from the Legal Services Corporation.

The amendment of Rule 6.1 as proposed, does nothing more than encourage all lawyers to join the ranks of the lawyers who already volunteer their time through VLN and other similar organizations. It also provides the "push" needed to get some lawyers to look past their bottom line to their moral obligation as a professional.

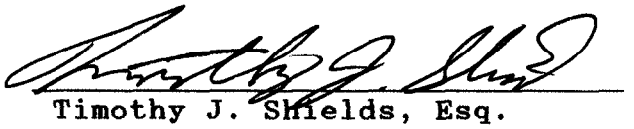
Member lawyers of VLN all come from the private Bar. Many of them had concerns about placing a non-rule into the Rules. Others had concerns about the "buy-out" provision and/or the ability for senior partners in large firms to require associates to do their pro bono for them. But, in the end, while perhaps not a perfect Rule, VLN's 40-lawyer Board voted unanimously to support the new Rule. Why? Because, in the final analysis, the new Rule will hopefully result in a greater delivery of pro bono legal services to the citizens of Minnesota. Donations to VLN should increase, and the number of volunteer lawyers should increase. If those events actually occur, more potential clients will be matched to lawyers. Fewer clients appear pro se, more families get the legal help they often desperately need.

The Court must be aware that the best and only solution to meeting the now unmet need of low and moderate income citizens for legal services is the private bar. Our society could not afford, and will not afford, to hire and pay enough lawyers through organizations like Legal Aid to meet the needs of all those who cannot otherwise afford a lawyer. It is the private bar, through organizations in Minnesota like VLN, and with cooperation from the courts, that will have to be the final solution, if a solution is ever to be reached. The proposed Rule 6.1 will, hopefully, go along way in assisting VLN to help lawyers to help others.

On behalf of Volunteer Lawyers Network, I urge the Court to approve the Petition and amend Rule 6.1.

Dated: November 10, 1995

VOLUNTEER LAWYERS NETWORK, LTD.



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♦

EDMUND P. BABCOCK - of Counsel
LANDOL J. LOCHER - of Counsel

October 20, 1995

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

As a member of the Minnesota Bar and in response to the request for written statements on the proposed amendment of the Rules of Professional Conduct presented by the Petition of the Minnesota State Bar Association, with particular reference to the Sale of Law practice, I wish to make the following comments.

While I am in favor of the proposed amendment, I have questions as to its applicability to the sale of partnership interests upon the termination of a partnership interest by reason of death, disability or withdrawal.

Assume a Partnership Agreement, which provides that a partner may withdraw from the partnership or will be deemed to have withdrawn upon his death or disability. The Partnership Agreement further provides that upon such withdrawal the withdrawing partner will be paid a termination price which has accumulated over the duration of the partnership. This termination price is predicated on existing accounts receivable, work in process, equipment, and capital acquisitions. The partner withdraws and is paid his termination price. Will this constitute a sale of law practice?

As we presently understand the law, in such instance, the clients of the law firm, serviced by the withdrawing partner, have a choice of either staying with the partnership or going with the withdrawing partner. They need to be so notified of that choice upon a termination. We further understand that under present law the partnership cannot impose a noncompetition or restrictive covenant on the withdrawing partner relative to the practice. The only recourse is to provide for some reduction in the termination price in the event a competitive practice is established. It is difficult to define a competitive practice as it relates to

existing clients or geographic areas. Will the proposed amendment change this situation? Will the partnership now be able to restrict the withdrawing partner's practice in time and place? Will the partnership have the right to prevent the withdrawing partner from soliciting existing clients? Can the law firm and the withdrawing partner send a letter which indicates that the withdrawing partner will not continue to service the existing clients even if that is their choice?

Will the new amendment protect a law firm upon withdrawal of the partner, head of a specialty department, from taking that block of business, particularly if there is a sale and transfer of a partnership interest involved? It would appear that if this amendment passes, it should be applicable to the purchase of a partnership interest by the other partners or partnership. It should not be left exclusively to the sale of an independent practice.

We believe that the proposed amendment should be modified to include a statement that makes clear that it applies to the sale and purchase of partnership interest by the existing partnership or other partners within the same partnership.

Respectfully submitted,

Felix A. Mannella

FAM:dc

ARTH LAW OFFICES
MARK ARTH

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November 4, 1995

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

C8-84-1650

OFFICE OF
APPELLATE COURTS

NOV - 6 1995

FILED

Re: Proposal of MSBA to amend Rule 7.4 of the Minnesota Rules of Professional Conduct

Dear Mr. Grittner:

I have been advised that a hearing has been scheduled for November 15, 1995 at 2:00 pm before the Minnesota Supreme Court on a petition of the MSBA to amend the above rule. Since I reside in Florida and will not be present for that hearing, I am providing 12 copies of this statement and attachments which comprise my analysis of the MSBA's proposed actions.

The attached reflects the problems the MSBA has had with their current rule and why it proposals to amend Rule 7.4 of the Minnesota Rules of Professional Conduct.

The State Board of Legal Certification recently lodged a complaint against me with the Office of Lawyers Professional Responsibility. The essence of the formal complaint filed with the Office of Lawyers Professional Responsibility is setforth in the following comment attached to the August 3, 1994 letter of Ms. Margaret Fuller Corneille, Director of the Minnesota Board of Legal Certification,:

> "Minnesota has no tax certification program. While Mr. Arth may be certified by the Florida Board as a tax attorney, Minnesota Rule of Professional Conduct 7.4(b) provides that a "lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board of (sic) entity which is approved by the State Board of Legal Certification." The Board found that the rule contemplate (sic) the "State Board of Legal Certification: to mean the Minnesota Board of Legal

> Certification and that it does not permit the attorney to substitute some other state as the certifying entity. **The Florida Board is able to apply for status as a certifying program in Minnesota, but it has not done so.** [emphasis added]

Though it is somewhat difficult from the above language to decipher the exact nature of this Board's complaint, apparently the idea is that this particular Minnesota Board feels it is somehow exceptionally competent and the Florida Bar is not to be trusted. This "complaint" was dealt with effectively in the three page opinion issued by the Office of Lawyers Professional Responsibility (also attached hereto). If the Minnesota Board of Legal Certification was dissatisfied with this opinion, they had the right to appeal.

Instead of appealing, they decided to try to effect a change in the rule. However, their **NEW PROPOSED RULE IS JUST AS DEFECTIVE AS THE OLD RULE. THEY STILL JUST DON'T GET IT!**

I assume that everything attached hereto is superfluous since this background information should have been supplied to the Court by the Minnesota Board of Legal Certification since ethics require that the Court be provided with all adverse authority directly on point.

Please try to explain to this Board what the Office of Lawyers Professional Responsibility was trying to tell them in the attached.

Sincerely,

Mark Arth

Mark Arth

MA/ms
enclosures: as stated above
12 Copies as required

In the Matter of the Complaint of
BOARD OF LEGAL CERTIFICATION
ATTN: MARGARET FULLER CORNEILLE, DIRECTOR
One West Water Street, Suite 250
St. Paul, MN 55107
against MARK A. ARTH
319 Ramsey Street
St. Paul, MN 55102,
an Attorney at Law of the
State of Minnesota.

NOTICE OF INVESTIGATION PURSUANT TO RULE 8(a), RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY (RLPR)

TO: BOARD OF LEGAL CERTIFICATION:

Your complaint has been received. It will be investigated, as provided by Rule 8(a), RLPR. You will be contacted if further information is required. You will receive written notice of the final decision.

In accordance with Rule 6(b), RLPR, your complaint will be investigated by an attorney in this Office. If you have any questions or further information, please contact the Assistant Director named below.

This Office can only investigate complaints of unethical conduct and take appropriate action. We cannot represent you in any legal matter or give you legal advice. You must retain your own attorney if you need legal advice or representation.

TO: THE ABOVE-NAMED RESPONDENT ATTORNEY OR RESPONDENT'S COUNSEL:

Enclosed is a copy of the complaint identified above, which is being investigated without referral to a district ethics committee. **Please provide copies of the following documents: your certification, the application you completed for the certification, the criteria and/or standards used for the certification, and a description of the qualifications of the certifying organization.**

Pursuant to Rule 25, RLPR, and Rule 8.1(a)(3), Minnesota Rules of Professional Conduct, please respond completely to the complaint in a writing mailed to the undersigned within 14 days of this notice.

Thank you in advance for your cooperation.

Dated: August 23, 1994.

MARCIA A. JOHNSON
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
520 Lafayette Road, Suite 100
St. Paul, MN 55155-4196
(612) 296-3952

By Karen A. Risku
Karen A. Risku
Senior Assistant Director

THE SUPREME COURT OF MINNESOTA

BOARD OF LAW EXAMINERS
BOARD OF CONTINUING LEGAL EDUCATION
BOARD OF LEGAL CERTIFICATION

One West Water Street, Suite 250, St. Paul, Minnesota 55107
(612) 297-1800 • FAX (612) 296-5866 • TDD (612) 282-2480

Margaret Fuller Corneille, Esq., Director

August 3, 1994

Ms. Marcia A. Johnson
Director
Lawyers Professional Responsibility Board
520 Lafayette Road, #100
St. Paul, Minnesota 55155

Dear Ms. Johnson:

The Minnesota Board of Legal Certification has reviewed the attorney listings from the Yellow Pages advertisements of the Minneapolis, St. Paul and Twin Ports phone directories. The advertisements listed below appear to violate Rule 7.4 of the Minnesota Rules of Professional Conduct.

At its recent meeting, the Board voted to request that your office investigate the advertisements and inform the Board as to the outcome of each investigation.

Thank you for your cooperation.

Very truly yours,

MINNESOTA BOARD OF LEGAL CERTIFICATION

Margaret Fuller Corneille
Director

MFC:sie

Minneapolis Yellow Pages - July 1993/1994

Attorney:	Mark Arth
Firm:	Arth Law Offices
Questionable text in advertisement:	"Florida Board Certified Tax Lawyer

Minnesota has no tax certification program. While Mr. Arth may be certified by the Florida Board as a tax attorney, Minnesota Rule of Professional Conduct 7.4 (b) provides that "a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board of other entity which is approved by the State Board of Legal Certification." The Board found that the rule contemplate the "State Board of Legal Certification: to mean the Minnesota Board of Legal Certification and that it does not permit the attorney to substitute some other sate as the certifying entity. The Florida Board is able to apply for status as a certifying program in Minnesota, but has not done so.

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.

-Real Estate (Cont'd)

LEVY JEFFREY A PA

Complete Real Estate Law Service

RESIDENTIAL / COMMERCIAL / RENTAL
• Purchase • Sale • Contracts • Mortgages
• Partnerships • Title Exams & Title Problems
• Leases • Financing • Closings • Sales By Owners
Free initial consultation
Telephone inquiries welcome
CONVENIENT LOCATION - FREE PARKING
Suite 1200 The Colonnade
5500 Wayzata Blvd St Louis Pk ——— 546-5605

LEWIS MICHAEL J APPRAISER/ATTORNEY
Real Property-Appraisals & Tax Appeals
81 So 9th Street #400 Mpls ——— 336-4318

LEIBMAN ROBERT

REAL ESTATE
YOUR STEP-BY-STEP GUIDE

• RESIDENTIAL-COMMERCIAL • LITIGATION
• PURCHASES-SALES • LEASES
• TITLE OPINIONS • CLOSINGS

REASONABLE RATES
593-2333
Interchange Tower (free parking)
Hwy 169 & 394 St. Louis Pk

MARSHALL AND ASSOCIATES PA
See Our Ad Under Attorneys-Civil Rights
9501 Lexington Av N Circ Pines ——— 784-0890
McLagan Clinton R
Capital Centre St Paul ——— 222-5000
MEAGHER & GEER
Karl J Yeager
Multifoods Tower ——— 338-0661
METROPOLITAN REAL ESTATE CLOSERS INC
7900 International Dr ——— 851-0888
PEDERSON MICHAEL D
103 W 2 St Chaska ——— 448-9950
Pribble William C
13100 Wayzata Blvd Mtka ——— 593-0041
Price David A
1900 Silver Lake Rd New Brghtn ——— 636-1500

PUGH WILLIAM C

WILLIAM C. PUGH

ALL AREAS OF REAL ESTATE LAW

PERSONALIZED, PROFESSIONAL SERVICE

6800 France Av S Edina ——— 929-6171

RADUNZ DOUGLAS P
431 S 7 St-Suite 2410 ——— 337-5353
RANUM MARY S 900 2 Av S ——— 347-7072
ROSENBERG ROBERT M
120 South 6th St-Suite 2500 ——— 349-5290
SALITERMAN & SIEFFERMAN
1000 Northstar Center East ——— 339-1400

SANDAHL SUZANNE M

BLOOMINGTON AV & LAKE ST
REAL ESTATE LAWYER
Deeds • Closings • Contracts • Leases
Title Exams • Purchases • Foreclosures
1518 E Lake St Suite 210 ——— 722-2693

SCHOONOVER JOHN H
11666 Wayzata Blvd Mtka ——— 541-0459
Silberman Edward B 1111 3 Av S ——— 375-1064
SINGER GERALD M PA
6009 Wayzata Blvd St Louis Pk ——— 525-0053
Smith Bradley 4635 Nicols Rd Eagan ——— 454-8440
STACKER HOWARD G 900 2 Av S ——— 347-7112
Stewart Zlimen & Jungers
430 Oak Grove St ——— 870-4100
STROMME LORRAINE G
2415 Foshay Tower ——— 338-1015
SYVERSON BRADLEY P L 900 2 Av S — 347-7125
THORFINNSON THOMAS M OF HARVEY & THORFINNSON
6640 Shady Oak Rd Edn Prairie ——— 941-1040

THORSEN BRADLEY C

REAL ESTATE LAW
COMMERCIAL & RESIDENTIAL
Certified as a Real Property Law Specialist by the Minnesota State Bar Association
701 4th Av S Suite 500 ——— 337-9562

THORSON STEVEN G

NORTHWEST SUBURBS
COMPLETE SERVICES FOR ANY REAL ESTATE MATTER
9353 Jefferson Hwy Maple Grove ——— 493-3999

Title Cure PO Box 3813 ——— 870-0741

VESELY MILLER & STEINER PA
HOPKINS AREA
• Residential - Commercial Real Estate
• Purchase Agreements Closings
• Leases Financing
• Construction & Land Development
400 Norwest Bank Bldg Hop ——— 938-7635

WARCHOL BERNDT & HAYEK

RESIDENTIAL & COMMERCIAL

35 W & Industrial Blvd ——— 331-4211

WILHELMY THOMAS R 900 2 Av S ——— 347-7058

-Securities

Lapp Laurie Libra Abramson & Thomson Chartered 120 South 6th Street ——— 338-5815
Please See Advertisement This Page
Pribble William C
13100 Wayzata Blvd Mtka ——— 593-0041
Risk Analytics ——— 928-9568

SECURITIES LAW

HAS YOUR STOCKBROKER OR FINANCIAL PLANNER TAKEN ADVANTAGE OF YOU?
FOR ADVICE REGARDING:
• SECURITIES ARBITRATION
• SECURITIES LITIGATION
CALL
WILLIAM S. LAPP
FREE INITIAL CONSULTATION
338-5815
LAPP, LAURIE, LIBRA, ABRAMSON & THOMSON CHARTERED
SUITE 1800 - ONE FINANCIAL PLAZA
120 SOUTH 6TH STREET MPLS

-Social Security

AATA-WEXLER LAW ASSOC
Denied Disability? Call Us
Hwy 394 & 169 St Louis Park ——— 546-4400
Fishman Fay E 3009 Holmes Av S ——— 827-8123
FOSTER CURTIS H
Workers' Compensation/25 Years Experience
Grain Exchange Bldg ——— 339-2711
GOLDFARB AND ASSOCIATES A PROFESSIONAL ASSOCIATION
No Fee Until You're Paid
5353 Wayzata Blvd St Louis Pk ——— 546-8888

KASZYNSKI WILLIAM P PA

SOCIAL SECURITY DISABILITY
Experienced Representation
NO RECOVERY - NO FEE
298-1000
SUITE 1424E FIRST NATL BANK BLDG

KINNEY LAW FIRM THE

Angry With SOCIAL SECURITY

CAN'T WORK?
WE CAN HELP!
NO RECOVERY - NO FEE
• Free Consultation • Free Parking
• We Only Do Social Security
527 Marquette S ——— 349-9220

Krieser Peter J 600 Hwy 169 St Louis Pk — 541-1090
Leppanen Ann K
Interchange Tower St Louis Pk ——— 541-0600

LEVIN FRANK W
25 YEARS EXPERIENCE
SOCIAL SECURITY DISABILITY
NO RECOVERY - NO FEE
HANDICAPPED ACCESSIBLE
Plymouth Building ——— 344-1810

MAGEE GERALD C 24 Dell Pl ——— 871-4600
Midwest Disability Services Anoka ——— 422-3770

ORR WILLIAM L
SOCIAL SECURITY DISABILITY
WORKERS COMPENSATION
PERSONAL INJURY
CONTINGENT FEE
31 Years of Experience
Norwest Midland Bldg ——— 338-8299

TRAWICK & SMITH 100 S 5 St ——— 338-4621
Zweifel Jeffrey
8800 Hwy 7 Suite 203 St Louis Park ——— 935-9690

-Sports

GOLDEN JOEL C
FULL RANGE OF LEGAL SERVICES FOR ATHLETES
CONTRACT NEGOTIATIONS - LITIGATION
3400 West 66th St ——— 920-0571

HITCHCOCK LAW FIRM
1445 Arcade St St Paul ——— 772-3401
TAYLOR F CHET 900 2 Av S ——— 347-7051
ZIMMERMAN/REED
5200 Norwest Center ——— 341-0400

-Taxes

AHL VICKI M LAW OFFICES
INCOME, ESTATE & GIFT TAX PLANNING & LITIGATION
CPA/ATTORNEY
FORMER IRS & MN DEPT. OF REV.
8800 Hwy 7 Suite 408 Mpls ——— 931-9398

Albers Greg H 2605 E Cliff Rd Brnsvl ——— 894-889

ARTH LAW OFFICES-MARK ARTH
OVER 20 YRS. EXP. CIVIL & CRIMINAL TAX
STATE, FEDERAL, CORPORATE & INDIVIDUAL
7 Yrs. With IRS (4 Yrs. Appeals Div.)
Audits • Appeals • Trials
Collection & Planning • Business Restructuring
MN. CPA Plus FLORIDA
& BOARD CERTIFIED TAX LAWYER
319 Ramsey SC St Paul ——— 222-3761

BERNICK & LIFSON PA

CIVIL & CRIMINAL
IRS & MINNESOTA
AUDITS - APPEALS
TRIALS
PAYMENT PROGRAMS
SETTLEMENT
BANKRUPTCY
• INCOME • SALES
• WITHHOLDING
SAUL BERNICK - CPA & FORMER IRS ATTORNEY
NEAL SHAPIRO - FORMER FEDERAL PROSECUTOR
PAUL QUAST - CPA
Suite 1200 The Colonnade
5500 Wayzata Blvd St Louis Pk ——— 546-1200

CRAWFORD BRUCE H
HELP WITH TAX PROBLEMS
OVER 20 YEARS EXPERIENCE
BUSINESS / INDIVIDUAL
STATE / FEDERAL TAX
AUDITS / APPEALS
COLLECTIONS / TRIALS
374-4662
5005 OLD CEDAR LAKE RD ST LOUIS PK

Davern McLeod & Pezalla
7500 Olson Memorial Hwy Gldn Vly ——— 545-5600
DRAKE KATHLEEN
Income, Estate, & Gift Tax Planning
4703 Golf Terr Edina ——— 929-7026
Frankman Leland J
Real Estate Taxes Only
1000 Northstar East Bldg ——— 375-1600
Heers & Heers 80 S 8 St ——— 341-9449
Hendrickson John W
13100 Wayzata Blvd Mtka ——— 593-0041

(Continued Next Page)

319 RAMSEY STREET
SAINT PAUL, MINNESOTA 55102
(612) 222-3761
FAX: (612) 222-2607

ARTH LAW OFFICES

MARK ARTH

ADMITTED TO PRACTICE LAW
IN FLORIDA AND MINNESOTA

Address Correspondence to:
Florida ☒ Minnesota ☐

240 N. WASHINGTON BLVD., STE. 318
SARASOTA, FLORIDA 34236
(813) 366-1809
FAX: (813) 957-1226

September 8, 1994

Ms. Karen A. Risku
Senior Assistant Director of the Office of Lawyers
Professional Responsibility
520 Lafayette Road, Suite 100
St. Paul, MN 55155-4196

PRIORITY MAIL

In re: Ms. Fuller-Coneille's complaint about disclosure of my Florida Board Tax Law Certification status

Dear Ms. Risku:

Enclosed you will find a copy of my Florida Certificate as a Board Certified Specialist in Tax Law and a copy of the application which I submitted. The exam and criteria/standards are set forth in the enclosed Directory of Board Certified Attorneys. Please return the Directory.

Ms. Fuller-Corneille's complaint appears to be that unless the Florida Bar Association applies to her for her approval of their certification process, I am not permitted to disclose to anyone in Minnesota that I am a Florida Board Certified Tax Attorney. Following that logic, I assume she would also want both the Florida and California Bars to apply to her to obtain her approval prior to it being disclosed to anyone in Minnesota that I am either a Florida or California lawyer.

I had considered including a response to that position, but will not do so since the law in this area is already crystal clear. Enclosed in a synopsis of the U.S. Supreme Court's June 13, 1994 unanimous opinion in Ibanez.

By copies of this letter, both the Florida Bar and the California Bar are being advised of this "Complaint" and being supplied with a copy of it as required by their rules. I apologize to both organizations for any time they or their staff may have to devote to this matter.

Sincerely,

Mark Arth

Mark Arth

MA/ms
enclosures: as stated above
cc: California Board of Bar Examiners
The Florida Bar

FILE COPY

leading to Howlett's injury. Some crew members, who might have held positions such that their knowledge should be attributed to the vessel, might have observed the plastic being placed under the bags during the loading process. The court's additional theory that the condition would have been open and obvious to the stevedore during unloading had it been obvious to the crew may also prove faulty, being premised on the vessel's state of affairs during loading, not discharge. Of course, the vessel may be entitled to summary judgment, since there is evidence that the plastic was visible during unloading, and since Howlett must demonstrate that the alleged hazard would not have been obvious to, or anticipated by, a skilled and competent stevedore at the discharge port. Pp. 13–14.

998 F. 2d 1003, vacated and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

LEGAL ADVERTISING, FREE SPEECH, FIRST AMENDMENT

Censoring Advertising Is Incompatible With Protection Of Speech

IBANEZ *v.* FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 93–639. Argued April 19, 1994—Decided June 13, 1994

Petitioner Ibanez is a member of the Florida Bar; she is also a Certified Public Accountant (CPA) licensed by respondent Florida Board of Accountancy (Board), and is authorized by the Certified Financial Planner Board of Standards (CFPBS), a private organization, to use the designation "Certified Financial Planner" (CFP). She referred to these credentials in her advertising and other communication with the public concerning her law practice, placing CPA and CFP next to her name in her yellow pages listing and on her business cards and law offices stationery. Notwithstanding the apparent truthfulness of the communication—it is undisputed that neither her CPA license nor her CFP authorization has been revoked—the Board reprimanded her for engaging in "false, deceptive, and misleading" advertising. The District Court of Appeal of Florida, First District, affirmed.

Held: The Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action. Pp. 5–13.

(a) Ibanez' use of the CPA and CFP designations qualifies as "commercial speech." The State may ban such speech only if it is false, deceptive, or misleading. See, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 638. If it is not, the State can restrict it, but only upon a showing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. See, *e.g.*, *Central Hudson Gas & Electric* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 564, 566. The State's burden is not slight: It must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. See, *e.g.*, *Edenfield* v. *Fane*, 507 U. S. ___, ___. Measured against these standards, the order reprimanding Ibanez cannot stand. Pp. 5–7.

(b) The Board asserts that Ibanez' use of the CPA designation on her commercial communications is misleading in that it tells the public she is subject to the Florida Accountancy Act and to the Board's jurisdiction "when she believes and acts as though she is not." This position is insubstantial. Ibanez no longer contests the Board's assertion of jurisdiction over her, and in any event, what she "believes" regarding the reach of the Board's authority is not sanctionable. See *Baird* v. *State Bar of Arizona*, 491 U. S. 1, 6. Nor can the Board rest on the bare assertion that Ibanez is unwilling to comply with its regulation; it must build its case on specific evidence of noncompliance. It has never even charged Ibanez with an action out of compliance with the governing statutory or regulatory standards. And as long as she holds a currently active CPA license from the Board, it is difficult to see how consumers could be misled by her truthful representation to that effect. Pp. 7–8.

(c) The Board's justifications for disciplining Ibanez based on her use of the CFP designation are not more persuasive. The Board presents no evidence that Ibanez' use of the term "certified" "inherently mislead[s]" by causing the public to infer state approval and recognition. See *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (attorney's use of designation "Certified Civil Trial Specialist By the National Board of Trial Advocacy" neither actually nor inherently misleading). Nor did the Board advert to key aspects of the designation here at issue—the nature of the authorizing organization and the state of knowledge of the public to whom Ibanez' communictions are directed—in reaching its alternative conclusion that the CFP designation is "potentially misleading." On the bare record made in this case, the Board has not shown that the restrictions burden no more of Ibanez' constitutionally protected speech than necessary. Pp. 8–13.

621 So. 2d 435, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court with respect to Part II–B, and the opinion of the Court with respect to Parts I, II–A, and II–C, in which BLACKMUN, STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined.

EMPLOYEE WAGES, LABOR CODE, NATIONAL LABOR RELATIONS ACT

State Policy Is Pre-empted By Federal Law

LIVADAS *v.* BRADSHAW, CALIFORNIA LABOR COMMISSIONER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–1920. Argued April 26, 1994—Decided June 13, 1994

California law requires employers to pay all wages due immediately upon an employee's discharge, Labor Code §201; imposes a penalty for refusal to pay promptly, §203; and places responsibility for enforcing these provisions on the Commissioner of Labor. After petitioner Livadas's employer refused to pay her the wages owed upon her discharge, but paid them a few days later, she filed a penalty claim. The Commissioner replied with a form letter construing Labor Code §229 as barring him from enforcing such claims on behalf of individuals like Livadas, whose employment terms and conditions are governed by a collective-bargaining agreement containing an arbitration clause. Livadas brought this action under 42 U. S. C. §1983, alleging that the nonenforcement policy was pre-empted by federal law because it abridged her rights under the National Labor Relations Act (NLRA). The District Court granted her summary judgment, rejecting the Commissioner's defense that the claim was pre-empted by §301 of the Labor-Management Relations Act, 1947 (LMRA). Although acknowledging that the NLRA gives Livadas a right to bargain collectively and that §1983 would supply a remedy for official deprivation of that right, the Court of Appeals reversed, concluding

---

In the Matter of the Complaint of
BOARD OF LEGAL CERTIFICATION
Attn: Margaret Fuller Corneille, Director
One West Water Street, Suite 250
St. Paul, MN 55107
against MARK A. ARTH,
an Attorney at Law of the
State of Minnesota.

DETERMINATION THAT DISCIPLINE IS NOT WARRANTED

TO: Complainant and the Respondent Attorney Above-Named:

Based upon the entire file the Director of the Office of Lawyers Professional Responsibility hereby determines that discipline is not warranted pursuant to Rule 8(d)(1), Rules on Lawyers Professional Responsibility. A memorandum stating the basis for the determination is attached.

NOTICE OF COMPLAINANT'S RIGHT TO APPEAL

If the complainant is not satisfied with this decision, an appeal may be made by notifying the Director in a letter postmarked no later than fourteen (14) days after the date of this notice. The letter of appeal should state the reason(s) why the complainant disagrees with the decision. An appealed decision will be reviewed by a designated Lawyers Professional Responsibility Board member, whose options are limited to (1) approving this decision; (2) requiring further investigation; or (3) if it appears that public discipline is warranted, directing that the case be submitted to a hearing panel. This determination will generally be based upon the information which is already contained in the file.

Dated: October 25, 1994.

MARCIA A. JOHNSON
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
520 Lafayette Road, Suite 100
St. Paul, MN 55155-4196
(612) 296-3952

By 
Kenneth L. Jorgensen
First Assistant Director

MEMORANDUM

The Minnesota Board of Legal Certification (BLC) forwarded a copy of an advertisement placed by respondent in the July 1993/1994 Minneapolis U.S. WEST Direct Yellow Pages to the Director for investigation. BLC questions the following portion of respondent's advertisement: "Florida Board Certified Tax Lawyer." BLC believes that respondent's advertisement violates Rule 7.4(b), Minnesota Rules of Professional Conduct (MRPC), because Minnesota has no tax law certification program and the Florida Board of Legal Specialization and Education has not applied to the Minnesota Board for approval as a certifying program in Minnesota.

The U.S. Supreme Court has ruled that truthful lawyer advertising related to lawful activities is entitled to First Amendment protection. *In re RMJ*, 455 U.S. 191 (1982). Because truthful, relevant information may assist consumer decision making, only false, deceptive, or misleading commercial speech may be banned. *See e.g. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). In 1983 the Minnesota Supreme Court held that DR 2-105(B) of the Minnesota Code of Professional Responsibility prohibiting a lawyer from holding himself or herself out as a specialist was unconstitutional. *In re Johnson*, 341 N.W.2d 282 (Minn. 1983). In 1985 the Minnesota Supreme Court promulgated Rule 7.4(b), MRPC, which provides that "a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification."

Since Minnesota's adoption of Rule 7.4(b), the U.S. Supreme Court has considered state regulation of attorney advertising regarding specialist certifications. In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S. Ct. 2281 (1990), the attorney (Peel) used professional letterhead stating his name followed by the notation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" (NBTA). DR 2-105(a)(3) of the Illinois Code of Professional Responsibility provided that no lawyer may hold himself out as "certified" or as a "specialist" except in the fields of admiralty, trademark and patent law. The U.S. Supreme Court held that Peel had a First Amendment right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist by the NBTA. The U.S. Supreme Court noted that neither the Illinois Disciplinary Commission nor the Illinois State Supreme Court made any factual finding of actual deception or misunderstanding, but rather concluded, as a matter of law, that Peel's claims of being "certified" as a "specialist" were necessarily misleading absent an official state certification program. The Court further stated:

> Even if we assume that [Peel's] letterhead may be potentially misleading to some consumers, that potential does not satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public .... We do not ignore the possibility that some unscrupulous attorneys may hold themselves out as certified specialists when there is no qualified

> organization to stand behind that certification. . . . To the extent that potentially misleading statements of private certification or specialization could confuse consumers, the state might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of specialty. (citation omitted.) A state may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA.

Peel, 110 Sup. Ct. at 2293.

In addition, the U.S. Supreme Court recently reversed the Florida Board of Accountancy's reprimand of an attorney for including her credentials as a CPA (Certified Public Accountant) and CFP (Certified Financial Planner) in her advertising. *See Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 114 S. Ct. 2084 (1994). The Accountancy Board, in pertinent part, argued that Ibanez' use of the CFP designation was misleading because:

> [A]ny designation using the term 'certified' to refer to a certifying organization other than the Board itself (or an organization approved by the Board) 'inherently mislead[s] the public into believing that state approval and recognition exists.'

Id. at 2088.

The Court disagreed, however, and found that the Accountancy Board had not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' advertisement or that any harm could have resulted from allowing it to reach the public's eyes. *Id.* at 2086. *See also Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (striking down Florida ban on CPA solicitation where Board "presents no studies that suggest personal solicitation . . . creates the dangers . . . the Board claims to fear" nor even "anecdotal evidence . . . that validates the Board's suppositions") and *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985) (striking down restrictions on attorney advertising where "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind"). In doing so, the Court stated:

> Given 'the complete absence of any evidence of deception,' the Board's 'concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.' (citations omitted).

Ibanez, 114 S. Ct. at 2090.

Here, respondent's advertisement clearly does not represent that he is certified by the Minnesota Board of Legal Certification. The advertisement does represent (and BLC does not allege the representation is untruthful) that respondent is certified by the Florida Board. The Florida Board requires that practicing lawyers meet professional and educational requirements before they are certified as a "Board Certified Tax Lawyer." In addition, applicants must provide written recommendations of five practicing lawyers.

Respondent was admitted to practice law in Minnesota in 1974 and in Florida in 1989. Respondent was employed by the IRS from 1971 through 1977 and has been engaged in the private practice of law since 1978. Respondent states that in addition to practicing in the tax law area, he has taught courses and published articles regarding tax law. Finally, respondent provided a copy of his certification from the Florida Board.

Respondent's truthful statement that he has been certified by the Florida Board provides potentially beneficial information to consumers of legal services (i.e. legal consumers seeking an attorney who is experienced and educated in tax law). Moreover, given the number of Minnesotans who also reside in Florida, it is entirely likely that persons in Minnesota might have a need for a tax attorney who is also familiar with Florida tax law. There is no allegation or evidence that actual deception or misunderstanding has occurred as a result of respondent's advertisement. Moreover, the possibility that the public could be misled into believing that respondent's tax certification was a Minnesota BLC certification is insufficient to rebut the "presumption favoring disclosure over concealment." *Ibanez*, 114 S. Ct. at 2090. This is especially true where BLC has not approved a tax law certification organization. Accordingly, a finding that discipline is not warranted must be made.

K.L.J.

Hennepin County Bar Association

Jane L. Schoenike
Executive Director

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Fax 612-340-9518

November 9, 1995

Mr. Frederick Grittner, Clerk
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN. 55155

Dear Mr. Grittner:

Enclosed herewith please find 12 copies of a letter of support from the Hennepin County Bar Association for the petition of the Minnesota State Bar Association, In re: Amendment of the Rules of Professional Conduct, No. C8-84-1650. The HCBA may request permission to make a brief oral statement at the hearing on November 15. I will contact you on Monday, November 13 to ask if time may be available. We are trying to resolve a schedule conflict for that afternoon.

If you have any questions, please call me at 340-0022.

Sincerely,

Jane L. Schoenike

Jane L. Schoenike