STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

ORDER FOR HEARING TO CONSIDER PROPOSED
AMENDMENT 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 April 12, 1993 at 9:00 a.m., to consider the petition of the Minnesota State Bar Association to amend Rules 7.2 and 7.3 of the Minnesota 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, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before April 9, 1993 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 April 9, 1993.

Dated: February 22, 1993

BY THE COURT:

A.M. Keith
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT

In re: File No. C8-84-1650

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

PETITION OF MINNESOTA STATE BAR ASSOCIATION

1. Petitioner Minnesota State Bar Association ("MSBA") is a not-for-profit corporation of attorneys authorized to practice before this Honorable Court and the other courts of this 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 Minnesota Rules of Professional Conduct ("Rules") governing attorneys-at-law practicing in the State of Minnesota.

4. In 1991 the MSBA established a committee to consider issues and problems arising under the existing Rules. That committee studied the issues, reviewed communications from lawyers, judges, and members of the public, and issued recommendations in the form of a Final Report.

5. The MSBA accepted the Final Report in part and adopted certain resolutions relating to amendment of the Minnesota Rules of Professional Conduct by action of its House of Delegates on June 27, 1992, at its annual convention held in Rochester. This Petition to this Court was authorized and endorsed at that time.

6. The MSBA has considered numerous complaints about misleading advertisements to the public where the existing Rules were inadequate and ill-suited for the protection of the public. The amendments proposed in this Petition are those deemed necessary and appropriate, and do not include various changes recommended but deemed unnecessary or inappropriate limitations on advertising.

7. The MSBA respectfully recommends and requests this Court to amend the Minnesota Rules of Professional Conduct, and specifically Rules 7.2 and 7.3, as follows:

Rule 7.2 Advertising and Written Communication

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, ~~such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television,~~ or through written communication.

* * *

(f) A lawyer may not advertise for or solicit clients by any means for the purpose of referring those clients to another lawyer who is not a partner, associate, or employee of the advertising or soliciting lawyer without disclosing in the advertisement or solicitation that such a referral may or will be made. The disclosure must be worded substantially as follows: "You are advised that your case may be referred to another firm or attorney not directly associated with this law firm. You are further advised that this firm will receive a portion of any fee you ultimately pay to the firm doing the actual legal work on your behalf. The specifics of this fee arrangements will be disclosed to you in detail in the retainer agreement this firm will provide for you to sign."

(g) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable.

(h) Advertisements and 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 from the recovery, if the lawyer so intends to compute the fee.

(i) The word "ADVERTISEMENT" must appear clearly and conspicuously at the beginning of, and upon any envelope containing, any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.

~~(e)~~(j) Every lawyer associated with or employed by a law firm which causes or makes a communication in violation of this Rule may be subject to discipline for

failure to make reasonable remedial efforts to bring the communication into compliance with this Rule.

Rule 7.3 ~~Direct~~In-Person and Telephone Contact with Prospective Clients
[Change only to title of rule].

8. The requested change is justified and appropriate to establish more explicit standards relating to lawyer advertising and to remove confusion that occurs under the rules as now articulated.

9. Petitioner would like to have an opportunity to respond to any comments,

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Honorable Court to adopt the recommendations of the MSBA by:

1. Amending Rules 7.2 and 7.3 of the Minnesota Rules of Professional Conduct as set forth above;

2. Allowing Petitioner an opportunity to file a supplemental memorandum in response to any submissions made by any persons in response to the publication of this Petition and any Order for public hearing; and

3. Allowing Petitioner time at any public hearing ordered on this Petition to address the court on behalf of its positions.

Dated: This 25th day of January, 1993.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
Robert A. Guzy (#38957)
Its President

By _____
R. Bertram Greener, Chair (#37503)
MSBA Lawyer Advertising Committee
514 Nicollet Mall, Suite 301
Minneapolis, Minnesota 55402
(612) 333-1183

Petitioner

MASLON EDELMAN BORMAN & BRAND

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

Attorneys for Petitioner

MURRIN LAW FIRM

John O. Murrin III
Civil Trial Specialist
Certified by Minnesota State Bar Association

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Rebecca A. Bly
John F. Markert
Jeffrey N. Herman
Leann C. Vergeldt

Sherry Skogrand
Paralegal

Jeanene M. Hayes
Director of Administration

March 29, 1993

Frederick Grittner
Clerk of the Appellate Court
245 Judicial Center
25 Constitution Avenue
Saint Paul, MN 55155

Re: Amendments to Rules of Professional Responsibility
Regarding Attorney Advertising Disclosures
Court File No. C8-84-1650

Dear Mr. Grittner:

Enclosed please find 12 copies of the Request to Make Oral Presentation and 12 copies of the Response to Proposed Chagnes in Rules of Professional Responsibility By Attorney John O. Murrin.

Very truly yours,

John O. Murrin

Enc.

JOM/jh

STATE OF MINNESOTA
IN SUPREME COURT
C8-84-1650

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

REQUEST FOR ORAL PRESENTATION BY ATTORNEY JOHN O. MURRIN

John O. Murrin, requests the opportunity to make an oral presentation regarding the issue of restrictive disclosures being considered for attorney advertising.

Dated 3-31-93

Respectfully submitted,

John O. Murrin
Attorney at Law
4018 W 65th St.
Edina, MN 55435
(612) 925-3202
Attorney I.D. #7679X

STATE OF MINNESOTA
IN SUPREME COURT
C8-84-1650

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

RESPONSE TO PROPOSED CHANGES IN RULES OF PROFESSIONAL RESPONSIBILITY BY ATTORNEY JOHN MURRIN

John O. Murrin, Attorney at Law, makes the following as his written statement concerning the proposed amendments to the Minnesota Rules of Professional Conduct:

The Minnesota Bar Association has petitioned the Court to amend the Rules of Professional Responsibility to require some restrictive wording in advertisements placed by lawyers. I believe these restrictions are unnecessary, cumbersome, and will not serve the best interest of the public.

The Bar Association has requested the following language be a required part of each advertisement placed by a lawyer:

> "You are advised that your case may be referred to another firm or attorney not directly associated with the law firm. You are further advised that this firm will receive a portion of any fee you ultimately pay to the firm doing the legal work on your behalf. The specifics of this fee arrangement will be disclosed to you in detail in the retainer agreement this firm will provide for you to sign."

and, if applicable:

> "We take some cases on a contingent fee basis; you should be advised that you will be liable for expenses regardless of the outcome. You should also realize that our fee will be a percentage of a recovery and that this percentage will be computed after expenses are deducted from recovery."

If this language were required to be read into every radio commercial, it would take a minimum of 20 seconds of advertising

time (35 seconds if both paragraphs needed to be included), leaving little time for the actual message the attorney wishes to convey. If it were part of a television commercial, it would most likely be in such small print or scanned across the screen in such a hurry that it would be unreadable. To allow time for it to be read aloud, would leave no time in a 30-second commercial for the actual advertisement message.

Aside from these concerns, the issue is whether such restrictive statements are necessary in advertisements? These restrictions, if the Court believes them to be necessary, belong in an attorney's retainer agreement. Perhaps the Court wishes to have attorneys require clients to specifically initial these two paragraphs so that the client's attention is directly drawn to these provisions when retaining an attorney.

I have been advertising legal services since 1977. For our particular organization, the proposed language would cause nothing but confusion. We advertise that we do general practice. Personal injury is part of that practice, but it is not our exclusive practice. Therefore, it would be nearly impossible to include this language and still let the public know that we will assist them in divorce, criminal, bankruptcy, personal injury, and other areas of law.

The question that needs to be asked when considering the amendments is will this serve the best interest of the public? As the attached article indicates, the image of the Bar is actually improved by advertising. It is attorneys who are against advertising and want restrictions imposed, not the public. Rather

than trying to restrict advertising, the Bar Association should be supportive and encourage creativity in advertising. It can do this by rewarding effective, positive advertising.

The proposed restrictions are not necessary and will not serve the best interest of the public. In fact, the public appears to have little complaint with lawyer advertising. Most complaints made about lawyer advertising to the Board of Professional Responsibility are made by other lawyers, not the general public. The Court should not make these amendments part of the Rules of Professional Responsibility.

Dated 3-31-93

Respectfully submitted,

/s/

John O. Murrin
Attorney at Law
4018 W 65th St.
Edina, MN 55435
(612) 925-3202
Attorney I.D. #7679X

ALTERNATIVE PERSPECTIVES TO LEGAL SERVICES ADVERTISING: ATTORNEYS VERSUS CONSUMERS

By: Bob Cutler, Ph.D.; Kurt Schimmel, MBA; and Raj Javalgi, Ph.d.
Note: The authors are Marketing faculty at the College of Business Administration, Cleveland State University.

Within universities, marketing faculty have displayed increasing interest in the marketing of legal services--especially since the 1977 case permitting lawyer advertising. We reviewed 15 academic marketing studies that examined what consumers and attorneys think about the advertising of legal services. We found that, in general, attorney attitudes toward advertising are negative while consumer attitudes are positive. We further found that attorney attitudes are slowly shifting toward congruence with consumers. For a profession that maintains direct contact with their consumers, we were surprised to find both the disparity in attitudes, and the slow rate of change.

Further, we suggest that the negative attitudes toward advertising reported by attorneys are based upon notions of "lofty ideals and traditions", and are maintained through a form of "corporate culture" within the legal community. Alternatively, the positive attitudes reported by consumers are based upon very practical "real life" problems where there is a desire for information to minimize the perceived risk associated with the purchase of a professional service.

Attorney Attitudes

From the late 1880s through 1930, advertising was in a boom period. The techniques for designing effective advertising were becoming popular, the public was optimistic and receptive, and there were few restrictions on what could be said or done in an ad.

In 1908, the American Bar Association reacted to this free-wheeling environment by including a provision in its first cannons of ethics that encouraged the states to ban all advertising by lawyers. This ban continued until it was overruled by the U.S. Supreme Court in 1977 in *Bates v. Arizona Bar*. This prohibition on the practice of advertising strengthened and reinforced the attitude that advertising was an unethical practice.

Over the years, these negative attitudes were passed along within the legal profession and became incorporated into the corporate culture of most firms. Not surprisingly, studies show that older attorneys hold more negative attitudes toward advertising than younger attorneys. In addition, attorney surveys indicate that those who advertise are perceived as "less established."

The culture of a law firm starts development based on the values of the founding partners. Successive partners, and new hires, are selected with similar value systems that "fit" with the firm.

The apprentice-like status of new attorneys generally succeeds at deeply ingraining the firms' philosophy and ideals. Mentor relationships further support the firm's culture.

This process provides the young attorney with both work experience and insights into the roles that members of the firm should assume as they aspire to partner status. It is during this learning process that the new attorney's attitudes begin to coalesce with those espoused by the firm. The more motivated the new attorney is to move up the ranks the more quickly the attorney's attitudes will mold to fit the firm.

The Consumer Perspective

Because legal services are often abstract, if not in the end result, at least in the process, consumers have difficulty in evaluating the value of the services. Most consumers also have only limited experience in dealing with attorneys, particularly for personal services, and consequently have difficulty in evaluating the outcome of the service performed. For these reasons, the decision of which attorney to choose from is a high-involvement, high-risk process. Research has demonstrated that consumers consider the purchase of a service as more risky than the purchase of a product. This feeling of high risk translates into a high anxiety level for the consumer making such a decision.

Continued on page 4

Continued from previous page

The circumstances under which this service is provided further heighten consumers' feelings of anxiety. Consumers generally do not contact an attorney until substantial feelings of fear/anger have developed. This situation is quite unlike the decision to employ a dentist--where the greatest fear is one of temporary physical pain.

There are several tactics for dealing with increased risk in decision making. The first is to increase information search activity. If more information can be gathered and evaluated prior to choosing an attorney, then the risk of a poor choice should be reduced. Another tactic for dealing with increased risk in decision making is to notice and evaluate peripheral cues, such as the demeanor of the attorney's support staff. Peripheral cues are evaluated, as a substitute for performance, in hopes that these cues are correlated to performance and can be used as substitute measures.

Consumers see the advertising of legal services primarily as a means for them to increase their information search. Several studies provide support for this view, finding that advertisements containing higher information content are evaluated more favorably.

Word-of-mouth recommendations (referrals) are another source of information for consumers. Advertising has been found to augment the effects of referrals. One study compared the effects of exposure to advertising alone, referral alone, and the combination of advertising and referral. The findings indicate that the combination increases a consumer's perception of the professionalism of the firm.

The media in which an advertisement is run can also affect consumer attitudes. It has been found that favorable attitudes toward a specific media may be transferred to the advertisements within that media. Newspaper advertisements are an example of this, with consumers perceiving newspapers to be current and credible sources of information.

To state that consumers' attitudes are positive toward attorneys' advertising in all media would be incorrect. The literature suggests that consumers have slightly negative attitudes regarding advertising in certain media. The media most negatively perceived for legal services advertising are: television, radio, and billboards. These are also the media where a greater range in the quality of presentation can be observed.

Print media, however, are relatively less expensive and production quality tends to be more uniform. Thus, it is worth questioning whether negative attitudes of consumers toward legal service advertising on television or radio may be due to the relatively poor quality of advertising for those services on TV and radio.

Implications

The resistance to advertising within many law firms appears to have a corporate culture base. Those firms wishing to now introduce advertising into their client development activities will need to take several steps. An in-house values examination will generally reveal the existence and strength of such a corporate culture. If such a culture exists and the firm's partners have decided that advertising is valuable, a program must be undertaken to start the slow process of changing the attitudes toward advertising.

Firms often develop multiple values within their corporate culture. If one of the values held within corporate culture is the need for creative, innovative, approaches to solving the problems faced by clients, then this can be used to aid in changing the culture. Presenting advertising as innovative may position it as completely in line with the major elements of the culture, and this would provide assistance in facilitating change.

An internal marketing program focusing on the positive results of advertising can be undertaken and continued until advertising is perceived more positively. While the internal marketing program is being undertaken, slowly increasing the firm's marketing activity will mitigate the "shock" effects of the firm suddenly advertising. An example of this would be purchasing a listing in the Yellow Pages or sending satisfaction inquires to current clients. These activities are not terribly obtrusive and should meet little resistance.

If a firm is currently using television advertising, and the attorneys' attitudes toward the advertisements are negative, it may be that production quality is not meeting their expectations. Production quality in this media is often a function of the advertising budget, and if funds are not available to increase quality a different approach should be taken.

See page 5, Alternatives

Alternatives, continued from page 4

Law firms are not alone in advancing cultural bias against advertising. Since the corporate culture of the legal profession is first formulated in the lawyer's educational process, law schools can play an important role -- one which can be changed by including marketing within law school curriculums.

The law firm corporate culture bias against advertising and marketing practices is frequently inconsistent. Many firms have adopted strategic marketing plans using a broad series of client development techniques such as public relations, firm brochures, presentation of seminars, publication of newsletters and acknowledged sponsorship of civic and cultural events. While these tools serve the same purposes as media-based advertising, they are acceptable within the culture of many firms.

Conclusion

The legal profession has addressed the question of advertising from a myopic perspective. The focus has been divided between how the legal profession views its own advertising, and how this advertising should be regulated. This approach prevents attorneys from addressing the question from a marketer's perspective: What do consumers thing about legal services advertising?

Lawyer Advertising News

The Newsletter of the ABA Commission on Advertising

American Bar Association, Commission on Advertising
541 N. Fairbanks Ct., Chicago, IL 60611

February, 1993, issue

and marketers of legal services.

The book and both supplements can be ordered from the Commission on Advertising, 541 N. Fairbanks Ct., 15th Fl., Chicago, IL 60611-3314, 312/988-5758 or ABA Order Fulfillment, 312/988-5555.

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April 6, 1993

MR FREDERICK K GRITTNER
CLERK OF APPELLATE COURT
MINNESOTA JUDICAL CENTER
25 CONSTITUTION AVENUE
ST PAUL MN 55155

Re: Attorney Advertising, Proposed Rules 7.02 and 7.03

Dear Mr. Grittner:

Pursuant to my telephone conversation with Julie on this date, enclosed find the original and 12 copies of Mr. Schneider's Objections to Proposed Rules 7.02 and 7.03.

Thank you for your attention and consideration to this matter.

Sincerely,

SCHNEIDER, JOHNSON & BANNON

Diana J. Anderson
Legal Assistant

/ms
Enclosures

RON\RULES.LTR

OBJECTIONS TO PROPOSED RULES 7.02 AND 7.03

After careful review of proposed Rules 7.02 and 7.03, we have serious reservations about both, and we have chosen to share our objections with the Court.

The fundamental objection to the proposed Rules is that they are unconstitutional. Under *Bates v. State Bar of Arizona*, 97 S. Crt. 2691, 433 U.S. 350, states may not forbid truthful, non-misleading advertising by attorneys. We believe that the proposed rules fail the *Bates* standards in several respects. First, an advertisement promulgated for the purpose of referring clients to another lawyer may be truthful and not misleading in the absence of the disclaimer proposed. Suppose that a law firm places a billboard which indicates words such as "practicing in the area of personal injury, products liability, and workers compensation." Suppose that the firm does in fact so practice, but occasionally refers all or part of their cases to another firm. There has been nothing misleading about such an advertisement yet it would be forbidden under the proposed rules.

In order to pass the First Amendment "*Bates* test," any Rule restricting the First Amendment right to advertise must be directed against more than a hypothetical abuse of the right to advertise. It must be directed against actual or probable instances of misleading advertising. Consider *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 105 S. Crt. 2265, 471 U.S. 626. In that case, an attorney placed an illustration in a newspaper representing an intrauterine device. The advertisement

implied that the firm would handle actions against companies improperly manufacturing such devices. The court held that since there was nothing in the illustration which was likely to deceive, mislead, or confuse, the State had the burden of showing that (1) there was a substantial government interest justifying the restriction as applied to the *advertising attorney*; and (2) to demonstrate that the restriction furthered that interest through the least restrictive means available. Applying *Zauderer* to the sorts of advertisements which would arguably violate 7.02 or 7.03 or both, the Supreme Court would be in effect, promulgating a blanket requirement for a disclaimer which would apply to virtually every attorney advertising in the area of personal injury law in order to prevent the rare case where a lawyer harbors a "secret intent" to take unfair advantage of a client.

The important lesson of *Zauderer* is that regulations which restrict advertising are presumptively unconstitutional, and this presumption can be overcome only by evidence that the practice regulated poses a real and concrete threat to the public. The possibility that a certain form of advertising might mislead, the hypothetical chance that the public could receive a wrong impression, or the speculative existence of a scenario where an advertisement might be misinterpreted is insufficient to overcome that presumption.

In the case of Rules 7.02 or 7.03, there is little if any concrete evidence of deception, confusion, or public dissatisfaction with lawyer advertising as it currently appears.

What, then, is the harm the regulations are intended to obviate? Presumably the possibility that a member of the public does not know that the lawyer might recommend that the client's case be referred out. But such a potential 'harm' would exist even were there no attorney advertising and clients selected attorneys on the basis of rumor. The question really is, how are advertisements without the proposed disclaimers 'misleading' and what evidence is there that anyone reading them has been misled? And the answer is: there is virtually no such evidence, nor is it likely that such evidence could be obtained. If that is so, the presumption of unconstitutionality has not been overcome.

The proposed regulation fails the *Bates* test in yet another respect. It is possible that the Supreme Court may disagree with the analysis presented above. But the Supreme Court is likely to be required to rule on the constitutionality of these rules in its judicial capacity. Since any restriction on truthful, non-misleading lawyer advertising raises serious First Amendment issues, if Rules 7.02 and 7.03 are adopted, a case involving the violation of these Rules is likely to come before this Court. When it does, the very Court which effectively will have passed on constitutionality will be asked to review the constitutionality of the regulations *de novo*.

It is a violation of the principle of separation of powers to allow the same body which promulgates a Rule to judge that very Rule's constitutionality in a case or controversy. Indeed, to ask the Court to pass on a case involving the

constitutionality of these rules would place it in a position where there is danger of violating Code of Judicial Conduct 3(1). Obviously, the inclination of a court to follow its previous determination will be strong, just as the inclination of a legislative body to assume the constitutionality of its own statutes would be strong were the legislative body given a judicial function. But a legislature has no such function; so if proposals like Rule 7.02 and Rule 7.03 are to be promulgated at all, they should be enacted as statutes by the Minnesota legislature, not instituted as rules by judicial fiat.

In connection with this, Minnesota does not allow its courts to render so-called 'advisory opinions' upon the constitutionality of statutes. How ironic it would be if the Supreme Court, which would surely not be party to adoption and the promulgation of rules deemed by it to be unconstitutional, should take it upon itself to pass on the constitutionality of rules with important substantive impact through the process of adopting them. To be sure, the court has the right to promulgate Rules of Professional Responsibility. But these rules generally relate to widely-accepted principles of ethical practice, not trade restrictions, and rarely touch upon serious constitutional issues. In this case, the proposed Rules have as their primary impact the regulation of commercial practices, and constitutional challenges to the regulations of such activities are serious and inevitable.

Yet another constitutional failing of the proposed Rules is that they are vague and overbroad. Proposed Rule 7.02 begins,

"A lawyer may not advertise for or solicit clients by any means for the purpose of referring those clients to another lawyer . . .." What does "for the purpose of" mean? Narrowly construed, it would mean that the lawyer violates the Rule only if he has a present intent to refer the case produced by the advertising to another attorney or firm when the advertising occurred. In the case of broad, generalized advertising such as is placed on billboards or in the yellow pages, the Rule would be essentially meaningless upon such a reading. There will be at least some clients who are attracted to an attorney by an advertisement but whom the attorney will not refer to any other lawyers. So on this narrow interpretation, an attorney does not "intend" to refer the case to another firm unless his or her only legal business consists of acting as a "client broker." Essentially, there are no such lawyers; such practices are prohibited already.

If the provision is construed broadly, it would prohibit the sort of advertising under consideration if an attorney <u>might</u> refer out a client who was induced to seek that firm's advice by reading or hearing an advertisement. Now, it is always <u>possible</u> that a firm may refer out business. It may turn out that a particular client's case is too complicated for the advertising attorney to handle alone. The attorney may suffer an illness, unanticipated at the time of the advertisement; the client may have a legal difficulty so arcane that, midway through a lawsuit, the advertising lawyer realizes that he or she needs help. How will that lawyer know this will happen in advance? More importantly,

how is the lawyer going to know it in advance *in every case*? What happens if the attorney advertises without the proposed disclaimer and determines halfway through the case that all or part of it should be referred to another firm? Is the lawyer barred from making the referral? Is he or she barred from collecting a fee even if the office has devoted years to the client's cause?

Since the disciplinary question, when it arises, is likely to revolve around an attorney's intent at the time the advertisement was made, the lawyer's fate is going to be determined by an *ex post facto* determination by the Board on Professional Responsibility. Will the Board use the "narrow" interpretation or the "broad" interpretation? Since the broad interpretation is probably unconstitutional, and the narrow interpretation is essentially meaningless, what principled standards will it use for determining a middle ground? And if such standards have been foreseen, why are they not written into these Rules, and formulated as part of them? It must be remembered that because lawyer advertising is inherently legal, and a restriction on it is not only a restraint of trade but a violation of the First Amendment, the presumption is in favor of a narrow construction of Rules like 7.02 and 7.03. If the United States Supreme Court follows this principle, then precisely what are these Rules accomplishing other than creating a chilling effect among lawyers who might otherwise wish to publish advertisements which are neither false nor misleading?

Because the proposed Rules are a restraint of trade, they

block useful and necessary channels of public information. As the Supreme Court said in *Bates*, an important policy purpose underlying legal advertising is the importance of disseminating useful information to the public concerning its rights and the rights of its members for access to remedies and redress. In the instant case, the burden of the proposed Rules would fall upon plaintiff's lawyers because defense lawyers are much less inclined to solicit business through print or other media advertising. Such firms have other, less overt means of obtaining business. Since the proposed rule has a disparate impact on different classes of lawyers, the court should be very hesitant about discriminating among legitimate classes of legitimate practitioners.

The defense bar has been zealous in its attempts to use restrictions on attorney advertising as a means of restricting plaintiff's access to redress. For example, in the defense bar newsletter "The Reformer," January 1993, the American Tort Reform Association states:

> There are lots of reasons why Americans are so much more litigious that others. - An attitude that insurers and other big organizations are fair game. ("It's no crime, or at worst a victimless crime, to filch a bite from a cat. - The contingent fee. ("Let's take a flyer. It won't cost anything.") - and lawyer advertising. Especially lawyer advertising.
>
> This is a subject which needs your attention. Find out what, if anything, has been done or is being proposed in your state. Find out if it is as effective as the Florida Rules. Then make yourself heard. Urge associations in your state to put Florida-style regulations of lawyer advertising high on their agenda: the State Bar, the Chamber of Commerce, the Manufacturer's Association, the Defense Lawyers Association, the Medical Society, the Accounting Society, and other professional societies, trade associations,

civic groups. Here is a chance to nip lawsuit abuse in the bud.

(See copy attached hereto.)

One group's "lawsuit abuse" is another group's "denial of redress." The function of courts is to referee such disputes in cases and controversies, not to take sides *ex ante*. To do the latter threatens the court with a loss of impartiality. If anybody should take sides, it should be the state legislature, to which both sides may contribute input in the rough-and-tumble of political discourse.

An insidious by-product which would likely result from the adoption of proposed Rules 7.02 and 7.03 is the dilution in the moral authority of the Board on Professional Responsibility. The impact of the proposed Rules will fall most obviously upon relatively small law firms whose case load requires them to refer some of their cases to lawyers or firms having the resources or the expertise to deal with the matter under consideration. Already the burden of disciplinary action falls disproportionately upon such firms, because they are at the bottom of the legal "food chain." But these are also the law firms most likely to have initial contacts with the relatively impoverished, unsophisticated, and unrepresented segments of our society. Hence, the burden of "making the law" within the interstices of these vague and general Rules will fall upon those lawyers with the least resources available to present their cases. Such lawyers are under-represented on the Lawyers Professional Responsibility Board and in

the inner sancta of the organized bar. Because of these realities, and because of the Professional Responsibility Board's usually - commendable zeal in enforcing a strict interpretation of Rules, the practical effect of 7.02 and 7.03 will be to have an in terrorem effect on the exercise of First Amendment rights by the very group of lawyers who most need to employ the rights which the First Amendment bestows, acting on behalf of the class of clients who needs it most.

Further, it puts the Board of Professional Responsibility in the position of acting as *de facto* advocates for a particular class of lawyers in restricting the economic activities of another class of lawyers. There then becomes a strong incentive on the part of both classes to insure interpretations from the Board consistent with that class's economic interests. When a Rule operates (as it is intended to operate) in the economic interests of one class of attorneys and against the economic interests of another, the Board will be asked to enforce disciplinary action based upon largely political and economic considerations. This makes political decision-making by the Board inevitable, and politization of the Board is an inexorable by-product.

Moreover, the proposed Rules address a problem which does not exist. The McKay report on lawyer regulation does not mention any problems of ethical practice which arise from advertising. There is no public clamor for a restriction on legal advertising. There is no groundswell of client complaints that their cases are being referred to other attorneys. Current ethical standards allow

a case to be referred to another attorney or firm. No lawyer would seriously challenge the wisdom of this practice. When a client comes to an attorney as a result of reading or hearing an advertisement, the lawyer is ethically bound to indicate whether he or she believes that the firm possesses the necessary expertise and resources to take the case. At the first interview, the attorney usually has a good idea of whether partial or total referral will be appropriate.

Under currently existing standards, therefore, attorneys have a duty to tell the client either that: (1) they will take the case and handle it individually or in conjunction with members of his or her firm; (2) they cannot take the case because it is too complex, and perhaps recommend firms capable of handling such litigation; (3) it will be necessary to refer out part of the litigation, indicating the arrangement that the attorney is going to have with the referral firm, and indicate the client's rights to decline to engage the referral firm or the attorney being consulted; or (4) indicate the possibility that all or part of the case may require referral later, with relevant information about that process being provided to the client. If an attorney does these things, he or she is in compliance with the Rules, and with good practice. If the attorney does not do these things, or the one which is appropriate under the circumstances, then the attorney is violating existing standards. No additional consumer protection is provided by requiring the attorney to state this sort of thing in advertising copy.

Insofar as the potential client is influenced by the existence of a disclaimer, the client would be disinclined to seek the services of a lawyer with the disclaimer vis-a-vis a lawyer whose advertising contains no such disclaimer. Since Rule 7.02 literally requires a disclaimer only if the attorney has a present purpose to refer the client's case, many attorneys may be inclined to leave off the disclaimer and take the risk that the Board will adopt the "narrow" interpretation of these Rules. So a competitive advantage will be given to those who are willing to risk disciplinary action. If all attorneys are required to use the disclaimers, regardless of purpose (and Rules 7.02 and 7.03 do not say this explicitly) then the practical effect would be to discourage clients from seeking plaintiff's attorneys generally. Since many of these individuals have an excellent claim for redress, surely it is socially improvident to encourage this sort of result. And in any event, such a result is a direct violation of the spirit of *Bates*.

The Court should be aware of the consequences of these rules. They will effectively outlaw billboard advertising, for example. True, attorneys could hide the necessary disclaimers in "ten point type," but the defense bar would soon persuade the Board of Professional Responsibility that the Rules imply that the disclaimers be made readily visible. If they are, they will take up most of a good sized billboard and the effect of such language is to contradict the message the attorney is attempting to convey. Plaintiffs' lawyers are not cigarettes. They should not have to

impeach themselves in public.

CONCLUSION

The proposed Rules take a partisan position in a politico-economic dispute between special interest groups. Until now, the purpose of the Canons of Ethics has been to protect the public, not to prefer one class of lawyers over another. Admixing ethical strictures with economic restrictions erodes the moral authority of the Rules of Professional Responsibility. By endorsing restrictions on non-deceptive, truthful, legal advertising, the Supreme Court is becoming a participant in a political dispute. Most certainly, the American Tort Reform Association is more than a casual observer. This sort of involvement should be avoided by public bodies at all cost; and if it cannot be avoided, it is the function of the legislature and not the courts to take action.

Respectfully submitted,

SCHNEIDER, JOHNSON & BANNON

Ronald H. Schneider, P. A.
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ATTORNEYS FOR PLAINTIFF

DIANA\RULES7.2&3

ATRA

The Reformer

1212 New York Avenue, N.W. • Suite 515 • Washington, D.C. 20005 • (202) 682-1163

January 1993

Dear ATRA Member:

We hope to see you at ATRA's annual Legislative Conference, which will be held this year at the Grand Hyatt Hotel, 1000 H Street, N.W., Washington, D.C., on February 3. The Conference will start with breakfast at 8:15 a.m. and adjourn about 1:00 p.m. You'll find a program and response form enclosed with this issue.

We are very excited that Barry Keene, the new President of the Association for California Tort Reform, California's tort-reform coalition, has agreed to be the keynote speaker. Until just a few weeks ago, Barry (a Democrat) was the Majority Leader of the California Senate. He is probably best known to ATRA's general membership as the author and sponsor of California's very effective Medical Injury Compensation Reform Act ("MICRA") of 1975. We are sure you will want to hear his reflections on the politics of California tort reform now that he has moved to the private sector. As you know, one of the major legislative battles of 1993 will be the plaintiff bar's attempt to gut MICRA. We trust that Barry will have something to say about that!

The purpose of this annual kick-off event is to tell you about ATRA's plans for 1993 and alert you to the 1993 legislative outlook. Since our success in 1993 depends largely on you, it is important that you attend.

The English Rule

At 2 p.m. on February 2, the day before the Conference, we are hosting a Symposium on the "English Rule." Adoption of a "loser pays" principle was probably the most controversial of the Bush Administration's civil justice reform proposals. ATRA's membership is so divided on the matter that we have decided to air all sides of the issue in an informal discussion. The experts will be there. We hope you will attend and participate too. If you would like to bring a guest, please do. We only ask that you and your guests "rsvp" promptly. There is no charge for the Symposium or the reception which will follow.

Professor Thomas Rowe of the Duke University Law School, who knows as much about the subject as anyone alive, will lay out the pros and cons. His conclusion, we suspect, will be con. Walter Olson, whose book *The Litigation Explosion* put the English Rule on the reform agenda, will come to its defense. Stuart Gerson, Assistant Attorney General of the United States, will explain why the Bush Administration included the English Rule in its reform proposals and will share with us whatever second thoughts he has as he returns to the private sector. Judge William Schwarzer, Director of the Federal Judicial Center, is a critic of the English Rule who will propose an alternative fee-shifting measure.

Lawyer advertising

There are lots of reasons why Americans are so much more litigious than others. -- An attitude that insurers and other big organizations are fair game. ("It's no crime, or at worst a victimless crime, to filch a bit from a fat cat.") -- The contingency fee. ("Let's take a flier. It won't cost anything.") -- And lawyer advertising. Especially lawyer advertising.

Lawyers spend a lot of money advertising. That won't come as a surprise to anyone who has ever turned on a TV set or looked at a billboard, but ATRA has been interested in finding out just how much lawyers spend. So, earlier this year, the Texas Public Policy Foundation, with our encouragement, sponsored a study of lawyer advertising in Texas. The study was done by the Center for Economic Development and Research at the University of North Texas and reached these principal conclusions:

- Advertising expenditures by lawyers in Texas during 1992 were $87,673,000.

- Personal injury lawyers account for 85% of lawyer advertising in Texas.

- Fewer than 20% of Texas personal injury lawyers account for almost all of the 85%.

Lots of money! We couldn't begin to guess what lawyers spend for advertising nationally, but the number must be huge. A single personal injury lawyer in Florida admits to spending almost $500,000 a year on TV advertising.

Lawyers have a right to advertise, but they have no right to mislead the consumer. In April 1991 Florida led the way by adopting rules to protect the consumer against deceptive lawyer advertising. Florida now bars lawyers from running ads that use dramatizations, testimonials, endorsements, jingles, self-laudatory statements or multiple voices. Any person featured in an ad must be a lawyer with the firm that is advertising. Most important, all ads must include a disclaimer saying that advertising is not the best way to choose a lawyer.

Since 1991 seven states have followed Florida's lead and put restrictions on lawyer advertising. Nine more states have proposals pending which would incorporate some of Florida's restrictions. About 20 other states are at some stage of considering such rule changes.

This is a subject which needs your attention. Find out what, if anything, has been done or is being proposed in your state. Find out if it is as effective as the Florida rules. Then make yourself heard. Urge associations in your state to put Florida-style regulation of lawyer advertising high on their agenda: the state bar, the chamber of commerce, the manufacturers' association, the defense lawyers' association, the medical society, the accounting society, other professional societies, trade associations, civic groups. Here's a chance to nip lawsuit abuse in the bud.

Medical liability in 1993

President-elect Clinton promises that comprehensive health-care reform will head the list of action items as he takes office. This opens a window of opportunity for enactment of federal medical liability reform. We must quickly establish the point that any effective health-care reform must

include effective reform of the medical liability system. If we dilly-dally, we run the risk either of letting the window close or of getting "reform" we don't want.

We at ATRA have a number of serious concerns on this score. One is that those who are most directly affected by medical liability are likely to be fully preoccupied with larger issues of health-care access and cost containment. Another is that it will be difficult for health care providers, with many different and sometime conflicting interests, to develop consensus and mobilize their forces quickly. And finally we fear that it will be difficult for some organizations, particularly those which feel that their members are uniquely affected by the tort liability system, to "yield turf" to a broad-based coalition.

ATRA has been a member from its start of the National Coalition for Medical Liability Reform and of its Working Group. We urge all our members, not only health-care providers but all those concerned with health-care cost, to join NCMLR. It will meet next in Washington on January 29. Call us for the time and place. Call us too if you would like a copy of NCMLR's legislative proposal.

Although ATRA is focused primarily on state legislation, it will do whatever it reasonably can to assist the cause of federal medical liability reform. (We have some relevant experience and expertise. In earlier incarnations, ATRA's President was Washington Counsel for General Electric and its Executive Vice President was Legislative Assistant to Senator Larry Pressler.) What is "reasonable" depends on membership interest and support. Please give us the benefit of your advice and counsel. Call Marty Connor or Diane Swenson at (202) 682-1163.

Product liability in 1993

Product liability reform is high on ATRA's agenda. We hope to see legislation enacted in Texas early in the upcoming session. There are other states too where we expect significant product liability reform this year. You'll hear all about it on February 3. What's up in your state?

There are a number of essential components of any effective product liability reform bill: fair standards of liability for manufacturing, design and warning defects, fair standards of liability for retailers and wholesalers, a regulatory compliance defense, a reasonable statute of limitations and statute of repose. Then there are generic reforms which bring fairness to product liability: joint and several liability, the collateral source rule, punitive damages.

We are reminded of the importance of statutes of repose by an item in the current issue of *The Binder*, a newsletter of the Aviation Insurance Association. In Cleveland v. Piper, a plaintiff is suing on the ground that the sixty-year-old design of the Piper Cub is unsafe. The complaint says that a pilot flying this antique has trouble seeing straight ahead when taxiing and has no shoulder harness. What ever were they thinking of back in the 30's!

Statutes of repose are often unfairly maligned. A statute of limitations says you must bring a lawsuit within a fixed number of years after your injury. A statute of repose says you must bring a lawsuit within a fixed number of years after a product which caused your injury was first sold.

There is nothing we hear more frequently from manufacturers, especially very small manufacturers, than the need for a statute of repose. A manufacturer should

not be liable for harm caused by a product after it has been out of the manufacturer's control for some considerable time (for example, ten years). Similarly, a service provider should not be liable for injuries occurring years after the fact.

A very distinguished torts scholar, Professor James A. Henderson, Jr., of the Cornell Law School, has written in defense of the statute of repose: "Asked to judge the product as of the time it was distributed many years ago, jurors attempting to do justice but lacking a time travel device face a hopeless task."

Records are gone. People are gone. In the case of products, others have been servicing and maintaining them for years. The passage of time has taken its toll. Public attitudes and expectations have changed. Clearly there is a point in time when it becomes fundamentally unfair to hold the supplier of a product or service responsible for an injury.

Signs of the times

Did you see George Will's column in *Newsweek* on December 14? Here's a sample of recent events that he reports:

- A seven-year-old California girl brings a sexual harassment action. Seems the boys on her school bus use "naughty words."

- A Florida woman's claim for damages for stress from having to work beside "large black males" is upheld.

- A Massachusetts fireman sues his department (and wins) for the distress it caused him by firing him after he clubbed his wife and fractured her skull. It turns out, since his behavior was clearly aberrant, that he is a victim of "handicap discrimination."

- A 17-year-old Maryland girl goes out for football and is injured in the first scrimmage. She sues the school district for $1.5 million because no one warned her "of the potential risks of serious injury inherent in the sport."

- A Princeton student sues the university for injuries received from high-voltage electrical apparatus when he climbs onto the roof of a railway station it owns.

- Brown University spends $50,000 defending a suit brought by a young woman who claims she injured her arm on a soap dish while showering with her boyfriend.

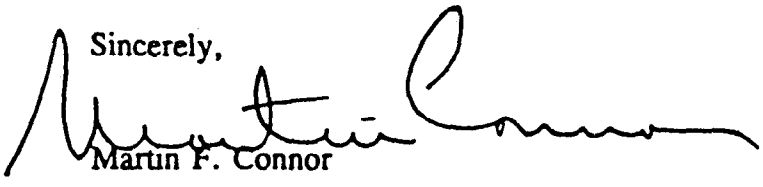
- The University of Alaska is ordered to pay $50,000 to a student who slid down a snowy hill in an inner tube and hit a tree.

Mr. Will finds something disturbing in all this. We admit that it does make one stop and think!

* * * * *

We are looking forward to a very exciting year at ATRA. We'll tell you all about it on February 3. See you there!

Sincerely,



Martin F. Connor

HALVERSON WATTERS BYE DOWNS REYELTS & BATEMAN, LTD.
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DULUTH, MINNESOTA 55802-1801

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March 30, 1993

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

Dear Mr. Grittner:

Enclosed are twelve copies of a written statement for the April 9 hearing.

Sincerely yours,

Don L. Bye

Don L. Bye

DLB:tlh
Encs.

March 29, 1993

TO: THE HONORABLE CHIEF JUSTICE A.M. KEITH AND MEMBERS OF THE COURT

Dear Chief Justice and Members of the Court:

I was a member of the MSBA Lawyer Advertising Committee that dealt with the subject matter of lawyer advertising.

I believe that I attended and actively participated in every meeting of that Committee.

I personally would have much preferred a stronger Committee report, and approval of more change at the State Convention. However, the modest change represented by the proposed rule amendments now before you is a step in the right direction.

Unrestricted and inappropriate advertising is cheapening our profession.

We must either police ourselves, and soon, or others in society will do it for us.

Sincerely yours,

Don L. Bye

Don L. Bye

C8-84-1650

JOHN H. BRADSHAW LAW OFFICES

TRIAL LAWYERS

P.O. BOX 559

EDEN VALLEY, MINNESOTA 55329-0559

(612) 453-6645

ATTORNEYS
JOHN H. BRADSHAW
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LEGAL ASSISTANTS
DEBRA H. MAYER
JULIE M. KUMMET

April 7, 1993

Frederick K. Grittner
Clerk of Appellate Courts
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

RE: April 12, 1993 Hearings before the Supreme Court regarding Attorney Advertising.

Dear Mr. Grittner:

This is to confirm my telephone conversation with you of this date, wherein I requested an opportunity to be heard and present oral comment in Courtroom 300 of the Minnesota Supreme Court on April 12, 1993 regarding MSBA's proposed rules governing lawyer advertising.

Five or six minutes should be ample for my comments.

I am enclosing this original and 11 copies per your request.

Thank you for your courtesy in this matter.

Yours very truly,

John H. Bradshaw

JHB/lkh

Enclosures

Geoffrey J. Gempeler
Timothy W. Nelson
John D. Hanson
Todd J. Kenyon

GEMPELER
PERSONAL INJURY
ATTORNEYS

Office Administrator
Brenda F. Korman

Legal Assistants
Cathy R. Kollar
Ruth M. Schleper
Tammy L. Gallus

April 9, 1993

SENT VIA FACSIMILE

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

RE: Minnesota State Bar Association Petition
to Amend the Rules on Lawyer Advertising

Dear Sir or Madam:

I request the opportunity to appear and speak at the hearing to be held on Monday, April 12, 1993 at 9 a.m. to express my opposition to the Minnesota State Bar Association's Petition to amend the rules on lawyer advertising. I am opposed to the particular proposals made by the Bar Association for the following reasons:

1. Although the Petition states that "numerous complaints have arisen", my review of the background concerning this proposal is that of the 1,384 complaints regarding lawyers in 1990, only 7 concerned advertising, and most of those complaints were filed by lawyers and not the general public. The number of advertising-related complaints rose in 1992 to 33 following a public request by the Bar Association soliciting complaints about advertising. There does not appear to be a concern by the public over advertising.

2. The existing Rules of Professional Conduct already address the problems that the new rules attempt to correct. This office handles personal injury and product liability cases for the Plaintiff. One of the proposed rules requires advertising to state specifics about the contingent fee arrangement. However, the applicable percentage fee may vary depending upon the complexity of the case. The arrangement on costs may depend upon the complexity of the case or the ability of the client to absorb those costs. The existing

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1-800-832-2224

rules require retainer agreements to be in writing and certainly that requirement should protect the public without the need to advertise the particular terms of contingent fees. Advertising specific terms will increase confusion and decrease effectiveness.

3. Advertising serves a useful purpose and should not be restricted. Very simply, if advertising didn't work, lawyers wouldn't spend the money on it. Obviously, advertising must perform an educational function for the public which prompts them to respond to it.

I presume part of the incentive for the Bar Association to restrict advertising has to do with the conference report for the State of Minnesota Lawyers Conference having to do with competitiveness in the legal profession. It is our belief that restricting advertising is not a solution to the problem of competitiveness in the legal profession. It has been our experience as a predominantly out-state law firm that advertising has allowed us to compete more effectively. Advertising has allowed us to compete with Twin Cities law firms who have opened branch offices in our community.

None of the proposals in our view further the interests of the consumer or prospective clients nor do they foster more public awareness or integrity for the profession. In my view, the real need is education of the public so that they can make wise and informed choices. Restricting advertising does not accomplish that goal. If the Bar Association feels that there is a need for more education, I would encourage them to engage in institutional advertising promoting and encouraging public awareness and education.

Very truly,

Geoffrey J. Gempeler

GJG:pas

STEVAN S. YASGUR
ATTORNEY AND COUNSELOR AT LAW
SUITE 410
7600 PARKLAWN AVENUE
EDINA, MINNESOTA 55435

LEGAL ASSISTANT
CHERILYN J. MAILAND

TELEPHONE
(612) 893-9393

April 9, 1993

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

Re: Proposed Amendment to Rules 7.2 & 7.3
Minnesota Rules of Professional Conduct

Dear Mr. Grittner

I am writing to oppose part of the proposed amendment of Rules 7.2 and 7.3 of the Minnesota Rules of Professional Conduct regarding mail solicitation by attorneys. Specifically, I oppose labelling correspondence and envelopes with the word, "Advertising." I would appreciate your submission of this letter to the Court at its hearing Monday morning, April 12, 1993.

For more than eight years, I have sent solicitations substantially identical to the enclosure to persons booked on a variety of criminal charges. I would estimate conservatively that I have sent Fifty Thousand (50,000) of these letters in that time. Most of the letters - at least 90% - bring no response at all. On average, the letters result in seven or eight new files per month. Of the remaining responses, most are "shopping" for a fee quote or a predicted result. Less than half of these inquiries result in actual client appointments. The overwhelming majority of office appointments are with people who do not retain me. Many of these people

have expressed their thanks for the information I provide about the operation of the criminal justice system.

I routinely discuss procedural steps and the time intervals between them, legal penalties and actual sentencing practices, and the choices faced by criminal defendants. The discussion invariably sounds like a "Law Day" presentation. There is no "hard sell" or pressure exerted to retain me as counsel. Indeed, I routinely advise that people "sleep on it," and contact me the next day if they wish to retain me. I doubt I have lost many potential clients by doing so. Many times I have spoken with individuals who told me in advance of our meeting that they had no money for a lawyer. When I could afford to do so, I have represented some of them for greatly reduced fees.

One interesting and important side light of mail solicitation is the occasional response from someone who was not, in fact, arrested. I have dealt with two such cases in the last nine months. These arise when an acquaintance furnishes another's name, birthday, and address during booking. Of course, the person who receives my letter is completely unaware of any criminal charge and might well be the subject of a future arrest warrant. As it was, alerted by my letter, these people have been able to contact police and establish their true identity. Both individuals - one in St. Paul and one in Chicago - thanked me profusely for contacting them. I can only speculate whether they would have opened my envelope had it been labelled, "Advertisement."

There are those who are offended by these letters. Some of the mailings I have seen from other law offices certainly are not in good taste and attempt to intimidate the recipients. I don't feel my letter does so. Nevertheless, I have received perhaps half a dozen written objections to the letter and perhaps that many phone calls in the past eight years. In addition, there have been about half a dozen complaints to the Board of Professional Responsibility of which I am aware. Written responses sent to me have been vitriolic, defensive and even abusive. Some of the telephone messages left on my answering machine were obscene. Only one or two letters were responsible, civil requests to refrain from further contact. None of the complaints to the Board have been found to merit any action.

In terms of conduct that offends the public, a couple of dozen instances, at most, out of 50,000 opportunities is fairly benign, I should think.

I can certainly appreciate the desire of the Court to avert possible misleading or overbearing contacts with the public, pursuant to the comment to Rule 7.3, especially the first two paragraphs. I personally share that goal. My concern is that requiring the label, "Advertisement," on a piece of mail will diminish an already light response. As a sole practitioner whose livelihood and area of concentration depend upon criminal defense, I can ill afford any new restriction on my ability to generate business, especially when the need for that restriction would appear to be so marginal. I'm sure you can appreciate that the label, "Advertisement," is the postal equivalent of a "Kick Me" sign and virtually begs the recipient to throw it away. This applies especially to envelopes.

All I ask for my effort is that the recipient read my letter and consider what I have to say. I believe that requiring envelopes to be labelled will diminish the chances of my letter ever being read. And for the handfold of objections I have received, literally hundreds of people have called to thank me for the offer extended, regardless of whether they accepted it. The proposed Amendment may not affect a large number of responses, in absolute terms, but would nevertheless have a great impact on me and other attorneys similarly situated.

I would prefer that the Court not adopt the suggested change as regards using the label, "Advertisement." After all, the best answer to unwanted correspondence is simply to throw it away. But if there is a demonstrated need to protect the public, I would suggest a notice on the correspondence itself, or on a separate enclosure, which identifies the writing as a solicitation and notes that such solicitations are permitted if not misleading. I would be happy to contribute a draft or work with any Court committee, if desired. I have some experience, albeit limited, drafting legislative changes that were signed into law [Minn. Stat. §518.551, Subd. 5(c)(2)(3) (Laws 1984)] and would welcome the opportunity to be involved in this matter.

I thank you for your assistance and ask that you convey my appreciation to the Supreme Court for their kind consideration of my request.

Sincerely,

Stevan S. Yasgur
SSY:cjm
Enclosure

STEVAN S. YASGUR
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SUITE 410
7600 PARKLAWN AVENUE
EDINA, MINNESOTA 55435

LEGAL ASSISTANT
CHERILYN J. MAILAND

TELEPHONE
(612) 893-9393

April 12, 1993

CONFIDENTIAL

«honorific»
«street»
«city», «state» «zipcode»

SAMPLE

Re: booking charge: «charge»

Dear «greeting»:

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 turn.

This is to advise you that I would be happy to meet with you before you go to court and answer any questions you may have about this matter.

THERE IS NO FEE FOR THIS CONSULTATION.

At your convenience, I will meet with you in my office and discuss your case for half an hour. If that is not convenient, it may be possible to make other arrangements 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
SSY:cjm
I also have an office at 245 East 6th Street in St. Paul.

STATE OF MINNESOTA

IN SUPREME COURT

File Number C8-84-1650

In re:

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

REQUEST FOR LEAVE TO MAKE AN ORAL PRESENTATION

The undersigned requests the privilege to make an oral presentation at the Hearing to Consider the Petition of the Minnesota State Bar Association to Amend the Rules of Professional Conduct.

Robert M. Rosenberg

Robert M. Rosenberg
Attorney I.D. No. 93385
Robert Merrill Rosenberg Professional Association
2500 One Financial Plaza
120 South Sixth Street
Minneapolis, Minnesota 55402-1826
612/349-5290

STATE OF MINNESOTA

IN SUPREME COURT

File Number C8-84-1650

In re:

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

MEMORANDUM IN OPPOSITION TO ADOPTION OF PROPOSED RULE 7.2(i)

Proposed Rule 7.2(i) Should Not Be Adopted By The Court.

Rule 7.2(a) of the Minnesota Rules of Professional Conduct authorizes written communication with a potential client, permitting lawyers to utilize direct mail advertising. Proposed Rule 7.2(i) has the practical effect of repealing this aspect of Rule 7.2(a) by imposing a "warning label" on lawyer's written communications with potential clients, virtually assuring that such mail will be promptly disposed of, unopened and unread. The proposed rule would impose a stigma on the legal profession in Minnesota that is unknown to any other profession or enterprise, save the mailers of unsolicited advertisements for "adult materials."

The proposed rule's impact is far reaching and negative. Had the Association proposed a rule that imposed discipline on attorneys who in fact had shown exceptionally bad taste, outrageous discourtesy or a heartless disregard for the privacy and emotional well being of others, it would have addressed actions worthy of sanction by this Court and the organized bar.

The proposed Rule merely degrades the status and honor of the legal profession and appears to be based on an unfounded assumption that the **"ADVERTISEMENT"** enclosed in an unopened envelope is likely to violate both the Rules of Professional Conduct and the attorney's oath, justifying a public warning of the hidden threat.

Proposed Rule 7.2(i) should not be adopted.

Open Communication Between Lawyers and the Public Should Be Promoted, Not Stifled.

For much of the 20th Century, lawyer advertising was prohibited, even the listing of areas of practice in the yellow pages of the phone book was considered undignified and improper. In the late 1970's the bar acknowledged the benefit the public might derive in knowing that a lawyer with a securities practice would not likely be the best selection for representation on a speeding ticket. With the landmark Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the longstanding, self-imposed ban on lawyer advertising was finally lifted.

Written communications to prospective clients were eventually treated as permitted forms of advertising and, in Minnesota, discipline was to be imposed on those whose

communications were false and misleading. At the same time "ambulance chasing" conduct, such as direct in-person or telephone solicitation of persons with whom the attorney had no family or professional relationship remained banned, protecting the injured or bereaved from the practiced persuasiveness of a trained advocate.

The proposed Rule 7.2(i) does not prohibit written communication otherwise permitted by Rules 7.1 and 7.2, but practically emasculates the privilege and right by requiring its warning on "any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship *and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.*"[1]

I would submit that the nature of such direct mail is generally not "institutional" in nature. The main purpose of such mailings is usually to let people with a specific, known, legal need know that the attorney may be able to provide assistance. If the lawyer did not know, or at least suspect that

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[1] The full text of Proposed Rule 7.2(i) reads: The word "ADVERTISEMENT" must appear clearly and conspicuously at the beginning of, and upon any envelope containing, any written solicitation to a prospective client with whom the lawyer has no family or professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.

the recipient needed legal services of the type discussed, it is doubtful the lawyer would write at all.

As a result, virtually any Rule 7.2(a) written communication is likely to be to a person who may be in need of a specific legal service because of a known *condition or occurrence,* and these "conditions" go far beyond the whiplash which follows a fender bender.

Were we to look at the nature of my own real property law practice, examples of types of mailings that could be undertaken will illustrate the problems with the proposed rule.

I do mortgage foreclosures and Rule 7.2(a) would permit me to write to banks that I knew serviced their own mortgage portfolios and would be in need of foreclosure work.

I represent condominium, townhouse and cooperative associations and Rule 7.2(a) would allow me to write to directors of those associations, knowing that by virtue of their duties as volunteer association officers they regularly face numerous issues from document amendments and rules enforcement to assessment collection.

I represent owners of real property in tax valuation matters and Rule 7.2(a) permits written communication with people who by

virtue of their ownership of commercial property might need legal services in challenging the assessor's estimate of market value.

I represent purchasers of residential real property and Rule 7.2(a) permits correspondence to corporate relocation officers with information on legal services available to their companies and employees.

The current Rule does not require that I warn the recipient that "legally oriented materials" are enclosed in the envelope that bears my name, nor require that I "apologize" and explain that my letter, which might otherwise encourage them to respond, was really just an "ADVERTISEMENT."

Under proposed Rule 7.2(i) any of the above targeted mailings would require the "ADVERTISEMENT" warning and stigma, because all recipients would be in a condition known to me to require the legal services of a mortgage foreclosure lawyer, a real estate lawyer, a condominium lawyer or a tax appeal lawyer. Do such written communications truly need a warning on the envelope or an explanation at the outset of the letter?

I would want any communication that went out over my signature to dignify my profession, but if Rule 7.2(i) is adopted I would be lumped with mailers of "adult materials" under a Supreme Court imposed warning to protect unwary bank presidents

and unsophisticated corporate officials of Fortune 500 companies. There is no need to impose such a labeling requirement on a lawyer's communications with the public.

Although I desire to see the day when each new president of our bar association will no longer need be concerned with the public's "perception" of lawyers, and while I strive in my own practice to speed its arrival, the very nature of our adversarial system and the infrequent contact most citizens have with lawyers tells me that day will not soon arrive. Proposed rule 7.2(i) does little to improve the either the lawyers' or the publics' lot, and does much to reinforce false and negative notions about lawyers.

Disciplinary Action Can Be Taken Under Existing Rules Against Those Whose Conduct Violates Accepted Guidelines And The Attorney's Oath.

As a former member of the Fourth District Ethics Committee I would begin each investigation with a review of the Rules to know what conduct I should be looking for, and at the end of the investigation I would review the Rules again, to see if the conduct I believed to have occurred violated a Rule that was not obvious at the outset.

Rule 7.1 "Communications Concerning a Lawyer's Services" provides:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about the results a lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Rule 7.3 "Direct Contact with Prospective Clients" provides:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by in person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

and the comment to Rule 7.3 notes in part:

> ".... Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.
>
> "The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third-

> scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading."

If a lawyer violates Rule 7.1 or engages in direct, in-person, solicitation in violation of Rule 7.3 the disciplinary path is clear. Proposed Rule 7.2(i) does no more than tell those whose trust we daily seek to gain, that we, as lawyers, are not to be trusted. That our communications should be shunned and they should be thankful that we have protected them from ourselves.

Upon admission to practice each lawyer in this state took the following oath before this Court:

> "You do swear that you will support the Constitution of the United States and that of the State of Minnesota, will conduct yourself as an attorney and counselor at law in an upright and courteous manner, to the best of your learning and ability, with all good fidelity as well to the court as to the client and that you will use no falsehood nor deceit, nor delay any person's cause for lucre or malice. So help you God." Minn. Stat. Sec. 358.07(9).

I, as do all but the smallest handful of those who have taken it, choose not to denigrate that oath nor the traditions of this court.

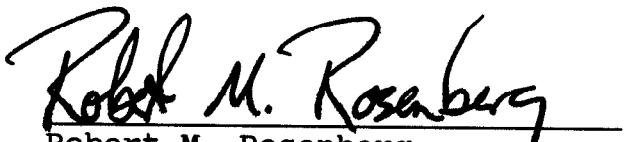
I do not believe any necessity exists for proposed Rule 7.2(i) when the existing Rules have penalties in place for those whose communications are false or misleading.

Proposed Rule 7.2(i) appears to be founded on a fear of modern communications that makes accident information available at an office personal computer, complete with names and addresses of parties, allowing the out-of-town, city attorney to write to Mrs. Accident Victim before the local lawyer who used to mow her lawn can stop by and sign a contingency fee agreement. These jealousies are no basis for promulgating an ethical guide that would only serve to limit commercial speech across the broad spectrum of legal practice.

If a rule could be skillfully designed, inappropriate communication may be the appropriate subject of an specific ethical guideline, however a Supreme Court rule designed to warn the public of communications from lawyers and thereby degrade lawyers and relegate communications now permitted by Rule 7.2(a) to the wastebasket is not the means to accomplish that end.

The court should deny the petition of the MSBA to the extent it seeks adoption of proposed Rule 7.2(i).

Respectfully submitted,



Robert M. Rosenberg
Attorney I.D. No. 93385
Robert Merrill Rosenberg Professional Association
2500 One Financial Plaza
120 South Sixth Street
Minneapolis, Minnesota 55402-1826

C8-84-1650

Law Offices of

MACDONALD, MUNGER, DOWNS & MUNGER

SUITE 200 ALWORTH BUILDING

DULUTH, MINNESOTA 55802-1973

727-7221

AREA CODE 218

A. BLAKE MACDONALD
HARRY L. MUNGER[1]
TIMOTHY N. DOWNS
MARK A. MUNGER[*1,2]

*ALSO LICENSED IN WISCONSIN
[1]CERTIFIED CIVIL TRIAL SPECIALIST, MSBA
[2]CERTIFIED CIVIL TRIAL SPECIALIST, NBTA

TOLL FREE
1-800/777-8418
FAX NO.:
1-218/727-8819

April 7, 1993

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

OFFICE OF
APPELLATE COURTS
APR 0 8 1993
FILED

Dear Mr. Grittner:

Enclosed are twelve copies of a written statement for the April 9 hearing. I was out of town during the week of March 29 through April 5 and was not aware of the fact that there were time constraints in presenting this petition.

Yours very truly,

Harry L. Munger

HLM/brc

Enclosures

April 7, 1993

PETITION IN SUPPORT OF RULE ADOPTION

TO: THE HONORABLE CHIEF JUSTICE A.M. KEITH AND
MEMBERS OF THE COURT

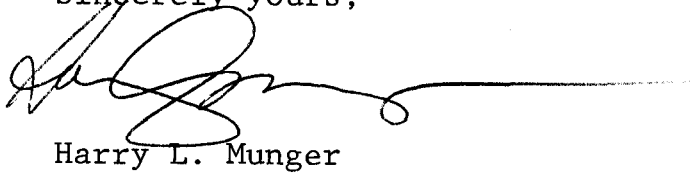
Dear Chief Justice and Members of the Court:

I have been practicing law for over thirty-five years and feel that the law for the allowance of legal advertising has been one of the most devastating causes of the loss of civility between members of the legal profession. I personally traveled to Minneapolis to present my support for rules limiting legal lawyer advertising at a time that it was going to be tabled. Partly because of this effort, the matter was revived, and, as you know, went on to be an issue at the last annual MSBA meeting.

I, personally, would have preferred a stronger committee report. One of the points not adopted was the use of stand ins on video presentations. I think this is misleading and have, in fact, had clients terminate client/attorney relationship because of this deception.

The changes presented are certainly a step in the right direction. I do not agree with those that feel that restrictions on advertising is unconstitutional given that it is adopted as a rule of conduct within the profession and not statutorily dictated.

Sincerely yours,



Harry L. Munger

STATE OF MINNESOTA
IN SUPREME COURT

File No. C8-84-1650

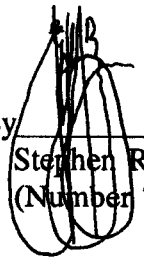
In re:

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

Request to Make Oral Presentation

Stephen R. Bergerson respectfully requests an opportunity to make an oral presentation to the Court at its hearing on April 12, 1993. This request is made pursuant to the Court's February 22, 1993 order.

Respectfully submitted,



By _____
Stephen R. Bergerson
(Number 7328)

Fredrikson & Byron, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402-3397
(612) 347-7043

OUT OF ORDER:

LAWYER AD BANS SHOW CONTEMPT FOR CONSUMERS

By Stephen R. Bergerson

IN MINNESOTA, SOME ATTORNEYS WANT TO EFFECTIVELY MUTE, MUFFLE OR MUZZLE LAWYER ADVERTISING.

EXPERIENCE HAS LARGELY SHOWN THAT DESPITE WHAT THEY SAY, LAWYERS WHO LOATHE ADVERTISING ARE: (1) RURAL-AREA LAWYERS ANGERED ABOUT LOSING "THEIR" CLIENTS TO URBAN LAWYERS WHO ADVERTISE IN "THEIR" AREAS; (2) THOSE WITH ESTABLISHED PRACTICES WHO WANT TO SILENCE COMPETITORS; (3) LAWYERS WHO WOULD RATHER THE PUBLIC DIDN'T REALIZE THAT THE PRACTICE OF LAW IS BOTH A PROFESSION AND A BUSINESS (ADVERTISING IS TOO "INDISCREET"); (4) LAWYERS WHO BELIEVE ADVERTISING "DEMEANS" THE PROFESSION; AND (5) LAWYERS WHO WOULD LIKE TO ADVERTISE, BUT DON'T KNOW HOW.

THE IDAHO STATE BAR ASSOCIATION AT LEAST HAD THE INTEGRITY (OR AUDACITY) TO ADMIT ITS MOTIVES WHEN IT RECENTLY PROPOSED A RESOLUTION OF "VOLUNTARY" ADVERTISING STANDARDS FOR ITS MEMBERS.

ITS PREAMBLE BEGAN WITH, "WHEREAS, THE PUBLIC IMAGE OF THE BAR HAS BEEN TARNISHED BY UNDIGNIFIED LAWYER ADVERTISING; AND MUCH OF

LAWYER ADVERTISING APPEARS TO THE GENERAL PUBLIC TO BE GENERATED SOLELY BY PROFIT MOTIVE RATHER THAN TO EDUCATE THE PUBLIC; AND IN ORDER T O BOLSTER PUBLIC CONFIDENCE AND THE IMAGE OF LAWYERS IN THE COMMUNITY..."

SINCE MOST OTHERS WOULD BE UNABLE TO ADMIT TO THESE MOTIVES WITHOUT SOCIAL AND PROFESSIONAL EMBARRASSMENT, THEY GIVE THEIR AD BAN BANTER A "CONSUMER INTEREST" SPIN: THE LEGAL PROFESSION MUST PROTECT THE PUBLIC FROM DECEPTIVE ADVERTISING.

FINE. BUT ASK THEM TO PROVIDE ACTUAL EVIDENCE OF CONSUMER DECEPTION, AND YOU GET ONLY ANECDOTAL AND USUALLY INACCURATE ACCOUNTS.

EVEN IF THAT WEREN'T THE CASE, EVERY SINGLE DECEPTIVE PRACTICE A LAWYER COULD CONCEIVE OF IS <u>ALREADY</u> REGULATED. THE LAWS AND AGENCIES DESIGNED TO DEAL WITH DECEPTIVE ADVERTISING HAVE BEEN IN PLACE LONGER THAN MOST LAWYERS HAVE BEEN PRACTICING LAW. FOR MORE THAN A DECADE, ETHICS BOARDS IN MOST STATES, INCLUDING OURS, HAVE HAD EXPLICIT AUTHORITY TO DISCIPLINE LAWYERS WHO USE DECEPTIVE ADS.

WHO'S COMPLAINING ABOUT LAWYER ADVERTISING, ANYWAY? NOT CONSUMERS. THEY KNOW WHERE TO TURN TO WHEN THEY'VE BEEN HAD BY AN AD, BUT THE PHONES ARE SILENT AT THE OFFICES OF THE ATTORNEYS GENERAL, FEDERAL TRADE COMMISSION AND BETTER BUSINESS BUREAUS. FOR EXAMPLE, OF THE 1,384 COMPLAINTS RECEIVED IN 1990 BY THE MINNESOTA LAWYERS BOARD OF PROFESSIONAL RESPONSIBILITY, SEVEN CONCERNED ADS. SEVEN. AND *LAWYERS THEMSELVES* FILED VIRTUALLY ALL OF THEM!

THIS IS CLEARLY A SOLUTION DESPERATELY SEARCHING FOR A PROBLEM.

THE AD BAN BACKERS RELY ON TWO ARGUMENTS. BOTH ARE ELITIST, NEANDERTHAL AND SELF-SERVING.

THE FIRST PORTRAYS ADVERTISING AS INHERENTLY MANIPULATIVE, AND CONSUMERS AS HOPELESSLY GULLIBLE. THIS IS A SELF-RIGHTEOUS AND ARCHAIC OPINION THAT REGARDS THE PUBLIC AS INCAPABLE -- UNLIKE THEMSELVES -- OF ADEQUATELY COMPREHENDING OR DEALING WITH ADVERTISING.

SINCE THE PUBLIC'S TASTE AND BEHAVIORAL STANDARDS FREQUENTLY DIFFER FROM THEIR OWN, THEY BLAME ADVERTISING FOR MANIPULATING OTHERS INTO MAKING THE "WRONG" CHOICES.

SECOND, AD BAN PROPONENTS ARGUE THAT ADVERTISING INCREASES THE COSTS OF LEGAL SERVICES. BOTH EXPERIENCE AND INTUITION INDICATE OTHERWISE.

THEY MUST HAVE FORGOTTEN WHAT HAPPENED WHEN LAWS BANNING PRICE ADVERTISING BY PHARMACISTS, LAWYERS AND OTHER PROFESSIONALS WERE RULED UNCONSTITUTIONAL IN THE MID-'70'S. PRICES WENT DOWN AND THE QUALITY OF SERVICES WENT UP. COMPETITION WILL DO THAT.

ADVERTISING INFORMS CONSUMERS OF THE AVAILABILITY, COSTS AND BENEFITS OF LEGAL SERVICES. IT ENCOURAGES COMPETITION BY HELPING CONSUMERS MAKE COMPARISONS AND CHOICES. THAT'S EXACTLY WHAT MANY CENSORS DON'T WANT.

WHAT THEY DO WANT IS TO PROTECT THEIR TURF AND PRESERVE THE PRECIOUS LITTLE THAT'S LEFT OF THE STATUS QUO. FOR MANY, IT'S A LAST

GRAB AT THE PAST. AN AD BAN IS THE MOST EFFECTIVE WAY TO MINIMIZE COMPETITION, MAINTAIN PROFESSIONAL MYSTIQUE AND DICTATE TASTE.

"BUT," THE CENSORS SAY, "WE DON'T WANT TO BAN ADVERTISING, JUST RESTRICT IT." THAT'S LIKE THE ASSASSIN SAYING HE WANTS ONLY TO RESTRICT HIS TARGET'S MOVEMENT.

WHEN THEY TRAIN THEIR CROSSHAIR ON ADVERTISING'S ABILITY TO ATTRACT ATTENTION, INFORM OR PERSUADE, THEY AIM AT THE AD'S EFFECTIVENESS, NOT ITS DECEPTIVENESS. THE CENSOR'S FURTIVE MISSION IS TO MAKE ADVERTISING SO MEANINGLESS THAT IT WON'T WORK; TO EVISCERATE EFFECTIVE COMMUNICATION AND EFFECTIVELY SILENCE THOSE WHO DARE TO BREAK TRADITION AND OVERTLY COMPETE. 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 THE USE OF DRAMATIZATIONS AND TESTIMONIALS.

THAT'S ADVERTISING?

CENSORS IN MANY STATES WANT ALL LAWYER ADVERTISEMENTS TO INCLUDE MANDATORY STATEMENTS THAT, "CHOOSING A LAWYER IS AN IMPORTANT DECISION AND SHOULD NOT BE BASED SOLELY ON INFORMATION CONTAINED IN AN AD." HERE SOME WANT US TO TELL PEOPLE WHAT THEY ALREADY KNOW: THAT AN AD IS AN AD.

THAT'S CONSUMER PROTECTION?

THE AD BAN BRIGADE SPENDS A LOT OF TIME ANALYZING WHETHER THEIR "RESTRICTIONS" WILL WITHSTAND CONSTITUTIONAL CHALLENGES. THEIR FOCUS IS SO FIXED ON CONSTITUTIONAL CONUNDRUMS AND LEGAL NICETIES THAT THEY OVERLOOK A FUNDAMENTAL AMERICAN ATTRIBUTE: LETTING PEOPLE DECIDE FOR THEMSELVES.

STIFLING SPEECH ALSO SUFFOCATES ANOTHER FUNDAMENTAL HUMAN ATTRIBUTE: THE ABILITY TO COMMUNICATE.

AD BANS DO NOT SERVE THE PUBLIC INTEREST. THEY SERVE THE CENSOR'S INTEREST. THEY ARE NOT MERELY ANTI-ADVERTISING. THEY ARE ANTI-CONSUMER.

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..."

THE ADVERTISING DEBATE HAS GENERATED A GREAT DEAL OF HEAT AND VERY LITTLE LIGHT WITHIN THE LEGAL PROFESSION. THE PUBLIC, MEANWHILE, HAS BEEN KEPT IN THE DARK. THAT'S WHERE IT WILL STAY IF THE CENSORS HAVE THEIR WAY.

Steve Bergerson practices advertising law with the Minneapolis firm of Fredrikson & Byron, P.A., where he has directed the creation of many award-winning legal ads. He chairs the American Advertising Federation's Self-Regulation Committee and is general counsel to the Advertising Federation of Minnesota.

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SAMUEL H. MASLON
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April 9, 1993

HAND DELIVERED

Mr. Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Mr. Grittner:

I am enclosing for filing an original and ten copies of the Request of Petitioner Minnesota State Bar Association to Make Oral Presentation.

If you have any questions regarding this request to make oral presentation, please feel free to contact me.

Yours very truly,

David F. Herr

DFH:psp
Enclosures

cc: Mr. Robert A. Guzy
Mr. R. Bertram Greener
Ms. Mary Jo Ruff, MSBA
Mr. Tim Groshens, MSBA

STATE OF MINNESOTA
IN SUPREME COURT

In re:

File No. C8-84-1650

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

REQUEST OF PETITIONER MINNESOTA STATE BAR ASSOCIATION TO MAKE ORAL PRESENTATION

Petitioner Minnesota State Bar Association ("MSBA") respectfully requests an opportunity to make an oral presentation to the Court at its hearing on April 12, 1993. This request is made pursuant to the Court's February 22, 1993, order. Petitioner's comments will be directed to the matters set forth in the Petition, and will respond to any new questions or issues raised by the written or oral statements of any other parties.

Petitioner MSBA respectfully requests that it be allowed to make the following presentations:

Robert A. Guzy MSBA President	Introductory Remarks
R. Bertram Greener Chair, MSBA Lawyer Advertising Committee	Description of the MSBA Process
David F. Herr Attorney for MSBA	Argument for Adoption of Rules Amendments
* * *	
David F. Herr	Rebuttal (if necessary)

Dated: April 9, 1993

Respectfully submitted,

By _____
David F. Herr (#44441)
3300 Norwest Center
Minneapolis, Minnesota 55402-4140
(612) 672-8350
Attorney for Petitioner

Wersal Law Office, P.A.

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Minneapolis, MN 55426
(612) 546-3513

OFFICES LOCATED AT:
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Arden Hills
Brooklyn Center
Columbia Heights
Coon Rapids
Eden Prairie
Minneapolis
St. Louis Park
St. Paul

April 8, 1993

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

RE: Proposed Amendments to Rules 7.2 and 7.3 of the Minnesota Rules of Professional Conduct

Dear Mr. Grittner:

I desire to make an oral presentation on the proposed rule changes on April 12, 1993. Please treat this letter as my written statement regarding the proposed amendments of Rules 7.2 and 7.3 of the Minnesota Rules of Professional Conduct. In this letter, I specifically wish to address proposed Rule 7.2 (i).

Initially, it is not clear to me what investigation, if any, the Minnesota State Bar Association conducted prior to making the proposed rule changes on the different types of written communication that exist. The Bar Association states that the proposed rules were meant to address numerous complaints about misleading advertisements to the public. The Bar Association does not state what the complaints consisted of or how the proposed rules are expected to solve the problem. In essence, this Court has been presented with solutions to problems that may not even exist. Rule 7.2 (i) is just such a solution.

Proposed Rule 7.2 (i) will require that the word "advertisement" appear upon the envelope of a written solicitation to a prospective client. What is the purpose of this requirement? The Minnesota Supreme Court should protect the public from misleading advertisement, but Rule 7.2 (1) is an attempt to protect the public from advertising itself. Can anyone seriously argue that a simple envelope, containing only an address to someone, is misleading? While I can understand that the letter contained inside the envelope could be misleading, I do not see how the envelope itself could be misleading. The only purpose to the requirement of putting the word "advertisement" on the envelope is to allow the potential client to sort out what they consider "junk mail" without having to open the envelope. Insofaras the envelope itself is not misleading, there can be no logical goal to be achieved by the requirement that the word "advertisement" appear

on the envelope. The only purpose of the Rule is to make written solicitation a less effective means of advertisement. This result is contrary to the duty of the Bar to make legal services available to the public.

Now let's discuss the actual letter that is contained in the envelope. Proposed Rule 7.2 (i) will require that the word "advertisement" also appear at the beginning of any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer. Again, what is the purpose of this Rule? If the purpose is to prevent misleading advertisements, we already have Rule 7.1 to accomplish that. What is to be gained by adding the word "advertisement" to the written solicitation?

Every day, in my home mail box, I receive five to ten pieces of mail soliciting me to buy condominiums on Gull Lake, dental insurance, steel siding for my home, chiropractic services, Folger's coffee, and the list could go on and on. As Americans we are deluged with ads on TV, radio, billboards, and by mail. The idea that someone would be misled by a written solicitation because it doesn't contain the word "advertisement" is absurd. I have attached, as Exhibits "A" through "J", letters which have been used by various lawyers to solicit clients. Exhibit "A" starts by stating, "If you have need of an experienced attorney. . ." Exhibit "B" states, "If you then feel I can help you, my representation can be arranged." Exhibit "C" states, "If you do not have an attorney, I would be glad to discuss your case with you. . . My attorney's fees are fair. . ." Rather than continue with this rendition, I would ask that the Court review each of these attached Exhibits "A" through "J". Each of them is obviously a solicitation for business and, adding the word "advertisement" to them would only be a statement of the obvious. If these solicitations are misleading, then Rule 7.1 is sufficient to discipline the attorneys involved.

If the Bar Association has received complaints, that does not mean there is a problem to be solved. I think that, sometimes, the public is afronted by these letters from attorneys soliciting business. However, the Court should not be in the business of trying to regulate "good taste."

Some may argue that, because of the very personal nature of a letter, some form of notation that it is an advertisement is necessary. Letters are personal in that they are addressed to a specific individual and are signed by a specific individual, and each of the letters "A" through "J" discuss something of a very personal nature, such as the fact that someone has been charged with a crime. And a letter may give the impression that the soliciting attorney has some special knowledge of the potential client's legal problem. But even if this argument is accepted, why are we treating all forms of written communication as if they were personal letters? I have attached, as Exhibits "K" and "L", flyers which have been used by my office in mass mailings soliciting business. The flyers are a form of written communication; however, they are impossible to mistake for anything but an advertisement soliciting business. The flyers do not have the personal nature of a letter, nor the appearance of a letter. The appearance of the flyer is, itself, an indication that the communication is an advertisement. As a general form, the flyer is not expected by those who receive it to convey information about a specific person's legal problems. Surely, this form of advertising should be exempt from the requirement of having to add the word "advertisement" as proposed in Rule 7.2 (i).

I believe there are other problems with proposed Rule 7.2 (i) as drafted. The proposed rule assumes there is a difference between written solicitation and other forms of solicitation, such as TV advertising or radio advertising. Why not require TV ads of lawyers to begin with an announcement stating, "What you are about to see is an advertisement"? One can easily conceive of a TV ad which contains actual written words shown on the screen. We must ask ourselves, "What is the difference between that form of written communication and the written communication in the form of a personal letter, as shown in Exhibits "A" through "J", or the written communication contained in a flyer, as shown in attached Exhibits "K" and "L"?" If the words can be the same on the TV screen as in the letter, how is the TV any less misleading? Once again, if the idea is that a TV is not the same form of personal communication that a personal letter is, neither is a flyer. Why are we treating all forms of written communication the same?

Proposed Rule 7.2 (i) also tries to make a distinction between written solicitation sent out en masse to everyone and solicitation sent out to those "who may be in need of specific legal services because of a condition or occurrence that is known

to the soliciting lawyer." The rule does not require the word "advertisement" in a written solicitation for personal injury that my office might send out to everyone who lives on Elm Street, but does require the word "advertisement" in the solicitation if I send it to a Mr. Jones, who I learned was recently involved in an auto accident. Again, the written language being communicated in each instance is the same. Why does the proposed rule treat these circumstances differently? When we are supposed to be focusing our rule so that it protects the public, we have created a rule that focuses on what the lawyer knew or didn't know when the solicitation was sent out. What possible difference does it make what the lawyer knows or doesn't know? The question we need to concern ourselves with how the advertising is affecting the public. I would also note that hinging a rule on what a lawyer knew or didn't know at the time of the solicitation, is unenforceable. How is the Court ever going to know what the lawyer knew when he sent out the solicitation?

Because of the inherent problems with proposed Rule 7.2 (i), I would ask the Court to reject the proposed rule in its entirety. In the alternative, I would ask the Court to consider applying Rule 7.2 (i) only to personal letters addressed by a specific attorney, to a specific individual, soliciting business. Generic forms of advertisement, such as the flyers which I have attached as Exhibits "K" and "L", should be exempt from the requirements of proposed Rule 7.2 (i).

Respectfully submitted,

WERSAL LAW OFFICE, P.A.

Gregory F. Wersal
Registration #: 122816

GFW/nj

EXHIBIT A

RICHARD SAND

ATTORNEY AT LAW

SOUTHBRIDGE OFFICE CENTER
SUITE 120
155 SOUTH WABASHA STREET
SAINT PAUL, MINNESOTA 55107
(612) 292-8801

CRIMINAL DEFENSE ATTORNEY

If you need an experienced attorney in criminal defense, for felony or misdemeanor charges, including D.W.I., please contact my office at (612) 292-8801.

There is no charge for your initial consultation. Your costs for legal services may be arranged on a payment schedule.

Very truly yours,

RICHARD SAND, Attorney at Law

Richard Sand

RAS/mdb

Please call my office to schedule an appointment in Minneapolis or Saint Paul.

EXHIBIT B

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

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

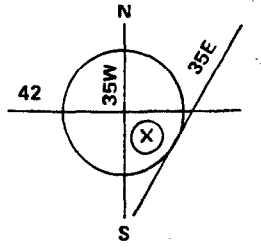
ROBERT H. MEIER
Attorney at Law

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

EXHIBIT C

THOMAS M. LOFTUS, *Attorney At Law*

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



M. A. Warmey
2836 Park Ave.
Minneapolis, MN 55407

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

EXHIBIT D

STEVAN S. YASGUR, P. A.
ATTORNEY AND COUNSELOR AT LAW
7400 METRO BOULEVARD
EDINA, MINNESOTA 55435
TELEPHONE
(612) 893-0123

October 10, 1989

CONFIDENTIAL

Ms. Mary A. Warmey
2836 Park Avenue
Minnepaolis, Minnesota 55407

Re: booking charge: D.U.I.

Dear Ms. Warmey:

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 CHARGE TO YOU.

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.

Steve Yasgur

Stevan S. Yasgur
SSY:cjm

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

EXHIBIT E

ROBERT S. WEISBERG
ATTORNEY AT LAW
COMMERCE AT THE CROSSINGS
SUITE 225
250 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55401

PHONE (612) 332-3100

KNOW YOUR RIGHTS. If you have been charged with a crime in Hennepin County you may be facing substantial fines and jail time.

You need expert legal advice to protect your rights. Call my office and we will work with you. We will explain the consequences of a traffic or criminal charge, the court procedures and your rights. Get expert legal advice at a reasonable rate.

CALL 332-3100

Ask for Robert Weisberg, attorney at law, for your **FREE CONSULTATION**

QUALITY LEGAL SERVICES
AT REASONABLE RATES

Robert S. Weisberg
Attorney at Law

EXHIBIT F

JOEL N. HEILIGMAN, P.A.
ATTORNEY AT LAW
4230 CENTRAL AVENUE N.E.
MINNEAPOLIS, MINNESOTA 55421
OFFICE (612) 788-9231

ST. PAUL OFFICE
395 WHITE BEAR AVENUE
ST. PAUL, MINNESOTA 55106
(612) 771-9223

October 11, 1989

Ms. Mary Warmey
2836 Park Avenue
Minneapolis, MN

Dear Ms. Warmey,

My name is Joel Heiligman and I have been an attorney since 1974. I have offices in Minneapolis and St. Paul for the convenience of my clients.

It is my understanding that you may have been recently arrested. I would be more than happy to discuss with you any questions you have concerning your situation.

If you have any questions about the court procedure or your rights, please call.

Very truly yours,

Joel N. Heiligman
Attorney at Law

EXHIBIT G

SKYWAY LEGAL CLINIC

LAW OFFICES

COMMERCE AT THE CROSSINGS

250 SECOND AVENUE SOUTH

SUITE 225

MINNEAPOLIS, MINNESOTA 55401

AREA CODE 612

TELEPHONE 332-3100

JEROME H. LEWIS
ALAN E. SEGAL
DAVID G. ROSTON
ANDREW J. GOODMAN

If you are not familiar with your legal rights, court procedures and the possible consequences of a DWI, traffic or criminal charges, the SKYWAY LEGAL CLINIC can provide you with information regarding these matters.

For a **FREE CONSULTATION** call 332-3100 between 8:30 a.m. and 5:00 p.m. or 333-8135 between 5:00 p.m. and 8:30 a.m.

SKYWAY LEGAL CLINIC

EXHIBIT H

LAW OFFICES OF

DENNIS MILLER

4725 OLSON MEMORIAL HIGHWAY
GOLDEN VALLEY, MINNESOTA 55422

TELEPHONE
612/544-8851

This letter is to advise you of my availability as an attorney if you should need legal assistance for any criminal charge or family legal matter.

I have twelve years of experience in the practice of law and have handled a wide variety of cases, ranging from speeding tickets to first degree murder.

I offer a free initial consultation by telephone or in my office to discuss your case. If you should then decide to retain my services, I charge very reasonable fees and allow them to be paid over a period of time on an installment basis.

My office is conveniently located just east of the intersection of Highway 100 and Highway 55 (Olson Memorial Highway) in Golden Valley. If I can be of assistance to you in any way, please call.

If you are unable to reach me during business hours, you may call my residence at 478-6414.

Very truly yours,

Dennis Miller

DM/lh

EXHIBIT I

GREATER MINNESOTA LEGAL CLINIC
828 Norwest Midland Building
401 Second Avenue South
Minneapolis, MN 55401

Okay....now you've gone and done it!! You picked one of the most devastating counties in the country 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 Minneapolis 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 yourcase? 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. However, because some workhouse time is a likelihood, we have compiled for our clients a first-hand experience booklet to aid in getting through the ordeal of incarceration. It covers everything from packing your suitcase to getting along with the authorities and other inmates. It won't make your time at Hennepin County Corrections Facility any fun, but it will make it tolerable. Being in the workhouse is not a pleasant experience. It's designed to make an impression on you.

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,

Greater Minnesota Legal Clinic

EXHIBIT J

Association of Criminal Trial Attorneys

An Association of Independent Attorneys

(612) 546-4400

SUITE 1660
SHELARD INTERCHANGE TOWER
HIGHWAYS 12 AND 169
ST. LOUIS PARK, MINNESOTA 55426

SUITE 1208
1st BANK PLACE WEST
120 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402

SUITE 201
FRIDLEY PLAZA OFFICE BUILDING
6401 UNIVERSITY AVENUE N.E.
FRIDLEY, MINNESOTA 55432

November 21, 1989

Mr. Namphouna H. Nguyen
2633 Stevens
Minneapolis, MN 55408

Dear Mr. Nguyen:

Public documents indicate that you were recently arrested for a misdemeanor. As you may know, you are facing criminal penalties which include a maximum of 90 days in jail, a $700 fine, or both.

Worse yet, a misdemeanor conviction could create a criminal record for the rest of your life. This could affect you every time you apply for a new job, attend a new school, or seek government certification. What can you do about these penalties?

First, you need to have an experienced attorney who can fight for you in court. One who has years of experience handling cases like yours.

Second, you need an attorney who knows the system inside and out. One who has experience both prosecuting and defending people arrested for misdemeanors in Minnesota.

If you would like to benefit from our experience, call our office to set up a free consultation with us. We will help develop a strategy to get you the best possible result in court. Call our legal assistant DeeDee at 546-4400 today. She will set up a convenient time to meet. Evening and weekend appointments are available.

Then, if you decide you want us to represent you, we will fight to get you the best possible result in court.

Sincerely,

David Wexler

David Wexler
Attorney at Law

DW/djs

EXHIBIT K

Don't Let Financial Problems Get You Down!

STOP

- *Home Foreclosures*
- *Tax Levies*
- *Conciliation Court Lawsuits and Garnishments.*

EXHIBIT L

INJURED?

If you have been injured at work or in a car accident...

Call

612-546-3513

No Fee-unless we recover money for you!

WERSAL LAW OFFICES, P.A.

We have 9 convenient locations

ANOKA
241 Van Buren

COON RAPIDS
277 Coon Rapids Blvd.

ARDEN HILLS
6 Pine Tree Dr.

EDEN PRAIRIE
Near Shopping Center

BROOKLYN CENTER
7000 Brooklyn Blvd.

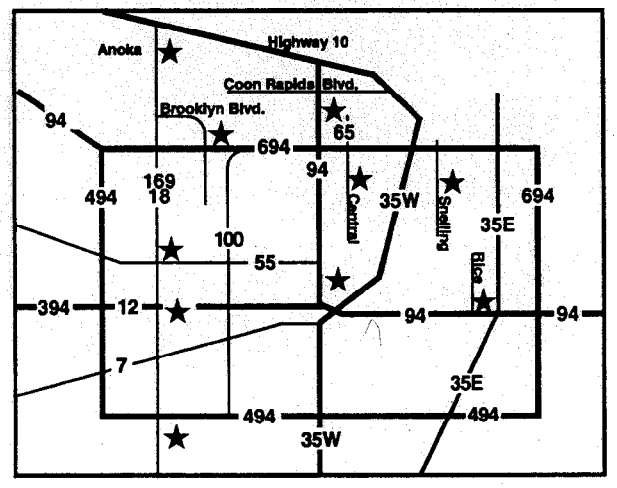
MINNEAPOLIS
706 2nd Ave. So.

COLUMBIA HEIGHTS
3989 Central Ave. NE

ST. LOUIS PARK
7841 Wayzata Blvd.

ST. PAUL
23 Empire Dr. - Near Capitol

FREE INITIAL CONSULTATION.



C8-84-1650

1275 Peavey Building
730 Second Avenue South
Minneapolis, Minnesota 55402

612.333.7151
612.344.1749 Facsimile

PRITZKER & MEYER, P.A.

Attorneys at Law

Fred H. Pritzker[+*]
Helen M. Meyer[+]
Wendy J. Cox
Joseph E. Atkins
Paul K. Downes

April 6, 1993

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

Dear Mr. Grittner:

The undersigned hereby requests the opportunity to submit an oral presentation at the hearing on Monday, April 12, 1993 regarding the proposed rules governing lawyer advertising.

Please find enclosed my written statement.

Thank you.

Sincerely,

Fred H. Pritzker

FHP/cb
Enc.

[+] *Civil Trial Specialist, certified by the Minnesota State Bar Association*

[*] *Civil Trial Specialist, certified by the National Board of Trial Advocacy*

Lawyers helping injured people

These remarks are presented in opposition to the proposed amendments to rules on lawyer advertising.

My name is Fred Pritzker. I practice with the Minneapolis law firm of Pritzker & Meyer, P.A. I am also the president-elect of the Minnesota Trial Lawyers Association. I have practiced exclusively in the area of plaintiff personal injury since 1977.

Before addressing some of the specific proposals before you, I would like to make some general comments.

Let us not forget that these rules, whatever their final form, constitute an abridgment of First Amendment rights guaranteed by the Constitutions of the State of Minnesota and the United States. However laudatory the goal, however clear the need, any rules which limit those rights must be scrutinized very carefully and their true need must be apparent.

And where is that need? I have yet to see published any authoritative data to suggest there is a need for these rules or that there are current abuses.

I also speak from experience. I have represented hundreds, if not thousands, of injured people over the past 17 years. Our firm engages in extensive direct mail advertising. In all those years involving all those individuals, I have yet to receive any complaint about any of the issues which form the subject of these proposed rules.

Two of the proposed rules mandate disclosures: the client's liability for expenses and the manner in which the fee will be calculated.

Most firms about which I am familiar, and certainly ours, have retainer agreements signed by their clients which address each of those two subjects.

If, indeed, there is a problem about disclosure regarding those two issues, a better way to address it would be to mandate inclusion of this information in the retainer agreement. The rule might further state that any failure to abide by such a requirement would result in forfeiture of the claimed item or expense.

One of the proposed rules requires the word "advertisement" appear clearly and conspicuously in written communications to prospective clients.

First, I would like to see data that suggests that there is mass confusion on the part of the public about a solicitation letter being anything different than it really is.

Second, does anyone seriously believe that the word "advertisement" has some talismanic nature that will magically wipe clean any misstatements or abuses contained in the body of the document itself? We have only to look at a package of cigarettes to know the futility of that.

Do we need to so seriously underestimate the intelligence of the public? Should we say that every fund raising letter we receive should be marked "solicitation;" that every politician's letter should state "contribution request;" -- you get the picture.

Let me be direct: many of the people who advocate for these rules either practice in silk stocking firms where clients have become institutionalized or are procured through very expensive marketing efforts or are resentful of the fact that the clients which they used to be able to count on are now going elsewhere in response to the successful marketing efforts of lawyers who recognize that the old days are gone and gone for good.

MINNESOTA TRIAL LAWYERS ASSOCIATION

MTLA

706 Second Avenue South • 140 Baker Building • Minneapolis, Minnesota 55402 • Telephone (612) 375-1707

C8-84/650

Executive Director
Nancy K. Klossner

Director of Public Affairs
Jane E. Tschida

April 7, 1993

OFFICE OF
APPELLATE COURTS

APR 0 8 1993

FILED

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

Dear Mr. Grittner:

The Minnesota Trial Lawyers Association hereby requests permission to make an oral presentation at the Supreme Court hearing on Lawyer Advertising, Monday, April 12, 1993.

MTLA's spokesperson is Charles T. Hvass, of Hvass, Weisman & King in Minneapolis. He has asked for 5-10 minutes to make the presentation on behalf of the Minnesota Trial Lawyers Association.

Enclosed are 12 copies of the written statement.

Very Truly Yours,

Logan N. Foreman

Logan N. Foreman, III
President

MINNESOTA TRIAL LAWYERS ASSOCIATION

MTLA

706 Second Avenue South • 140 Baker Building • Minneapolis, Minnesota 55402 • Telephone (612) 375-1707

MTLA position on proposed rules governing lawyer advertising:

We support the right of those in need of legal service to be informed about their need for legal representation.

We support strict ethical guidelines for all those who are contacting and counseling victims of accidents and injuries, victims of crime, those accused of crime, and those who are in need of family and marital legal help.

We regret the lack of ethical guidelines for others who are in contact with tort and crime victims.

We believe that the current ethical rules covering fees and costs are sufficient.

We believe the burden of proof imposed on those seeking further rules concerning advertising has not been met.

MARK R. ANFINSON
ATTORNEY AT LAW
LAKE CALHOUN PROFESSIONAL BUILDING
3109 HENNEPIN AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55408
612-827-5611
FAX: 612-827-3564

April 9, 1993

Frederick K. Grittner, Esq.
Supreme Court Administrator and
Clerk of Appelate Courts
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Petition of MSBA to Amend the
Minnesota Rules of Professional Conduct
Court File No. C8-84-1650

Dear Mr. Grittner:

Enclosed are 14 copies of a Memorandum in Opposition to portions of the above-captioned petition, with attachments. Please add my name to the list of those desiring to testify at the hearing on Monday.

If you should need anything further, simply let me know. Thank you for your help on this.

Yours truly,

Mark R. Anfinson

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE BY MAIL

Mark R. Anfinson of the City of Minneapolis, County of Hennepin in the State of Minnesota, being duly sworn, says that on the 9th day of April, 1993, he served the annexed Memorandum in Opposition on David Herr, the attorney for the Petitioner in this action, by causing a copy thereof to be transmitted via facsimile and deposited in the post office at Minneapolis, Minnesota, postage prepaid, enclosed in an envelope addressed to him at 3300 Norwest Center, Minneapolis, Minnesota 55402, the last known address of said attorney.

Mark R. Anfinson

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

Notary Public

Notary Public Minnesota
SARAH M. SHAFTMAN
HENNEPIN COUNTY
My Commission expires Feb. 6, 1997

lawyerad\affserv.mail

STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-1650

In Re:

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

MEMORANDUM IN OPPOSITION TO PROPOSED RULE 7.2(i)

I. Introduction

This Memorandum and the accompanying materials are submitted in opposition to a portion of the Petition of the Minnesota State Bar Association to amend the rules on lawyer advertising. Respondents' objections focus on proposed rule 7.2(i); Respondents do not oppose the remainder of the relief requested in the Petition. They believe that the proposed change would not only be contrary to the free expression guarantees of the state and federal constitutions, but would also be inimical to the interests of the consumers of legal services in Minnesota.

II. Constitutional Considerations

It is unnecessary to burden the Court with a detailed description of the evolution of constitutional law in the context of lawyer advertising. Respondents will simply summarize the main postulates relevant to the Petition now under consideration.

The United States Supreme Court has defined lawyer advertising as commercial speech. It is thus entitled to the protections constitutionally accorded to that category of expression. See Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

The Court has held that "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985). State regulation of commercial speech "may extend only as far as the interest it serves". Shapero v. Kentucky Bar Association, 486 U.S. 466, 472 (1988), citing Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 565 (1980). Thus, "state rules that are designed to prevent the 'potential for deception and confusion . . . may be no broader than necessary to prevent the' perceived evil." Id. at 472, citing In re R.M.J., 455 U.S. 191, 203 (1982).

The Shapero decision dealt explicitly with the issue of so-called targeted direct mail advertising by lawyers, i.e., "soliciting legal business for pecuniary gain by sending . . . letters to potential clients known to face particular legal problems." 486 U.S. at 468. It is this form of advertising that would be primarily affected by proposed Rule 7.2(i). The Court concluded that for purposes of constitutional analysis, such mailings are functionally the same as print advertising, and plainly "distinguishable from . . . in-person solicitation." Id. at 475. Attempts at regulation must therefore satisfy the same constitutional criteria as would be applied in the case of other print advertising.

The Court has also said that lawyers may be compelled in certain circumstances to make some disclosures in their advertising. Zauderer, 471 U.S. at 642. However, the Court has made it clear that it is not suggesting that "disclosure requirements do not implicate the advertiser's First Amendment rights at all." Id. at 651. "We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." Id. Thus, disclosure requirements must at minimum be "reasonably related to the State's interest in preventing deception of consumers." Id.

The Court has also acknowledged that an inquiry into rules that compel disclosures must proceed against the backdrop of decisions recognizing that compulsions to speak may be as offensive to the First Amendment as are prohibitions. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Furthermore, the Court has noted that compelled speech often tends to serve established interest groups. See, e.g., West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). (The relevance of this observation to the present proceedings will be discussed in more detail below.)

An independent constitutional basis for protecting speech, including the commercial variety, is found in Article 1, §3, of the Minnesota Constitution. This Court has directly addressed the issue of lawyer advertising twice, In Re Appert, 315 N.W.2d 204 (Minn. 1981), and In Re Johnson, 341 N.W.2d 282 (Minn. 1983). In both decisions, the Court referred to the U.S. Supreme Court's interpretation of the federal constitution. Neither decision, however, excluded reliance on the Minnesota Constitution.

Appert involved direct mail advertising, though it does not appear that the advertising was aimed at persons with known potential legal problems. The Court found that no

"compelling state justifications for restricting advertising had been presented." 315 N.W.2d at 210. Furthermore, the Court expressly concluded that there were "important individual and public interests present that supported the advertising." Id. "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 these individuals would not have been made aware of their rights." Id.

Similarly, in Johnson, the Court endorsed the criteria that must, under the First Amendment, be satisfied before commercial speech may be restricted: "[T]the State must assert a substantial interest and the interference with speech must be in proportion to the interest served." 341 N.W.2d at 284, citing Central Hudson, *supra*, 447 U.S. 557, 563-564. "Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent the regulation furthers the State's substantial interest." Id. at 284-285. Therefore, even though an emerging faction of the U.S. Supreme Court now seems prepared to read the First Amendment guarantees in the area of lawyer advertising more narrowly than before (see, e.g., Shapero, *supra*, O'Connor, J., dissenting), nothing limits this Court's prerogative to continue to read the free expression protections of the Minnesota Constitution more expansively, as it did in Appert and Johnson.

One final point of constitutional dimension: Where the state seeks to interfere with expression, it cannot simply rely on conclusory allegations of necessity. Except in those infrequent cases where the harm to be addressed is self-evident and indisputable (e.g., in-person solicitation), the state must concretely demonstrate that a problem exists and that there is a reasonable relation between the problem identified and the restriction on speech proposed

to correct it. Central Hudson, *supra*; Zauderer, *supra*. It is thus clear that Petitioner may not simply assume that the disclosures described in proposed Rule 7.2(i) are warranted. Petitioner must make a specific showing of need and reasonableness satisfying the criteria discussed above. This Petitioner has not done and cannot do. In fact, as discussed in the next section, not only would the proposed amendment fail to benefit legal consumers, but it could cause many of them serious harm.[1]

III. The Effect of the Proposed Amendment

Attached is the Affidavit of T. Erick Loken, a local expert in direct mail marketing. Mr. Loken has invested virtually his entire professional career in this field. He asserts categorically that a rule requiring the inclusion of the word "advertising" on the outside of direct mail envelopes would virtually ensure that a significant percentage of recipients would throw their letters away without opening the envelope and examining them. This conclusion is supported by the attached affidavits of two individuals who retained attorneys on the basis of direct mail advertisements, and who state that they might well have thrown the letters away unopened if they had been marked "advertising."[2]

---

[1]The Supreme Court in its decision In Re R.M.J. does state at footnote 20 that a requirement might be imposed on lawyers to stamp "This is an Advertisement" on direct mail envelopes. This is, however, clearly unexamined dicta, and the Court offers it after stating that it would be permissible *only* after a requisite demonstration of need. In light of the affidavits attached to this Memorandum, the other evidence discussed below of the potential harm of such labelling, and the entire lack of factual demonstration of need by Petitioner in this case, the Court's offhand comment in footnote 20 is of little relevance.

[2]Respondents note that many additional affidavits of this nature could have been submitted, but were not because they would seem to be cumulative. However, the undersigned represents that he has talked with or reviewed statements from such individuals, and that the affidavits attached are representative.

Under these circumstances, proposed Rule 7.2(i) can hardly be said to be "reasonably related to the state's interest in preventing deception of consumers." Zauderer, 471 U.S. at 651. Indeed, it is not an exaggeration to say that the state would be engaged in *abetting* consumer deception. As the attached materials reflect, many people with potential legal rights are not initially aware of them. Some of these people, particularly the less affluent or well educated, often do not personally know any attorneys and cannot readily find one with experience concerning their particular problem. If letters from attorneys are simply thrown away unopened, many persons may be effectively deprived of their legal remedies, because they will never be informed of what those are.

As Mr. Loken's Affidavit notes, a common reaction to mail labeled "advertising" is to view it as "junk mail" and discard it unopened. Yet true junk mail seldom informs consumers about potentially important legal rights of which they may not otherwise be aware. By causing some consumers to believe they are receiving mere junk mail, requiring attorneys using direct mail to label their envelopes in this fashion promotes consumer confusion and deception rather than reducing it, a result hardly consistent with the rule articulated in Zauderer and other lawyer advertising cases.

Further eroding Petitioner's case, both constitutionally and practically, is the considerable accumulation of evidence indicating that potential consumers of legal services benefit substantially from advertising, particularly targeted direct mail. The attached Lawrence and Swartz Affidavits are representative. Also attached is a 1988 article from the Wall Street Journal reporting that despite criticisms of targeted direct mailing by the established profession, recipients have praised the practice, claiming that it helped them

considerably in selecting a competent lawyer. Cohen, *Direct-Mail Legal Pitches get Big Boost*, Wall St. J., July 5, 1988, at 23, col. 3.

The factually dubious foundation for proposals to restrict lawyer advertising, such as the one contained in Petitioner's Rule 7.2(i), have provoked various commentators to speculate about the possibility of other, unexpressed reasons for the advancement of such proposals. No less an authority than Justice Marshall observed that "[n]ot only do prohibitions on solicitation interfere with the free flow of information protected by the First Amendment, but by origin and in practice they operate in a discriminatory manner." Ohralik v. Ohio State Bar Association, 476 U.S. 447, 474 (1978) (Marshall, J., concurring). This discrimination occurs "with respect to the suppliers as well as the consumers of legal services." Id. at 475.

The author of a recent law review article on lawyer advertising and solicitation reaches a similar conclusion: restrictions on solicitation "place the small firm and the solo practitioner at a disadvantage relative to the more established lawyer." Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 482 Maine L. Rev. 369, 414 (1990). Referring in part to Rule 7.3(c) of the American Bar Association's Model Rules of Professional Conduct, which contains disclosure requirements similar to those found in Petitioner's proposed Rule 7.2(i), Hill observes that "the current ethical rules may in fact be viewed as an expression of the need to protect various interest groups." Id. at 415. This becomes even more relevant if one believes that direct mail is "the most sensible [advertising] alternative for attorneys to utilize," Whitman, *Direct Mail Advertising by Attorneys*, 20 N. Mex. L. Rev. 87, 111 (1990), especially for attorneys with small practices or those that are not well established.

A seasoned local observer who has witnessed firsthand the efforts to hobble lawyer advertising in Minnesota also concludes that protecting consumers has little to do with these suggested amendments, and that the initiative comes mainly from "those with established practices who want to silence competitors." Stephen R. Bergerson, *Lawyer Advertising Bans Show Contempt for Consumers*, American Advertising, Winter 1992–93, at 24. Such restrictions "aim at the ad's effectiveness, not its deceptiveness." Id. at 25. (Bergerson is a partner in the Twin Cities law firm of Fredrikson and Byron, and a well-known expert in advertising law.) Bergerson also notes that of the 1,384 complaints received by the Minnesota Lawyers' Board of Professional Responsibility in 1990, only 7 involved advertising, and most of these were submitted by other lawyers. Id.

In order to be consistent with the constitutional mandates discussed above, Petitioner's case for proposed Rule 7.2(i) must be that the simple receipt of an envelope from a lawyer has a substantial potential for consumer deception. The absence of any factual support from Petitioner for this proposition only reflects its inherent implausibility. The potential for deception resides in the letter enclosed in the envelope, not in the envelope itself.[3]

Respondents do not dispute that reasonable rules governing content and requiring disclosures in such letters are appropriate. Existing rules contain ample authority for the review and control of potentially misleading direct mail solicitation letters. That authority would be enhanced by other portions of the relief requested in the Petition.

---

[3]The tenuous nature of the evidentiary support for Rule 7.2(i) is further highlighted by the minority report submitted by a significant portion of the MSBA's Lawyer Advertising Committee, which opposed, among other things, the adoption of Rule 7.2(i) on the grounds that the "label requirement is unnecessary and an insult to the consumer's intelligence."

Policing the letters themselves may be somewhat more involved than is labelling envelopes so that consumers will not read them. But as the Supreme Court has noted, "our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Zauderer, 471 U.S. at 646. Any minor uncertainty that an unlabelled letter from an attorney might cause is more than outweighed by the fact that, as the Supreme Court has recognized, in a matter of moments a recipient of a direct mail advertisement can open it, recognize that it is advertising, and, if not interested, be done with it "simply by averting [his] eyes," Ohralik, 436 U.S. at 465, or can readily put it "in a drawer to be considered later, ignored, or discarded," Shapero, 486 U.S. at 475−476. In sum, the marginal intrusiveness of a letter without external disclosures is far outweighed by the benefits to the consumer that might be described in the letter, about which the consumer might otherwise never learn.

IV. Conclusion

Petitioner simply cannot sustain a case for the restriction described in proposed Rule 7.2(i). As the Supreme Court observed in Shapero, "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient." 486 U.S. at 479.

Petitioner has requested leave to respond to comments concerning the Petition submitted to the Court (Petition, para. 9). Respondents ask the same opportunity to reply to any response of Petitioner addressing the comments contained in this Memorandum.

DATED: April 9, 1993

Respectfully submitted,

Mark R. Anfinson
Attorney for Respondents
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611
Atty. Reg. No. 2744

lawyerad\memo.opp

STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-1650

In Re:

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

AFFIDAVIT OF MARK R. ANFINSON

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

1. I represent the parties identified as "Respondents" in the accompanying Memorandum. The Respondents are attorneys who engage in targeted direct mail advertising in Minnesota. At this stage of the proceedings, they prefer that their identities not be disclosed.

2. I have reviewed the issue of standing in this proceeding and I do not believe that disclosure of the identities of my clients is required. If the Court perceives any problem with standing as a consequence of this, I ask that it treat me as the party in interest.

3. In addition to the affidavits attached from individuals who have benefitted from direct-mail advertising, I have talked with or reviewed the statements of numerous additional

individuals who make similar claims. I believe that the attached affidavits are representative of this group.

FURTHER YOUR AFFIANT SAITH NOT.

Mark R. Anfinson
Attorney for Respondents
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611
Atty. Reg. No. 2744

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

Notary Public

Notary Public Minnesota
SARAH M. SHAFTMAN
HENNEPIN COUNTY
My Commission Expires Feb. 6, 1997

lawyerad\affidavit.mra

STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-1650

In Re:

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

AFFIDAVIT OF T. ERICK LOKEN

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

T. Erick Loken, being first duly sworn, on oath states as follows:

1. I am president of Measured Marketing Corporation, 100 Portland Avenue, Minneapolis, Minnesota. Measured Marketing specializes in direct marketing methods.

2. I personally have extensive experience in direct marketing, which includes direct mail marketing. Attached to this Affidavit is my biographical summary, describing in detail my experience and credentials in these areas.

3. I have reviewed the amendment proposed by the Minnesota State Bar Association to the rules concerning lawyer advertising, which among other things would require attorneys engaging in direct mail marketing to state "Advertising" on the outside of the envelopes.

4. Based on my experience in direct mail marketing, I believe that such a

requirement, if adopted, would cause a significant percentage of people who receive direct mail marketing advertising from attorneys to discard the letter unopened. It is my professional opinion that many recipients, upon seeing the word "Advertising," would conclude that the piece was merely "junk mail" and would not bother to examine the letter.

5. As a consequence of the steady increase in direct mail marketing, consumers have become increasingly selective about what they take time to look at. It has become progressively more challenging to design direct mail pieces that consumers will review. In this environment, if the word "Advertising" is placed on the exterior of an envelope, I believe that many recipients will regard this as tantamount to an invitation to throw the letter away without reading it.

FURTHER YOUR AFFIANT SAITH NOT.

T. Erick Loken

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

Notary Public

RICHARD E. POWELL
NOTARY PUBLIC - MINNESOTA
WASHINGTON COUNTY
My commission expires 6-1-94

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BIO

T. Erick Loken

President, Measured Marketing Corporation

Ted is a 20-year veteran of the marketing communications industry. He accepted his first position in marketing with General Mills right after graduation from the University of Minnesota in 1968. Three and a half years later he left General Mills to open his own advertising agency, and built a $4 million operation in five years. He first "discovered" direct marketing in 1975 when be bought a copy of the then just-published Successful Direct Marketing Methods by Bob Stone.

In 1980 Ted sold the agency to Carmichael Lynch, a large Twin Cities advertising agency. In 1985 he was asked to head Carmichael Lynch's direct marketing division. With Ted at the helm, the direct division went from two employees to twelve in four years and Carmichael Lynch became one of the area's most well-respected direct marketing agencies. In 1990, he left Carmichael Lynch Direct and founded Measured Marketing Corporation, a marketing communications agency specializing in direct marketing based in downtown Minneapolis. In three years this new venture has grown to eight employees, $6 million in capitalized billings, and nearly $1 million in income.

Mr. Loken is an active member of the American Marketing Association, the American Advertising Federation, and the Direct Marketing Association. He is a past board member of the MDMA (Midwest Direct Marketing Association) and served on the Direct Marketing Advisory Board for the American Association of Advertising Agencies for two years.

Ted is a frequent speaker on marketing communications for the AAAA and the DMA. He is on the speaker's roster for the AAF and spoke over a dozen times to AAF chapters in 1992. Mr. Loken appears frequently as a guest lecturer on direct marketing at the University of Minnesota and the University of St. Thomas. And, he is a member of the faculty at Metropolitan University where he teaches a full-credit course on direct marketing.

STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-1650

In Re:

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

AFFIDAVIT OF MICHELE LAWRENCE

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

1. I live at 10640 Grouse Street in Coon Rapids, Minnesota.

2. In December, 1992, I was hurt in an automobile accident when I left work in Minnetonka. My injuries were relatively minor, but I did have some continuing problems.

3. At the time of the accident, I did not know any lawyers. I was not aware of the legal rights that I had as a result of the automobile accident.

4. After the accident I received letters from attorneys that explained my legal rights to me, and told me that if I took certain actions I might be able to recover damages from the accident. The information was very helpful to me.

5. I often throw "junk mail" away without reading it. I believe that if the letters I received from attorneys after my accident had been marked "Advertisement" I may have

thrown them away and never learned about the legal rights I had.

FURTHER YOUR AFFIANT SAITH NOT.

Michele Lawrence

Michele Lawrence

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

Michele L Redd

Notary Public

MICHELE L. REDD
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Comm. Exp. July 20, 1998

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STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-1650

In Re:

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

AFFIDAVIT OF PATRICIA SWARTZ

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

1. I live at 5742 Sumter Avenue North in Crystal, Minnesota.

2. I was hurt in an automobile accident in April, 1991, near Elk River. My injuries were not severe, but I did have problems.

3. I did not know any lawyers before this accident, and I did not know that I had any special legal rights after having been injured in an auto accident.

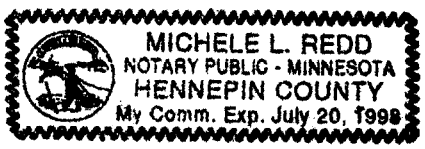
4. After the accident some attorneys wrote me letters that explained these legal rights to me. The letters were very useful. I might not have opened them, however, if they had been marked "Advertisement," so I would not have learned about my rights in this case.

FURTHER YOUR AFFIANT SAITH NOT.

Patricia Schwartz

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

Notary Public



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Direct-Mail Legal Pitches Get Big Boost

Court Ruling Fuels Debate Over Ethics

By Laurie P. Cohen
Staff Reporter of The Wall Street Journal

Within 72 hours of his arrest on a drunken-driving charge, James H. Parker received letters from five different lawyers he had never heard of. They were all eager to represent him.

The Washington, D.C., maintenance worker hired one of them for a fee of $500. "I figure he knows what he's doing, with the way he talks," Mr. Parker says.

Potential clients are likely to see more of these unsolicited pitches from lawyers. Last month, in a case brought by the Kentucky Bar Association against Louisville lawyer Richard D. Shapero, the Supreme Court ruled that attorneys have a First Amendment right to solicit business through mailings to people known to have legal problems. Now, the 25 states that had prohibited targeted mailings by lawyers will have to lift their bans. Moreover, the ruling will erase some of the stigma that has long been attached to such mailings.

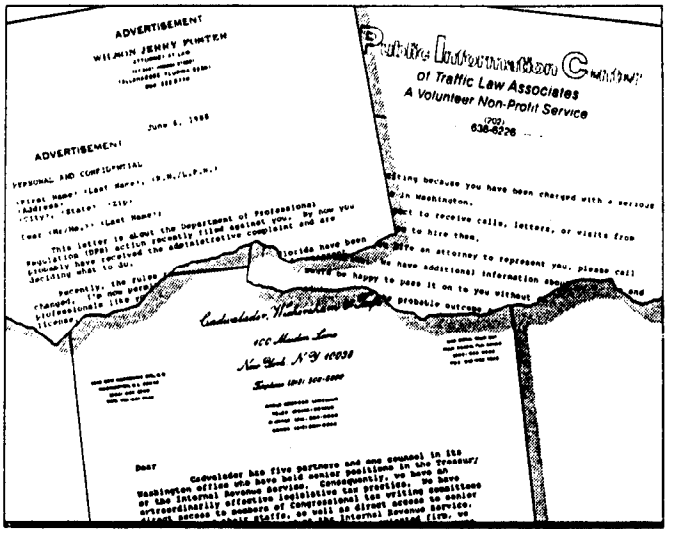
The court's ruling was the latest in a long string of decisions, beginning in 1977, that have relaxed the restrictions on advertising by lawyers. These days, many lawyers routinely peddle their services in newspapers, on television and in the Yellow Pages. Even the largest and most conservative law firms pay publicists to help them scout for clients.

Eroding Prestige?

But though advertising by lawyers has become a way of life, many attorneys and the American Bar Association believe that targeted mail solicitation is pushing things too far because it erodes the prestige of lawyers as well as raising certain ethical issues. "We are a profession, not a trade," says Frank Doheny Jr., who argued the Kentucky bar's case before the Supreme Court. "We don't solicit business by sending letters."

Says retired Chief Justice Warren Burger, a longtime critic of advertising by lawyers: "The fact that the Constitution permits you to do something doesn't mean you can do it professionally or ethically."

Targeted mailings, critics say, are likely to be difficult to police for potential abuses. They worry, for instance, about misrepresentation by an attorney who makes promises that can't be kept; unlike newspaper ads, they say, the letters that lawyers send probably won't be seen by regulators unless a complaint is made. Critics also charge that some lawyers who flood accident victims and their families with letters are seeking to take advantage of people under stress.



That's what they say happened after an accident involving a Continental Airlines jet last November. The plane had skidded off a Denver runway and flipped over, killing 28 people. Within days, lawyers say, the attorneys' letters were pouring in.

David Whitney, a Caldwell, Idaho, attorney who represents the family of a crash victim, recalls that the family received letters from more than 50 lawyers offering their services. "How would you feel if you had just been in an accident and all of a sudden you get a letter from a lawyer saying, 'You need to be advised, and here are my great feats' "? asks Mr. Whitney. "I just don't feel this approach to the concept of advertising is in good taste."

But supporters of targeted mail solicitation say that even if some letters are in bad taste, at least they are from lawyers seeking to work on the victims' behalf. "Victims are barraged with 'Come on, let's settle' solicitations from insurance company and airline lawyers right after the crash," says Mr. Shapero. "That's even worse because those lawyers aren't even on (the victim's) side."

Besides, other supporters add, were it not for letters sent by lawyers, many poor or uninformed accident victims might be quick to accept much lower settlement offers from insurance companies than they could get if they had a lawyer.

"Most of the clients who respond to my letters are people who wouldn't even go to an attorney unless I wrote them," says Ronald J. Schweighardt, a Fort Lauderdale, Fla., lawyer. Mr. Schweighardt says he has gotten about 100 clients from the more than 2,000 letters he has sent since the beginning of the year.

Indeed, some recipients are happy they bothered to read the letters. Mr. Parker, the Washington, D.C., maintenance worker, says he's pleased he was able to pick a lawyer with so little effort. Getting contacted by lawyers already familiar with his case, he says, was "a whole lot better than looking in the Yellow Pages and calling a whole page full of them."

In another case, a 35-year-old Miami nurse feared she was about to lose her license to practice last year when she was charged with failing to keep accurate records of medicine she gave patients.

Because the nurse is a former drug addict, she was already on probation with the Florida agency that regulates medical professionals. Last year, she contacted six local attorneys, all of whom requested upfront fees of $3,000 to $5,000. Despite the hefty fees, all of the attorneys told the nurse they weren't even sure how to handle a case such as hers.

Then she received a letter from Wilson Jerry Foster, a Tallahassee, Fla., lawyer who specializes in medical-licensing cases and had her name in the records of the state's Department of Professional Regulation. He charged her $1,200. After a hearing last month, the agency allowed the nurse to keep her license, extending her probation by a year. "Because of Mr. Foster, my livelihood is intact," she says.

Regulators in states that had allowed targeted mailings before the court's ruling say complaints have been rare. "For the most part, lawyers have behaved in an ethical, responsible manner," says Thomas Johnson, chairman of the American Bar Association Commission on Advertising. "Most complaints," he adds, "are made by other lawyers" whose clients have received letters from other attorneys.

For example, a Florida Bar Association report shows that about 250,000 targeted mail solicitations were sent by 177 Florida lawyers last year. Of the 99 complaints that the bar association received, only 22 were filed by non-lawyers.

Attorneys say that targeted mailings aren't likely to be used by most lawyers. Most of the letters sent so far by lawyers seek clients who are victims of personal injuries or who are accused of crimes or traffic violations.

But targeted mailings are becoming more popular. Since 1984, John Spaulding, a Washington, D.C., attorney, has combed police arrest records to turn up people charged with serious traffic offenses. He sends out about 70 letters each week and figures he has gotten more than 2,000 clients as a result. But lately, Mr. Spaulding says, "Competition is stiff, prices have been driven down and it's not as lucrative" as it once was. Potential clients, he adds, are now "getting 15 letters, compared to the two or three they got a few years ago."

So Mr. Spaulding has become more resourceful. "People who are more affluent will get a handsome, sophisticated letter on fine stationery that doesn't quote a price," he says. The less affluent "get something that says, 'Do not pay more than $100 to an attorney.' "

While most letters have been sent by small law firms and solo practitioners like Mr. Spaulding, some lawyers say a major impact of the court's recent ruling will be on larger law firms that may find this type of advertising more acceptable and cost-effective than TV or newspaper ads.

Big Firms Join In

But when a big firm sends out such materials, it can get a lot of attention. Take the case of Cadwalader, Wickersham & Taft. The big Washington, D.C., law firm has received sharp criticism recently for a letter it mailed to prospective tax clients earlier this year. "We have direct access to members of congressional tax-writing committees and members of their staffs, as well as direct access to senior officials in the Treasury and at the Internal Revenue Service," the firm said in its letter.

As soon as it was sent, the letter began to draw fire from competitors and tax experts alike who thought the law firm was overstating its abilities. "The rumbling you hear . . . is the sound of Cadwalader, Wickersham and Taft rolling over in their graves at having the name of their firm identified" in this kind of letter, says former Chief Justice Burger.

But John Walsh, a Cadwalader partner, defends his firm's action. "The letter was a generalized and broad attempt to let our existing clients know about an area they might find useful," he says. "I don't think we oversold ourselves."

Wall Street Journal
July 5, 1988

LAW OFFICES

MESHBESHER & SPENCE, LTD.

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(612) 339-9121

FAX (612) 339-9188

REPLY TO MINNEAPOLIS OFFICE

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JAMES A. WELLNER
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MARK D. STREED
RANDALL G. SPENCE
HOWARD I. BASS
DANIEL C. GUERRERO
KATHERINE S. FLOM
PAMELA R. FINNEY
JEFFREY P. OISTAD
DANIEL E. MESHBESHER
ANTHONY J. NEMO
JEFFREY A. OLSON

April 9, 1993

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

RE: **Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct**
File No. C8-84-165

Dear Sir/Madam:

Enclosed please find the Affidavit of Service showing service of the Statement by Meshbesher & Spence, Ltd. in Opposition to Petition to Amend Rules and the Request to Make Oral Prsentation on Robert Guzy, President of the Minnesota State Bar Association.

Very truly yours,

Jack S. Nordby

JSN:th

Enclosure

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Thomas McAlpine, being first duly sworn upon oath, deposes and states that on the 9th day of April, 1993, he served the following documents upon Robert Guzy, therein named personally at 514 Nicollet Mall, Minneapolis, in the County of Hennepin, State of Minnesota, by handing to and leaving with Marlene Mattson a true and correct copy thereof:

1. Statement by Meshbesher & Spence, Ltd. In Opposition to Petition to Amend Rules

2. Request to Make Oral Presentation

Thomas McAlpine

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

Tammy R. Hahn
Notary Public

Tammy R. Hahn
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Comm. Exp. 11-7-97

LAW OFFICES

MESHBESHER & SPENCE, LTD.

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KATHERINE S. FLOM
PAMELA R. FINNEY
JEFFREY P. OISTAD
DANIEL E. MESHBESHER
ANTHONY J. NEMO
JEFFREY A. OLSON

April 8, 1993

HAND DELIVERED

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

RE: **Petition of Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct**
File No. C8-84-165

Dear Sir/Madam:

Enclosed for filing please find 12 copies of the statement and 12 copies of the Request to Make Oral Presentation pursuant to the Court's order of February 22, 1993.

Very truly yours,

Jack S. Nordby

JSN:th

Enclosure

STATE OF MINNESOTA
IN SUPREME COURT

No. C8-84-165

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

REQUEST TO MAKE ORAL PRESENTATION

Pursuant to the Court's order of February 22, 1993, Jack Nordby, representing Meshbesher & Spence, Ltd., requests leave to make an oral presentation of approximately five minutes at the hearing on the above-captioned petition on April 12, 1993.

Respectfully submitted,

MESHBESHER & SPENCE, LTD.

By _____

Jack S. Nordby
Attorney Reg. No 79546
1616 Park Avenue
Minneapolis, MN 55404
Telephone (612) 339-9121

Dated: 7 April 93

STATE OF MINNESOTA
IN SUPREME COURT

No. C8-84-165

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

STATEMENT OF MESHBESHER & SPENCE, LTD., IN OPPOSITION TO PETITION TO AMEND RULES

MESHBESHER & SPENCE, LTD.
Jack S. Nordby, Esq.
Attorney Reg. No 79546
1616 Park Avenue
Minneapolis, MN 55404
Telephone (612) 339-9121

STATE OF MINNESOTA
IN SUPREME COURT

No. C8-84-165

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

STATEMENT OF MESHBESHER & SPENCE, LTD., IN OPPOSITION TO PETITION TO AMEND RULES

Preface

This statement is submitted pursuant to the Court's order of February 22, 1993, in opposition to the Petition of the Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct, by Meshbesher & Spence, Ltd., a law firm with offices in St. Paul, Minneapolis and St. Cloud. This is a relatively small firm with a diversified practice including civil and business litigation, commercial law, criminal defense and lawyers professional responsibility. The firm advertises in various media, in a manner believed to be both ethical and in good taste and at considerable expense.

The writer of this submission is a member of the firm, a major part of whose practice for over 20 years has been the defense of respondent lawyers in disciplinary cases, as well as other matters involving questions of professional responsibility. He was counsel for the respondents in In re Appert, 315 N.W.2d 204 (Minn. 1981), in which this Court dealt at length with constitutional and public policy issues implicated in the question of advertising by lawyers and concluded, in general, that non-misleading advertising that

does not involve in-person confrontation with the prospective client is both constitutionally protected and of substantial public benefit, and in In re N.P., 361 N.W.2d 386 (Minn. 1985), which concerned issues of solicitation, inter alia. Undersigned counsel has also written and spoken extensively on issues of professional responsibility and discipline and has taught two full law school courses on the subject as well as many continuing legal education programs. He attempts to remain current with the literature in the area, including that concerning advertising, both to maintain competence in his practice and as a matter of personal predilection. He has examined the petition and other materials obtained from the bar association, reviewed various cases and commentaries, and consulted with knowledgeable colleagues both within and outside his law firm in preparing this submission.

The Petition is Insufficient and Perhaps Misleading

The bar association's petition is the product of a committee whose final report was apparently adopted "in part" by the House of Delegates. Our enquiries indicate two points of relevance not revealed in the petition: First, this committee was formed to study the matter again shortly after **a previous committee had concluded that no changes in the rules were required or desirable;** second, most of the proposals of the second committee were rejected by the House of Delegates. We believe this history is pertinent to the Court's consideration since it suggests the proposed amendments represent a compromise between a minority in the bar association who are opponents of advertising generally and a

majority among whom there is substantial sentiment for the appropriateness and adequacy of the rules presently in force.

Next, the petition asserts the committee heard from "lawyers, judges and members of the public," but no such materials nor summaries of them are appended to the petition.

Finally, and most importantly, the petition alleges that the "MSBA has considered numerous complaints about misleading advertisements to the public where the existing rules were inadequate and ill-suited for protection of the public" and that the proposed amendments "are those deemed necessary and appropriate." (Petition, paragraph 6) The obvious implication of this passage is that the bar association received a large number of complaints, supposedly from aggrieved members of "the public," concerning abuses of advertising which these proposed amendments were specifically tailored to address.

Our investigation, however, suggests this is not the case and that in this respect the petition is therefore at best misleading:

A. These "complaints" are conspicuously absent from the body of the petition itself and are not attached to it. Since they are supposedly the impetus for the petition, one might have expected the bar association to present them, or at least a summary and description of them, as exhibits, for the consideration of the Court and comment by interested parties.

B. Information we have obtained indicates that the "numerous" complaints are in fact (i) about a dozen or so letters, (ii) not from the "public" generally at all but from lawyers, (iii) some if

not all of which were generated by and in response to an advertisement by the MSBA soliciting such complaints, and (iv) they are **not concerned** with the specific items addressed by the proposed amendments; they concern primarily the aesthetics of certain advertisements and the practice of solicitation by mail; **none** appears to raise the points made in the proposed amendments.

Therefore, it appears that the petition's very premise is questionable and perhaps altogether vacant--i.e. the clear suggestion that there is widespread public dissatisfaction with particular aspects of advertising that these proposed rules are designed to remedy.

In fact, it appears there is **not a single complaint** about the practices in question.

This petition is, in effect, a pleading invoking this Court's inherent, exclusive and substantial authority to regulate the bar. Rudimentary principles of pleading require that the moving party state a cause of action and allege facts which if proved would require the relief sought. Elementary principles of litigation require the moving party to produce appropriate evidence sufficient to satisfy the tribunal that that relief is appropriate, together with reference to the applicable law.

On its face, the petition fails to go beyond the most conclusory assertions and, as we have suggested, may in fact invite the application of an apple to a problem involving oranges, since, so far as we are able to tell, the proposed amendments have nothing at all to do with the issues raised in the alleged "numerous

complaints." If the bar association has other complaints or evidence of abuses, we trust these will be supplied to the Court and to other interested parties, but even that would not explain the absence of some helpful recitation of this in the petition itself.

The Proposed Amendments Do Not Remedy Any Existing Problem but Would Create Other Problems; the Points They Address Are Already Covered More than Adequately By the Rules of Professional Conduct; and the Changes Would Impede the Desirable and Constitutionally Protected Flow of Information to the Public; They Are a Disguised Assault on Advertising in General

We have already questioned whether there even exists any problem of the sort the petition suggests. In addition to the lack of evidence presented to date by petitioners, we note that among the many reported decisions of this Court on lawyer disciplinary matters there is an absolutely eloquent silence so far as improper advertising is concerned, in well over a decade since In re Appert, supra. The only decisions appear to be In re Johnson, 341 N.W.2d 282 (Minn. 1983) (holding a restriction on advertising legitimate specialization certification unconstitutional); and In re N.P., supra, (upholding the constitutionality of the prohibition of in-person solicitation). Neither has anything to do with the issues raised in the petition.

Moreover, among the approximately 82 private admonitions described in the Director's annual summaries since 1984, only one involves an advertisement (Bench and Bar, Feb. 1993; the advertisement claimed the firm was largest personal injury firm in

the area with substantial experience, but the evidence was otherwise). This admonition demonstrates that the Director has the tools and ability to prosecute misleading advertising but has been required to do so only once. Two other admonitions involved misleading letterheads; March 1987; May-June 1988. Again, none of these involves the points made in the petition. These, of course, do not include all admonitions issued during that period of nearly a decade, but those the Director found of sufficient interest to deserve comment (which in itself is no doubt of some relevance). We assume the Director would inform the Court upon request as to any other such private dispositions, as well as the number of complaints about advertising for which discipline was found not to be warranted. Since overall complaints average, we believe, over 1,000 a year, this information should be of some interest. Undersigned counsel can say that, so far as he can recall, among the hundreds of disciplinary respondents he has represented or consulted with, none, except in Appert, supra, has been charged with improper advertising, and that involved quite different questions.

The available data, therefore, hardly supports the petition's suggestion that there is a serious problem in need of this Court's attention. Indeed from a review of the high volume of disciplinary cases decided by this Court during this period, it appears that there can hardly be a question of **less** concern to the bench, the bar or the general public than this.

We therefore say that so far as has been shown the "problems" which the petition addresses **do not exist.**

Even if we were to suppose arguendo that there are difficulties in the areas addressed by the amendments, these are already dealt with in the Rules of Professional Conduct. Rules 7.1-7.5, adopted after In re Appert, supra, and after the pertinent decision of the United States Supreme Court, regulate advertising and other communications about legal services in a manner that experience has now proven effective. Rule 1.5(c) specifically requires contingent fee agreements to be in writing **and to state the very points concerning expenses** recited in the proposed amendments. Rule 1.5(e) requires written agreements as to referral fees; Rule 1.6 generally requires the client's consent for disclosures of confidences to anyone, including lawyers to whom cases are referred. The proposal that the word "advertisement" appear on communications is at best superfluous, at most insulting to the intelligence of consumers, since any non-misleading communication (i.e. that is not in violation of existing rules) will obviously be just that. Nothing at all beneficial would be gained by this proposal, and it would tend if anything to have the opposite effect to that supposedly desired, that is, it would tend to "commercialize" and even demean these communications, aggravating in the eyes of the "public" with whom the bar association purports to be concerned the perception that the bar is a crassly commercial enterprise. We suspect its intent is simply to discourage lawyers from advertising at all, and we are

confident that would be its only real effect, rather than to assist the public. It is a first step in what will be, unless it is rebuffed, a continuing assault by die-hard opponents of advertising, many of whom do not want the public informed of their rights and remedies.

Another intractable difficulty of the first three proposals, probably prohibitive to most who advertise, and certainly a potential source of more confusion than enlightenment, is that the information required to be conveyed would be either (A) too brief and cryptic to be truly informative or (B) so extensive as to consume the entire advertisement. This would appreciably increase the cost of advertising while diminishing its effectiveness. And since this is information **which must be in the written retainer agreement in any event**, and certainly is most efficiently discussed between lawyer and client when the contract is executed, the proposed language accomplishes nothing significant--except to discourage advertising generally and to confuse.

By way of analogy, it is rather like requiring doctors, in their **advertising**, to explain the extent of insurance coverage of particular aspects of the services they offer; or of demanding that merchants of products, in their **advertising**, describe the coverage of any warranty or part, and so on. This is important information, to be sure, but it is properly discussed and explained **when the contract is entered**, not in the advertising.

It should not go unremarked that since the rules already require the information to be in the retainer agreement, the bar

association **pre-supposes** that lawyers will violate and are violating those rules; otherwise the proposals are superfluous. Experience and the available data do not support any so cynical an estimation of the profession.

Finally, apart from the practical obstacles to making such rules as these workable, they impinge on serious constitutional rights and privileges and invite altogether unnecessary, prolonged and expensive litigation of constitutional issues and interpretation of their provisions. It is elementary that courts should not and do not decide constitutional questions if they can be avoided by reaching a decision on other grounds. A rule-making procedure such as this, originated by a private organization, with no identifiable organized "adversary" on the other side, and without an evidentiary hearing with procedural safe-guards, is hardly the proper forum for such decision-making.

We are conscious of the fact that the recommendations of the bar association carry some weight, and properly so, with the Court. We are uncomfortably aware that as a small private firm we are entitled to no comparable prima facie credibility or respect, none beyond whatever persuasiveness our arguments may inherently deserve. Nor is there any organization of comparable size or authority to which we can appeal.

This fact of life will, we hope, impel the Court to examine the petition and its proponents with particular care and require them to produce, if they can, the evidentiary substance and legal

authority which they believe supports their claims. The burden of proof and persuasion is with them, and they have not met it.

We note that the committee was established in 1991 (following, as we have noted, the work of an earlier committee that **recommended no changes**); the House of Delegates acted in August of 1992; the petition was dated January 25, 1993; this Court's order for hearing was dated February 22, 1993, and published in Finance and Commerce on March 5, 1993, ordering that statements be submitted by April 9, 1993, and oral presentations made on April 12, 1993. Thus, the bar association has been working on the question for years; after the convention, it took six months more for them to submit the petition. We opponents, by contrast, lacking the bar association's resources, having no effective organization to do comparable preparation, and very much required to attend to the day to day business of practicing law, have had only a month to do what we can.

Thus we solicit the Court's searching enquiry of the petitioners and scrutiny of the **substantive basis** of their proposals. We suggest that this will demonstrate the proposals are unsupported, unneeded and more likely to be the source of future mischief than any benefit.

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Thus we solicit the Court's searching enquiry of the petitioners and scrutiny of the **substantive basis** of their proposals. We suggest that this will demonstrate the proposals are unsupported, unneeded and more likely to be the source of future mischief than any benefit.

We respectfully request the petition be denied.

Respectfully submitted,

MESHBESHER & SPENCE, LTD.

By _____

Jack S. Nordby, Esq.
Attorney Reg. No 79546
1616 Park Avenue
Minneapolis, MN 55404
Telephone (612) 339-9121

Dated: 8 April 93

Harry A. Sieben, Jr.
Clint Grose (1923-1987)
John E. Von Holtum
Timothy J. McCoy
John W. Carey
Douglas E. Schmidt
Mark R. Kosieradzki
Raymond R. Peterson
Mark G. Olive
James P. Carey
William D. Sommerness
David A. Stofferahn
Wilbur W. Fluegel
David W. H. Jorstad

SIEBEN, GROSE,
VON HOLTUM,
McCOY & CAREY, LTD.

900 MIDWEST PLAZA EAST • 800 MARQUETTE AVE. • MINNEAPOLIS, MN 55402-2842
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Willard L. Wentzel, Jr.
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Arthur C. Kosieradzki
Scott H. Soderberg
John B. Wolfe, Jr.
Robert W. Schaumann
Judy L. Emmings
Lisa M. Montpetit

Of Counsel
Miles W. Lord

April 9, 1993

Minnesota Supreme Court
c/o Clerk of Appellate Courts
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

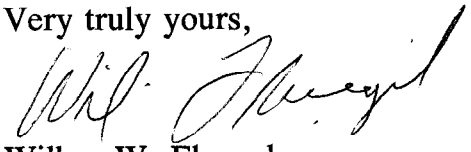
RE: Petition of Minnesota State Bar Association to Amend Rules of Lawyer Advertising
Court File: C4-84-1650

Dear Justices:

Enclosed please find the Request to Make Oral Presentation and Statement of the Case for the April 12, 1993, hearing on the Petition of Minnesota State Bar Association to Amend Rules of Lawyer Advertising.

Thank you for your attention and cooperation with this matter. If you have any questions, please feel free to contact my office.

Very truly yours,



Wilbur W. Fluegel

FOR THE FIRM

WWF/nar

enclosures

65962_1

STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-165

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

REQUEST TO MAKE ORAL PRESENTATION

Pursuant to the Court's order of February 22, 1993, Wilbur W. Fluegel, hereby requests leave to make an oral presentation of approximately ten minutes at the hearing on the above-captioned petition on April 12, 1993.

Respectfully submitted,

DATED: April 9 1993

Wilbur W. Fluegel, #30429
900 Midwest Plaza East
Eighth and Marquette
Minneapolis, Minnesota 55402
(612) 333-4500

STATE OF MINNESOTA

IN SUPREME COURT

No. C8-84-165

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

STATEMENT OF WILBUR W. FLUEGEL IN OPPOSITION TO PETITION TO AMEND RULES

Wilbur W. Fluegel, #30429
900 Midwest Plaza East
Eighth and Marquette
Minneapolis, Minnesota 55402
(612) 333-4500

This statement is submitted pursuant to the Court's order of February 22, 1993, in opposition to the Petition of the Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct.

1. **A Problem Has Not Been Demonstrated**.

In the MSBA petition, the organization states "numerous complaints" have arisen under the "existing rules." The implication of the Petition is that many clients or members of the public have complained about advertising matters that must be addressed by changes in the existing rules. I am unaware of any statistical data to support such a proposition.

Statistics available from the Lawyers' Professional Responsibility Board reflect that in 1990 the Board received a total of 1,384 complaints of all types regarding lawyers, but that only 7 concerned advertising, none of which was filed by a client. As reflected in exhibit 1, this volume certainly does not reflect "numerous complaints," but rather represents less than 1% of all complaints. Moreover the fact that all complaints were from lawyers fails to demonstrate that the public perceives a problem.

My information is that the number of advertising-related complaints rose to approximately 30 in 1992, following a public request by MSBA in its magazine "*In Brief*," which solicited complaints about advertising from lawyers. Exhibit 2 is an extract of the MSBA minutes of October 25, 1991, detailing the solicitation of complaints[1] and exhibit 3 is a copy of the February 21, 1992 minutes describing the lack of any further complaints.[2] Again, the number of complaints may hardly be

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[1] Minutes of October 23, 1991, at 2 "MSBA in Brief."

[2] Minutes of February 21, 1992, at 2 "Review of Advertising."

described as "numerous," and the problem may not be fairly characterized as one of public concern.

Attached as exhibit 4 are copies of the complaints that I have been able to obtain. As you can see, they reflect that they are in response to the MSBA's solicitation, rather than being generated as ethical complaints. Moreover, these letters question the "professionalism" or "quality" of advertisements, rather than addressing themselves to ethical violations. Indeed, the letters typically comment that the advertisements they are questioning are "not false, misleading or in violation of the ethical rules." See copies of letters, exhibit 4.

The MSBA has failed to demonstrate that a problem exists and the Petition should be rejected for this reason.[3]

2. **The Existing Rules Address Any Problems That May Arise**.

Proposed Rule 7.2(f) requires a disclosure to be made by a lawyer whose advertising is for the purpose of referring clients to others. The proposed disclaimer requires an indication that the firm will only receive a portion of the fees, and that the terms of the fee arrangement will be specified in a written retainer. Rule 1.5(c) already provides that a "contingent fee agreement shall be in writing and shall state . . . [the] percentage that shall accrue to the lawyer . . . ." Rule 1.5(e) provides that when fees are divided between lawyers who are in different firms, and the division is

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[3] It is also interesting to note that the "charge" of the sub-committee changed from one "[t]o study and recommend" whether proposals should be made to change the rules (*see* Meeting Notice, January 10, 1991, exhibit 5), to a charge "[t]o develop a specific proposal regulating lawyer advertising" (*see* Minutes of September 20, 1991, at 3, exhibit 6), even though the first group constituted for review of the rules had *not* recommended any be made. In other words, it appears that the group promulgating the changed rules that are before the Court did not act out of an impartial analysis of the need for a change, but instead actively solicited complaints to support a pre-existing agenda for change.

other than in proportion to the service performed by each lawyer, the division of fees must be contained in a "written agreement with the client," and the client must be "advised of the share that each lawyer is to receive." Finally, Rule 1.5(e) indicates that the client must "not object to the participation of all the lawyers involved," and the total fees must be reasonable. A comparison of the language in the rules is shown in exhibit 7.

The concerns about a potential misunderstanding appear adequately addressed by the existing rules.

The same may be said regarding proposed Rules 7.2(g) and (h) which require advertisements to express whether the contingent fee agreement also makes the costs contingent on the outcome and require specificity on whether the percentage calculation of the fee is computed before or after costs are deducted. Existing Rule 1.5(c) already requires that a written contingent fee agreement "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," and how "expenses [are] to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." A comparison of the language in the rules is set forth in exhibit 8.

Finally, the concerns addressed by proposed Rule 7.2(i) which requires the word "ADVERTISEMENT" appears at the beginning of a letter and envelope of any direct communication with a prospective client appears adequately to be addressed. Rule 7.2(b) which requires copies of "written communication shall be kept for two years . . . along with a record of when and where it was used," and Rule 7.3 which

bars in person direct contact with prospective clients for pecuniary motivation. A comparison of the language in the rules is set forth in exhibit 9.

Not only is an enforcement mechanism in place, but as stated by the Minority Report (exhibit 10), the requirement of a label on advertising "is unnecessary and an insult to the consumer's intelligence." As the Minority noted,

> Consumers understand advertising. They need no statement explaining an advertisement is an advertisement. Disclaimers in other product categories already show us they are ineffective and soon become ignored.

(*Id.*) Either the Minority is right and the labelling will be ignored by the public and hence be ineffective, or it will work, and consumers will discard it as "junk mail," without reading contents that could provide them with valuable information.[4]

3. **Advertising Serves A Useful Purpose**.

As recognized by the Minnesota Supreme Court in *In re Appert & Pyle*, 315 N.W.2d 204, 215 (Minn. 1981) and by the United States Supreme Court in *Zauderer v. Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), lawyer advertising performs an important public function of alerting members of the public who might not otherwise be aware of their rights or of available remedies, particularly at affordable costs.

4. **Constitutional Questions Exist Regarding Regulations that Potentially Chill Free Speech**

While regulations that promote ethical contact by lawyers with the public fulfills a valid purpose, regulations that effectively bar such commercial speech is constitutionally suspect. An otherwise permissible written communication to a

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[4] As noted by the U.S. Supreme Court in *Zauderer*, certain types of claims might never have been brought were it not for direct advertising by attorneys: Dalkon Shield, Copper-7, asbestosis claims, etc. Advertising can perform a useful function.

prospective client that is labeled "advertisement" will be treated as junk mail and discarded before its contents have been read. Since the Minnesota and United States Supreme Courts have both recognized the potential importance of the contents of such letters, a new regulation that would in practice result in the destruction of such communication before their reading has the effect of barring this valid means of communicating services to the public.

Constitutional concerns have been expressed about the proposed changes, by the MSBA in its Minutes, but it was determined to proceed with changes based upon the advice "that the Minnesota Supreme Court would be the likely defendant" in any challenge to the new rules, and "not the MSBA, and that the Attorney general defends the court in litigation," so that the costs of litigation should not be a deterrent to the MSBA advancing the proposal of the majority group of the second assembled sub-committee on advertising.[5]

5. **Conclusion**

The MSBA has failed to demonstrate any compelling justification to change the machinery of the existing rules, which appear more than adequate to address any problem that might arise. Given the constitutional concerns that exist relative to further limitation of lawyer advertising, and the useful purpose that it can serve, the fact that there are not actual "numerous" public complaints but only a few complaints by competing attorneys, should not justify a modification of the existing rule structure.

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[5] *See* Minutes of October 25, 1991, at 1 "Advertising Restrictions Litigation," exhibit 2.

I appreciate this opportunity to present the above information to the Court and would request ten minutes of time at the hearing to present these concerns to the Court. Thank you for your attention to this matter.

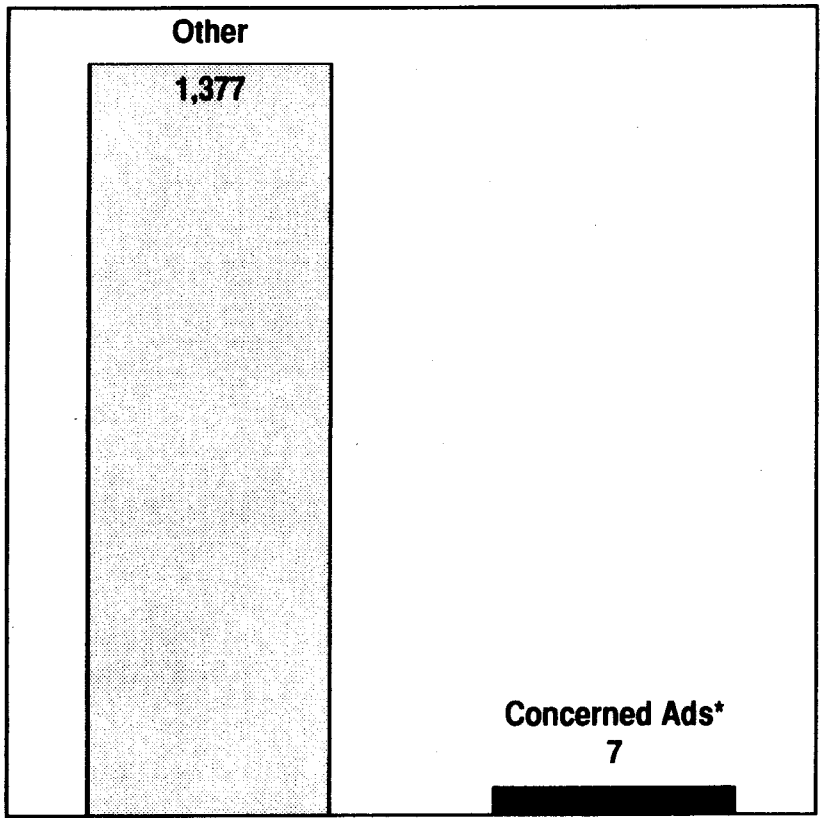
DATED: April 9 1993

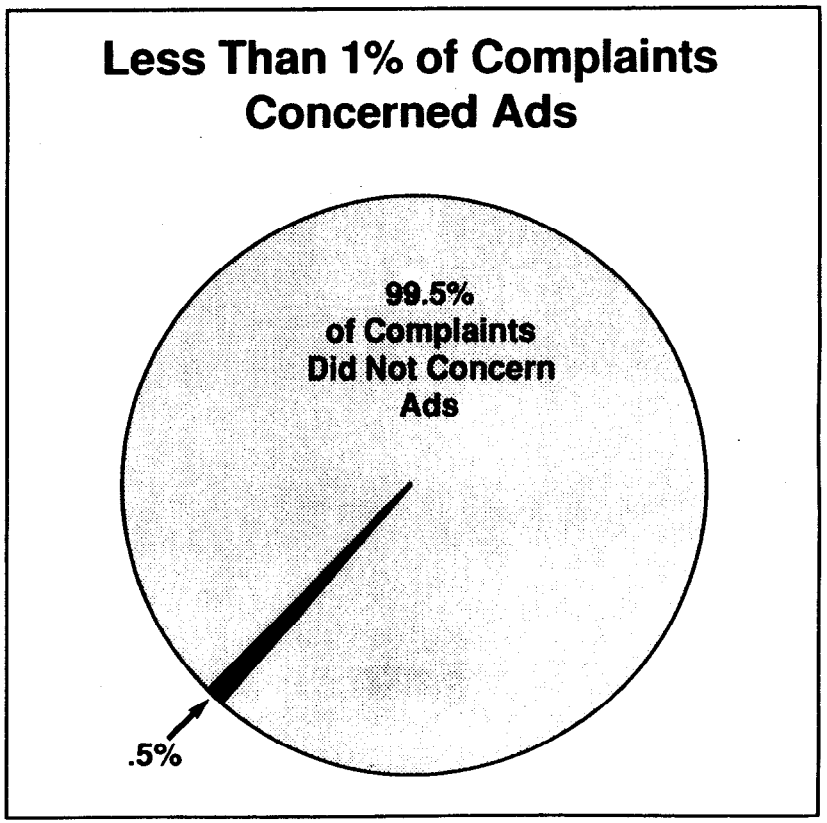
Wilbur W. Fluegel, #30429
900 Midwest Plaza East
Eighth and Marquette
Minneapolis, Minnesota 55402
(612) 333-4500

65741_1

EXHIBIT "1"

1,384
COMPLAINTS RECEIVED BY THE LAWYERS BOARD
1990





*** All complaints were filed by lawyers**

EXHIBIT "2"

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.

EXHIBIT "3"

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.

EXHIBIT "4"

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.

-Divorce & Family

CANN SCHMIDT HASKELL & D'ALBANI PA
205 7 St Bemidji ——— 751-4060

Kief Fuller Baer Wallner & Rodgers Ltd
Bemidji ——— 751-2223
Please See Advertisement This Page

Smith Thomas T 115 5 St Bemidji ——— 751-3130

-Malpractice-Professional

SOMMERNESS 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

-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

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

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.

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 ††
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

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

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

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.

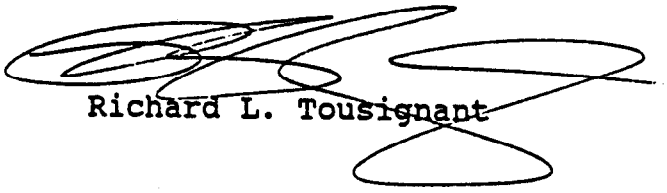
This is the type of solicitation which gives all lawyers a bad name. You will note that in three different areas of the letter, they type in capital letters and underline, "TIME IS OF THE ESSENCE". It appears that this is placed in the letter to instill some kind of fear in the individual to get them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

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

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

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

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 chart
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,

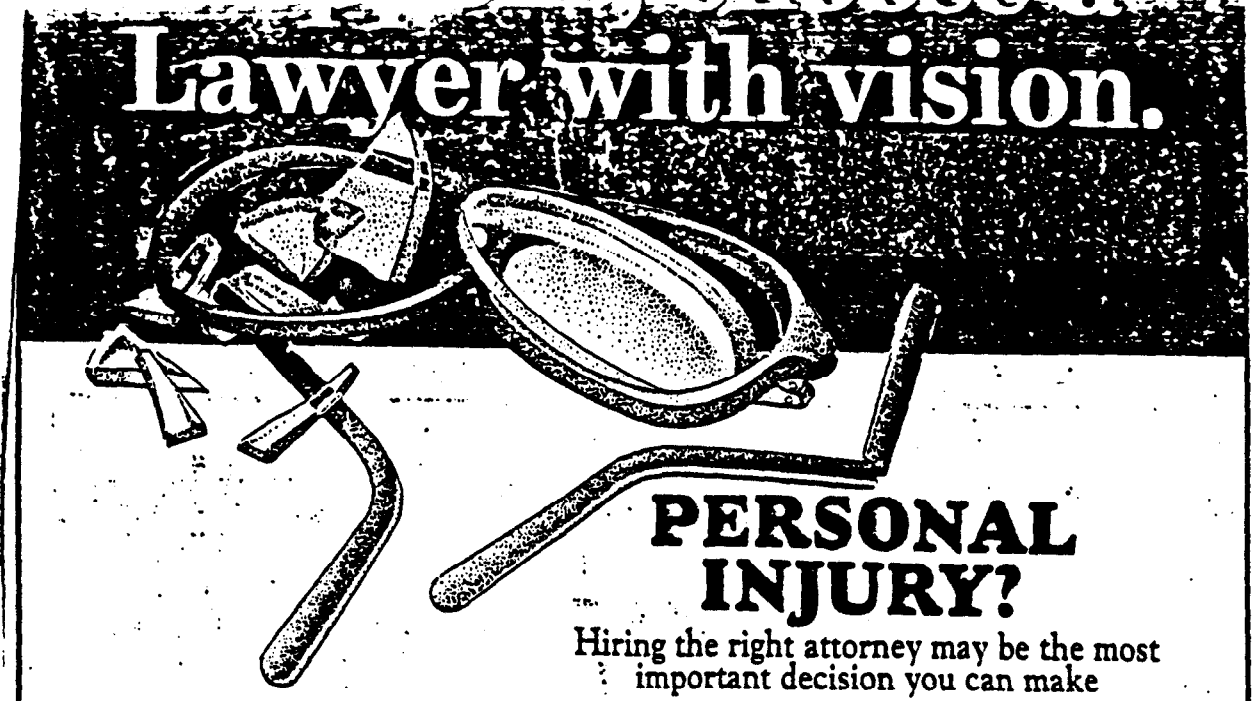
KALINA, WILLS & WOODS

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 two 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 Mr. 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

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

McGinnie Metro Appraisal
2174 3 St Wh Bear Lk — 426-7144

SEARCH CO REAL ESTATE APPRAISERS THE
Farm-Residential-Commercial-Condemnation Appraisals-
Jerry Dixon-Fee Appraiser
168 N Lake Forest Lake — 464-7880

Archery Equipment & Supplies

FOREST LAKE SPORTS & TACKLE
1007 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 Mrne St Croix — 433-5600

JMB ARCHITECTS
6225 White Bear Pkwy White Bear Lake — 653-1696
Forest Lake — 464-5248

Morrison/Walijarvi Architects Inc
2189 4 St Wh B 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

HIS ART GALLERY THE
Hwy 8 & Cty Rd 25 Lindstrom — 257-1120

Nature's Image
200 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
- RESURFACING
- BOBCAT GRADING
- DESIGN PAVERS
- PATCHING
- SEALCOATING
- CRUSHED ROCK
- 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 OR 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 5 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 (11:0
(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 (11:1
(9)	M*A*S*H 8423	Night Court	Waterloo (1970). Rod Steiger, Christopher Plummer 877268					News 78249.	M*A*S*H 2918171	Arsenio Hall (10 (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 (11:0
(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 Stor
(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		Dinosaurs! (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). 4648		
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 Beggar'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 Beach 953171		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	Loveliness 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 C		
TBS	Addams	Sanford	A Woman Called Moses (7:05) (1978). Cicely Tyson, Will Geer 63668442								Shar
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) 8316499			
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	Late	
WGN	Jeannie	Be Told	Amadeus (Part 1) (1984). 980688				News (cc) 669797		NL Court	Kojak 127442	
WOR	Gimme	Cosby	Wiseguy 635591		New York at Night		News (cc) 631775		Love Boat 634852		Koj
DIS	Woofl (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 (5:15) 86545626		Friday the 13th (1980). Adrienne King 141442				Lethal Women (1989). Marvin 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				Just 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 Coas** "Georgia" Jekyll Island Savannah; Atlanta 8702

[DIS] **American Teac** Profiles honor teachers f nation; they, in turn, ho them as the teacher c 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

If you have been charged with a CRIMINAL or TRAFFIC offense, DON'T PANIC! We can help!

Even if you think you are guilty,

WE CAN HELP YOU.

We know how. And we have a long history of helping people through the criminal justice system.

Knowing what to do and how to do it is sometimes the key to obtaining a reduced charge, lighter sentences or a dismissal of all charges.

CALL US NOW!

And call us before your court appearance.

WERSAL LAW OFFICE P.A.

546-3513

We have 5 convenient locations

ST. LOUIS PARK
7841 Wayzata Blvd.

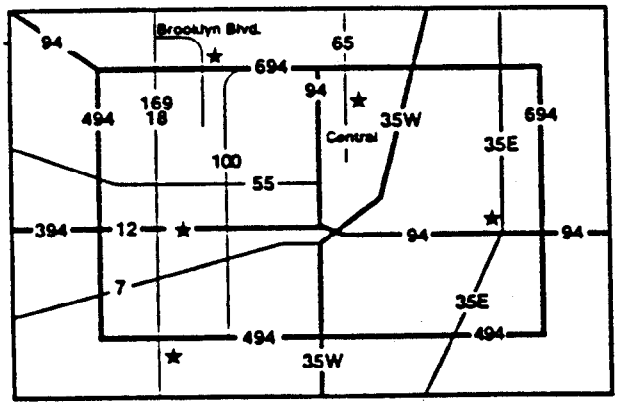
COLUMBIA HEIGHTS
3989 Central Ave. NE

BROOKLYN CENTER
7000 Brooklyn Blvd.

EDEN PRAIRIE
Shopping Center

ST. PAUL
Near Capitol

FREE INITIAL CONSULTATION.



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

LEGAL ASSISTANT
CHERILYN I. 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.

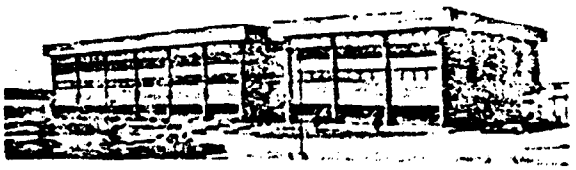
Our office would like to help you before, during and after your upcoming hearing. Contact us at 473-2837 (Dial G-R-E-A-T-E-R) for an initial no-cost, no-obligation interview.

Very truly yours,

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

Greater Minnesota Legal Clinic

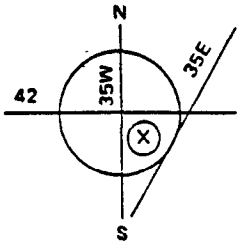
Contact us at 473-2837 (Dial G-R-E-A-T-E-R)



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

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

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. Althougn 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.

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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)

WILLIAM J. WERNZ
SENIOR ASSISTANT DIRECTOR
THOMAS C. VASALY
ASSISTANT DIRECTORS
CANDICE M. HOJAN
KENNETH L. JORGENSEN
MARTIN A. COLE
BETTY M. SHAW
WENDY WILLSON LEGGE
PATRICK R. BURNS
KAREN A. RISKU

SUITE 100
ST. PAUL, MINNESOTA 55155-4196

TELEPHONE (612) 296-3952
TOLL-FREE 1-800-657-3601
FAX (612) 297-5801

December 5, 1991

Thomas M. Skare, Esq.
1219 - 14th Street
Cloquet, MN 55720-3139

Re: Advertisement for "The Advocate"

Dear Mr. Skare:

We have received your December 2, 1991, correspondence regarding the advertisement for The Advocate. I telephoned The Advocate and spoke with a claims service agent there named Lamont Knazze, who is not an attorney. Mr. Knazze told me that there are no attorneys who work for The Advocate. He said that if persons require legal services, they are referred to an outside attorney, but that The Advocate is not a referral service. According to Mr. Knazze, the attorneys to whom cases are referred do not pay any sort of a referral fee to The Advocate.

If you believe that the information provided by Mr. Knazze is incorrect, and you know of one or more attorneys who work for The Advocate, please submit the name(s) and, if available, the address(es) of the attorney(s), and advise this Office whether you wish us to consider your letter a complaint against the attorney(s). This Office only has jurisdiction to investigate complaints against persons currently or formerly licensed as Minnesota attorneys. We do not have jurisdiction to investigate claims of the unauthorized practice of law by persons never licensed as Minnesota attorneys.

The county attorney has jurisdiction to prosecute claims of unauthorized practice of law. If you believe that The Advocate is engaging in the unauthorized practice of law, you may wish to contact the county attorney. If you believe that The Advocate has engaged in false advertising, you may wish to contact the Better Business Bureau or the Office of the Attorney General.

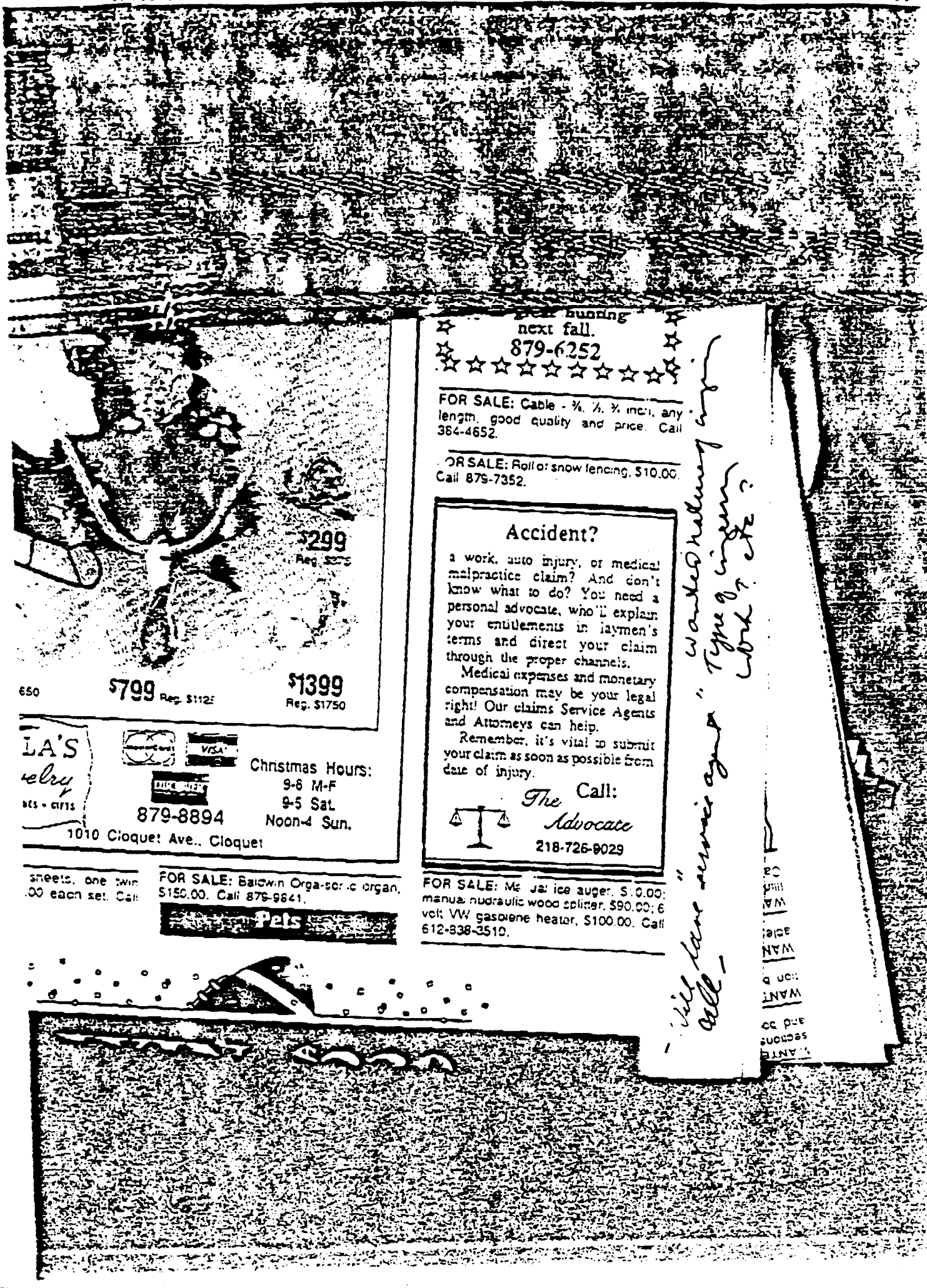
Please feel free to call me if you have any questions.

Very truly yours,

William J. Wernz
Director

By Wendy Willson Legge
Wendy Willson Legge
Senior Assistant Director

tt
cc: Lamont Knazze (with copy of December 2 letter)



$299
Reg. $375

650 $799 Reg. $1125

$1399
Reg. $1750

LA'S
elry
ES • GIFTS

879-8894

1010 Cloquet Ave., Cloquet

Christmas Hours:
9-6 M-F
9-5 Sat.
Noon-4 Sun.

next fall.
879-6252

FOR SALE: Cable - ¾, ½, ¾ inch, any length, good quality and price. Call 384-4652.

OR SALE: Roll of snow fencing, $10.00. Call 879-7352.

Accident?

a work, auto injury, or medical malpractice claim? And don't know what to do? You need a personal advocate, who'll explain your entitlements in laymen's terms and direct your claim through the proper channels.

Medical expenses and monetary compensation may be your legal right! Our claims Service Agents and Attorneys can help.

Remember, it's vital to submit your claim as soon as possible from date of injury.

The Call:
Advocate
218-726-9029

sheets, one twin .00 each set. Call

FOR SALE: Baldwin Orga-sonic organ, $150.00. Call 879-9841.

Pets

FOR SALE: Ma jai ice auger, $10.00; manual hydraulic wood splitter, $90.00; 6 volt VW gasolene heater, $100.00. Call 612-838-3510.

EXHIBIT "5"

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.

EXHIBIT "6"

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,

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

EXHIBIT "7"

PROPOSED RULE

7.2(f) A lawyer may not advertise for or solicit clients by any means for the purpose of referring those clients to another lawyer who is not a partner, associate, or employee of the advertising or soliciting lawyer without disclosing in the advertisement or solicitation that such a referral may or will be made. The disclosure must be worded substantially as follows: "You are advised that your case may be referred to another firm or attorney not directly associated with this law firm. You are further advised that this firm will receive a portion of any fee you ultimately pay to the firm doing the actual legal work on your behalf. The specifics of this fee arrangement will be disclosed to you in detail in the retainer agreement this firm will provide for you to sign."

CURRENT RULE

RULE 1.5 FEES

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

EXHIBIT "8"

PROPOSED RULE

7.2(g) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable.

7.2(h) Advertisements and 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 from the recovery, if the lawyer so intends to compute the fee.

CURRENT RULE

RULE 1.5 FEES

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. 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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

EXHIBIT "9"

PROPOSED RULE

7.2(i) The word "ADVERTISEMENT" must appear clearly and conspicuously at the beginning of, and upon any envelope containing, any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.

CURRENT RULE

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(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.

(d) Any communication made pursuant to this Rule shall include the name of at least one licensed Minnesota lawyer responsible for its content if the legal services advertised are to be performed in whole or part in Minnesota.

(e) Every lawyer associated with or employed by a law firm which causes or makes a communication in violation of this Rule may be subject to discipline for failure to make reasonable remedial efforts to bring the communication into compliance with this rule.

EXHIBIT "10"

LAWYER ADVERTISING COMMITTEE MINORITY REPORT

The Lawyer Advertising Committee has approved a number of changes to the Minnesota Rules of Professional Conduct. Except for proposed Rules 7.2(a) deleting the list of examples of public media, (g) liability for expenses, and (h) contingency fees, we think these changes are unnecessary.

The rules and regulations already in effect, protecting consumers from false and misleading advertising, are enough. Any further effort to protect consumers would certainly be redundant and possibly unconstitutional.

Proposed Rule 7.2(e) -- General Disclaimer

Consumers understand advertising. They need no statement explaining an advertisement is an advertisement.

Disclaimers in other product categories already show us they are ineffective and soon become ignored.

Proposed Rule 7.2(f) -- Brokering Disclaimer

The brokering disclaimer is unnecessary. The existing rules adequately cover division of fees and truthfulness in advertising.

Proposed Rule 7.2 (i) -- Label

The label requirement is unnecessary and an insult to the consumer's intelligence.

Proposed Rule 7.2(j) -- Burden of Proof

The burden of proof provision is pointless and may conflict with the requirement that the disciplinary authority prove violations by clear and convincing evidence.

RECOMMENDATION

The minority recommends the MSBA adopt only the proposed amendments to Rule 7.2(a), (g), and (h). (Note: The minority does not oppose the adoption of aspirational goals or the resolution to the Lawyers Professional Responsibility Board.)

Martin Cole
Tracy Eichhorn-Hicks
John Hovanec
Kenneth Kirwin
Gary Stoneking

CASE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the Minnesota Rules of Professional Conduct; Minnesota State Bar Association ("MSBA"),

Petitioner.

BRIEF IN OPPOSITION TO THE PETITION TO AMEND THE MINNESOTA RULES OF PROFESSIONAL CONDUCT, MILAVETZ AND ASSOCIATES, P.A.

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ARGUMENT

The issue before the Honorable Court today is twofold. First, whether the proposed amendments will accomplish the public benefits sought by Petitioner. Second, whether the State of Minnesota should further regulate professional advertising under the language of the proposed rules when no actual problem exists with the current Rules of Professional Conduct which regulate professional advertising in light of Article I, §3 of the Minnesota Constitution and under the free speech and press provision of the first amendment to the Unites States constitution.

Petitioner requests this court to engage in a proactive

regulation of attorney advertising. Specifically, Petitioner alleges that it has "considered numerous complaints about misleading advertisements to the public where the existing Rules were inadequate and ill-suited for the protection of the public." (Petition).

Petitioner requests this court to amend Rules 7.2 and 7.3 of the Minnesota Rules of Professional Conduct. We contend that the proposed amendments to Rule 7.2 would unduly restrict attorney advertising and offend the public's first amendment rights to receive information. Furthermore, the proposed amendments will not accomplish the public benefit sought by Petitioner. The proposed rules will only increase the costs of advertising and will confuse the message to the public.

We support a consideration of an amendment to Rule 7.3 that would clarify what is meant by "direct contact" with prospective clients, but that would not be so overbroad as to sweep into areas of protected free speech.

I. THE PROPOSED RULES ARE CONSTITUTIONALLY SUSPECT.

We need not remind this Honorable Court that attorney advertising is in the category of constitutionally protected commercial speech, Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977). Petitioner has failed to meet the heavy burden to show why further restrictions are necessary.

Under current law[1], first amendment principles governing state regulation of commercial speech concerning lawful activities is limited to false or misleading speech and may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S.Ct. 2265 (1985).

In NAACP v. Button, 371 U.S. 415 (1963), the Supreme Court held that the state carries the burden to demonstrate a compelling justification for regulating protected first amendment speech. Similarly, in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Supreme Court held that regulations of constitutionally protected speech must satisfy rigorous procedural safeguards and that any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity. Id. at 639.

The Bates decision requires that the state's interests in restricting lawyer advertising must be compelling in light of the individual and societal interests in the free dissemination of commercial information. Bates, 433 U.S. at 2706. The decision also implies that sufficient evidence must be introduced to support a finding that the advertisement is improper or misleading. The

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[1]The First Amendment provides, in part: "Congress shall make no law ... abridging the freedom of speech, or of the press...." The Due Process Clause of the Fourteenth Amendment has been constructed to make this prohibition applicable to state action. See, e.g. Stromberg v. California, 283 U.S. 359 (1931); Lovell v. Griffin, 303 U.S. 444 (1938).

Wisconsin Supreme Court allocated the burden of proof in such cases to the disciplinary authority. In re Marcus, 320 N.W.2d 806 (Wis. 1982).

Petitioner has not introduced any evidence to support a finding that existing advertisements are improper or misleading. Rather, Petitioner argues that there is potential for false or misleading advertising.

We remind this court that state rules which are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the perceived evil." In Re RMJ, 455 U.S. 191, 203, 102 S.Ct. 929,937 (1982). What is the perceived evil with the existing Rules? Petitioner advances the argument that it has considered numerous complaints about misleading advertisements to the public. Should not this evidence, if it exists, be brought forward by the Board of Professional Responsibility? If in fact there is a problem, would not Petitioner have secured corroborating evidence from the Board of Professional Responsibility?

The fact of the matter is that there have been hundreds of thousands of people who have heard and seen attorney advertising and have retained the services of attorneys as a result of the advertising. There has been, however, no documented complaint of any member of the public who has been misled or deceived by an attorney in Minnesota under the existing rules which Petitioner wishes to modify.

Petitioner is a trade association of attorneys who are not

elected by members of the public and represent the financial interests of the majority of attorneys in Minnesota. Petitioner has not conducted a public hearing in this matter nor has Petitioner heard testimony from any witness under oath. The numerous complaints that Petitioner claims that it has received are not complaints from anyone who has been deceived or misled. The fact that numerous attorneys have complained about other attorneys advertising does not mean that this Honorable Court should act on such unfounded accusations brought against attorneys who advertise.

We contacted the Board of Professional Responsibility. The Board is responsible for handling client complaints regarding attorney advertising and solicitation. We were specifically told, however, that the Director's office did not provide any information to Petitioner in support of Petitioner's claims. We note that the Board of Professional Responsibility has not taken a position in regard to this petition.

We highlight for this court Petitioner's admission that this petition calls for a proactive approach to allegedly misleading attorney advertising. Petitioner has wholly failed to substantiate its claim that the existing Rules are inadequate and ill-suited for the protection of the public.

Petitioner should show three things. First, that there are current or past advertisements or advertisements that are likely to occur in the future that are actually untruthful or misleading. Second, that the current rules cannot effectively regulate this speech. Three, that the proposed rules are sufficiently precise

and narrowly drawn so as to effectively and carefully regulate attorney advertising without infringing on constitutionally protected speech.

II. THE PROPOSED AMENDMENTS WILL NOT ACCOMPLISH THE PUBLIC BENEFITS SOUGHT BY PETITIONER.

RULE 7.2 (F)

Proposed Rule 7.2 (f) states:

> A lawyer may not advertise for or solicit clients by any means for the purpose of referring those clients to another lawyer who is not a partner, associate, or employee of the advertising or soliciting lawyer without disclosing in the advertisement or solicitation that such a referral may or will be made. The disclosure must be worded substantially as follows: "You are advised that your case may be referred to another firm or attorney not directly associated with this law firm. You are further advised that this firm will receive a portion of any fee you ultimately pay to the firm doing actual legal work on your behalf. The specifics of this fee arrangements will be disclosed to you in detail in the retainer agreement this firm will provide for you to sign."

The problem with this proposal is that it is overbroad and unclear. The rule can be construed as to include an attorney who will only occasionally refer out a particular case or who may co-counsel at the time of trial or appeal.

Referral of cases between lawyers is common. One reason for this is that an attorney may not take on a legal matter that the attorney knows he or she is not competent to handle. (Model Rule 1.1) This includes referring cases to a specialist such as a trial specialist, an appellate specialist or a specialist in a certain area of law such as tax, product liability or slip and fall cases.

Another reason is to avoid a conflict of interest. (Model Rule 1.7)

One argument in favor of referring cases is that the client is referred to a lawyer who is better able to do the work. Moran v. Harris, 131 Cal.App.3d 913 (1982). The referring lawyer may be too busy to handle a case or may not feel competent to handle the case.

The proposed rule under Rule 7.2 (f) clearly discourages an attorney's obligation to refer cases. We contend that most attorneys who advertise for or solicit clients have at one point in time referred a case to another attorney. The proposed rule does not make clear how broadly the phrase "[a] lawyer may not advertise . . . for the purpose of referring those clients to another lawyer" should be read. Does "purpose" mean sole purpose? Primary purpose? Principal purpose? Dominant Purpose? or any purpose?

Would an attorney who fails to have this disclosure in his or her advertisement be sanctioned who refers a case to another case to try the case or refers the case to another attorney to argue on appeal?

We contend that it is imperative to keep the referral process open. The practical result is that the client will be referred to the lawyer who is best able to do the work. It is in the public's best interest to encourage rather than discourage attorney referrals.

RULE 7.2 (G) AND (H)

Proposed Rules 7.2 (g) and (h) states:

(g) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable.

(h) Advertisements and 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 from the recovery, if the lawyer so intends to compute the fee.

In essence, Petitioner is saying that it is unlawful to advertise in the current manner and that there is something misleading about the contingent fee arrangement. Just as the Board of Pharmacy feared in Virginia Pharmacy Board v. Virginia Consumer Council, 96 S.Ct. 1817 (1976), Petitioner is fearful of an advertisement's effect upon its recipients. The court in Virginia Pharmacy noted, however, that freedom of speech protection is afforded to the communication itself, to its source and to its recipients both. Id. at 1823.

In striking a balance between the speaker and listener, the court observed that the State of Virginia's protectiveness of its citizens, the recipients, rested in large measure on the advantage of their being kept in ignorance. id. at 1829. The argument assumed that the public is not sophisticated enough to realize the limitations of advertising and that the public cannot be trusted with correct, but incomplete information. The court, however, abandoned this "highly paternalistic" approach.

An alternative to this "highly paternalistic" approach taken by the court was that people will perceive their own best interests and will shop and compare to their own benefit. Id. at 1829. This

alternative approach was affirmed in Bates, 97 S.Ct. at 2700.

The United States Supreme Court has struggled with the issue of whether a specific reference to contingent fee arrangements are misleading or deceptive. Justice Brennan, in his partial concurrence in Zauderer, stated, "an attorney's failure to specify a particular percentage rate when advertising that he accepts cases on a contingent-fee basis can in no way be said to be inherently likely to deceive." Zauderer, 105 S.Ct. at 2286-87.

Justice Burger stated in Virginia Pharmacy, "nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." Virginia Pharmacy, 96 S.Ct. at 1382.

We contend that Petitioner's proposal is a regression to the paternalistic approach abrogated in Virginia Pharmacy and Bates. We do not mean to say that price information cannot be confusing at times, but to make the leap that absent further disclosure, price information is misleading or deceptive is wrong.

We belong to a profession where members are ethically obligated to put their client's interests ahead of their own. Most clients have an interest in keeping the cost of litigation to a minimum. If an attorney must disclose in the advertisement that the client will be ultimately liable for costs when in fact the attorney wishes to waive the costs if there is an unfavorable outcome, this is to the disadvantage of the client. Even if the attorney waives the costs, the client will always have expectations

of a cost waiver.

The practical alternative is to fully explain the billing aspects of the case in the retainer agreement. The American Bar Association advises that an attorney should reach "a clear agreement with their client as to the basis of the fee charges to be made," and that this is to be done "as soon as possible after the lawyer has been employed." (E.C. 2-19 (1976)).

We contend that the public is more sophisticated than Petitioner assumes. Advertisements in the commercial world provide at least some of the relevant information, not a complete foundation, on which to select an attorney. To require more disclosures on attorney advertisements and written communications would only confuse the attorney advertisement. Additionally, the disclosure requirements could lead to the increase of advertising costs which would disadvantage clients.

As mentioned, Petitioner has wholly failed to prove that the mentioning of a contingent fee arrangement is false or misleading. Misleading means something that is calculated to lead astray or to lead into error. Black's Law Dictionary (6th Edition). We recognize that when people are not cautious or watchful in their buying habits they are likely to be misled. see Commonwealth v. Ferris, 25 N.E.2d 378 (Mass. 1940). This should not be the case when people are searching for an attorney. As with any major purchase, we contend that the buying public will be cautious when they go out attorney shopping.

Furthermore, the general public should be aware that they may

have to pay some fee to retain the services of an attorney. The expectation to pay absolutely nothing for retaining an attorney is not reasonable. Justice Blackmun, in delivering the majority opinion in Bates stated, "rare is the client, moreover, even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge." Bates, 97 S.Ct. at 2701 (citing B. Christensen, Lawyers for People of Moderate Means 152-153 (1970)).

Usually, the client is made aware by virtue of the retainer agreement of what their expenses will be. This is important to note since each case is unique in and of itself and consequently, retainer agreements should be crafted to take into account all aspects of the individual case. An attorney would be derelict in his or her duty if they failed to make clear in the retainer agreement the potential costs to their client.

We contend that the proposed rules attempt to correct a problem that may be best alleviated by the use of written retainer agreements. Law firms which do not advertise may be guilty of misleading their clients in regard to legal fees and costs more so than advertisements allegedly mislead clients.

Lastly, to suggest that the fee and cost explanation would be effective in eliminating the alleged false and misleading nature of advertising is absurd. The proposed rules are technical rules without the necessary detail to make them effective. There is no mentioning of the type-size, color or length of print nor the duration of such disclosures in television advertisements.

Obviously then, this technical disclosure can be easily buried in print and television advertisements.

On the other hand, an attorney who whole heartedly wishes to comply with this rule and emphasized the disclaimer, would have great difficulty in allowing the public to receive the message that is most important to hear. The message that the public wishes to hear is that there is a law firm that may be willing to handle their case on a contingent fee basis so that they will not have to pay money to an attorney before their case is resolved.

The proposed rules will serve to limit the public's first amendment rights to hear this message. This message will be cluttered with technical, confusing verbiage which will be a burden upon those attorneys who wish to advertise and upon members of the public who wish to hear this message.

RULE 7.2 (I)

Rule 7.2 (i) states:

> (i) The word "ADVERTISEMENT" must appear clearly and conspicuously at the beginning of, and upon any envelope containing, any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.

The issue with this proposal is whether the appearance of the word "advertisement" upon the envelope containing any written solicitation would make the written solicitation any less false or misleading. A similar issue, but cast in terms of being overreaching, was decided in Shapero v. Kentucky Bar Ass'n., 108

S.Ct. 1916 (1988). The United States Supreme Court held that absent a showing that a letter of solicitation was false or misleading, a lawyer's letter soliciting business is not particularly overreaching.

The court stated, "such advertising is constitutionally protected commercial speech, which may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Id. at 1918.

The concern in Shapero was whether direct-mail solicitation is coercive or pressures the recipient for an immediate yes-or-no answer to the representation offer. The court held that direct-mail solicitation does not.

Petitioner takes the position that there is something wrong with direct-mail solicitation. We contend, however, that the appearance of the word "advertisement" does not make the letter any less false or misleading. As highlighted in the comment section to Model Rule 7.3, the word "advertisement" would do nothing to assure the accuracy and reliability of the contents. As a matter of intuition, the word "advertisement" mitigates the genuine offer to represent the recipient.

Additionally, Petitioner has not met its burden to show that letters of solicitation generally exhibit the evil of overreaching. Under Shapero, Petitioner's proposal must be denied.

RULE 7.3

Proposed Rule 7.3 changes only the title of the rule to read

"In-Person and Telephone Contact with Prospective Clients." We do not object to the this Honorable Court's consideration of the amendment of this rule. The proposed change has the practical effect of giving a clearer meaning to "direct contact" with prospective clients. Nevertheless, the proposed rule is overbroad and prohibits constitutionally protected direct contacts. A direct contact under some circumstances may be constitutionally protected.

CONCLUSION

The United States Supreme Court has stated that lawyer advertising is in the category of constitutionally protected commercial speech. Areas for regulation and/or protection include, however, time, place and manner restrictions and false, misleading or deceptive restrictions. None of these problem areas have been substantiated today. Furthermore, the proposed changes will not directly accomplish the goals advanced by Petitioner. Consequently, Petitioner's request to have the Minnesota Rules of Professional Conduct amended to reflect the above-mentioned disclosure requirements must be denied.

Respectfully Submitted

Dated: June 8, 1995

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