ENGEBRETSON AND ULLEBERG, P. A.
ATTORNEYS AT LAW
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ST. PAUL, MINNESOTA 55101
TELEPHONE (612) 227-0900

ANDREW P. ENGEBRETSON
ROLF ULLEBERG

RICHARD P. WRIGHT
PEGGY A. BRENDEN
JAMES E. OSTGARD

OF COUNSEL
MICHAEL J. WELSH

June 2, 1981

Michael J. Hoover
Administrative Director
Lawyers Professional Responsibility Board
300 Mid Continent Building
372 St.Peter St.
St. Paul, MN 55102

46994

Robert Sheran
Chief Justice MinnesotaSupreme Court
State Capitol
St. Paul, MN 55155

Re: Proposed admendments to Minn Code of Professional Responsibility

Dear Mike:

I find I will not be able to appear formally before the Supreme Court on June 5, in the above matter. Perhaps this informal method of expressing a point of view might be permissable and useful.

I felt the working of DR 5-103 "avoiding acquisition of interest in litigation" might be unduly restrictive.

I suggest that a third paragraph be added to the proposed amended Cannon 5, as follows:

> " (3) " If a lawyer feels there will be a probable recovery from a responsible party by settlement or by judgment, he may so advise a medical or other creditor being owed money apparently arising out of the accident caused by the responsible party; and in writing assure the creditor that payment of the debt will be protected out of such recovered funds by settlement or judgment, if such funds materialize, so long as such arrangement is requested and/or approved by the client."

My experience has been that such contingent protection assurance can ethically be given and should be given to enable the client to procure medical care and treatment particularly, and to give the client some peace of mind from harassment from creditors.

I hope these thoughts are of some value to you.

Best personal regards,

MICHAEL J. WELSH

MW:ea

7-29

John O. Murrin III
Robert M. McClay
Joseph M. Hoffman
Thomas E. Johnson
Paul D. Nelson
Steven C. Smith
Joel Fisher
Douglas F. McGuire
Richard K. Hocking
Joel C. Monke
Max Jensen
Richard L. Zilka, Jr.

Robert J. Healy
of Counsel

Jeanene M. Hayes
Paralegal

Murrin
Metropolitan Legal Center
PRIVATE ATTORNEYS AT LAW

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612/827-4666
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☐ Branch Office
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Brooklyn Center, MN 55429
612/560-2560
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201 West Burnsville Parkway
Suite 154
Burnsville, Minnesota 55337
612/890-5630
☐ California Office
4053 Chestnut
Riverside, California 92501
714/370-1400

July 20, 1984

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

Dear Persons:

I have been advised that there will be hearings on the Rules of Professional Responsibility for the new proposed draft.

Would you please contact me concerning that time and place.

Thank you.

Very truly yours,

John O. Murrin

JOM/jh

(C1)

LEONARD E. LINDQUIST
NORMAN L. NEWHALL
LAURESS V. ACKMAN
GERALD E. MAGNUSON
EDWARD M. GLENNON
MELVIN I. ORENSTEIN
ISRAEL E. KRAWETZ
EUGENE KEATING
JAMES P. MARTINEAU
RICHARD J. FITZGERALD
PHILIP J. ORTHUN
EDWARD J. PARKER
JOHN A. FORREST
WILLIAM E. FOX
JERROLD F. BERGFALK
WILLIAM T. DOLAN
JOHN H. STROTHMAN
DAVID G. NEWHALL
KURTIS A. GREENLEY
ROBERT V. ATMORE
HOWARD J. KAUFFMAN
JOHN B. WINSTON
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MARK R. JOHNSON
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ROBERT G. MITCHELL, JR.
J. MICHAEL DADY
J. KEVIN COSTLEY
ROBERT J. HARTMAN
JOSEPH G. KOHLER
PAUL H. TIETZ
JACK A. ARNOLD
RICHARD D. McNEIL
ALAN C. PAGE
JAMES P. McCARTHY
STEVEN J. JOHNSON
LYNN M. ANDERSON
TERI L. HACKER
DAVID A. ORENSTEIN
THOMAS E. GLENNON

OF COUNSEL
THOMAS VENNUM
DENNIS M. MATHISEN
DAVID M. LEBEDOFF

May 21, 1981

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

Re: June 5, 1981 Hearings on Proposed Amendments to Court Rules of Professional Responsibility and Proposed Amendment to DR5-103 of Minnesota Code of Professional Responsibility 46994

Dear John:

This is to advise you that the Lawyers Professional Responsibility Board will be represented at the above hearing by Robert F. Henson and me. Mr. Henson will present the position of the Lawyers Professional Responsibility Board regarding the proposed Amendment to DR5-103 and I will present the position of the Lawyers Professional Responsibility Board regarding the various Amendments to the Rules.

Sincerely,

Gerald E. Magnuson

GEM/jp
cc: Mr. Robert F. Henson
Mr. Michael J. Hoover

5-22 -- Copy to each Justice

[redacted]

64

united transportation union

Minnesota Supreme Court
State Capitol Building
St. Paul, Mn. 55101

May 16, 1981

Honorable Justices

As officers in Local 1882 of the United Transportation Union, we feel an amendment to DR 5-103(B), Minnesota Code of Professional Responsibility is not only justified but a needed move to insure proper justice.

Litigation in Federal Employer Liablity Act cases is a very long process, often taking 2 years to resolve. This places unbearable financial hardship on many of the injuried parties. In many cases the only financial assistance comes in the way of Railroad Retirement Health and Sickness Benefits ($500 per month max.) in varying lengths of time in accordance with the provisions of that Act. Many of the young workers do not even qualify for these benefits because of the length of time it takes to be eligible.

A loan, which the injuried party would remain liable for, could help him to remain financially solvent. It would help to avoid Government Assistance in the form of welfare, whereby saving a burden on our taxpayers. In many cases, the injuried party would be unable to continue to pursue his litigation to a successful settlement without a loan. This gives the Railroad, in FELA cases, an unfair advantage to settle a claim for much less than is deserved. Leaving the client in a position to solve his present financial burden but not enough to help with long range responsibilities such as rehabilitation or training for a new career.

Minnesota, known to be a progessive state, should not fail to make reforms which would help to insure the future of our citizens.

Respectfully submitted,

James R. Beath - S-T UTU #1882
Daniel R. Nutt - VLC - 1882
Gregg W. McCabe Leg. Rep #1882
Gerald E. Herron President 1882
Jon F. Lockhart Local Chairman (E) 18
Charles J. Anderson Local Chairman (C) 1

(62)

Sheet Metal Workers' International Association

2683 South Vaughn Way
Aurora, Colorado 80014
Phone: (303) 750-7225

VICTOR S. STEPSAY
International Representative

May 19, 1981

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

Gentlemen:

The undersigned, as International Representative of the Sheet metal Workers' International Association, petitions this Court to change the Minnesota Code of Professional Responsibility to allow attorneys to guarantee loans to their injured clients during the pendency of their lawsuits.

As International Representative of the Sheet Metal Workers, I am in a position to know that without financial assistance the members I represent would suffer sorely because of lack of funds. It is necessary and essential that they have some means of supporting themselves during the time their lawsuit is pending.

These members, whose lawsuits are pending, oftem have to settle their cases early for small sums. They accept these small sums because of the economic stress they are subject to while awaiting determination of the case.

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

Sincerely,

Victor S. Stepsay
International Representative

(63)

6-5-81

May 19, 1981

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

Dear Sir:

With regard to the upcoming public hearing on the Petition of the State Board of Professional Responsibility to change the Code of Professional Responsibility, I would appreciate the opportunity of appearing on behalf of the Brotherhood of Railroad Signalmen as General Chairman and member of the Board of Trustees for this area. I am enclosing herewith a Petition presenting the views of this International Union.

Sincerely,

W. A. Class, Jr., G.C.
965 Payne Avenue
St. Paul, Minnesota 55101

P.S. Would you please advise as to what time I can expect to be heard on the matter.

(65)

[redacted]

united transportation union

May 21, 1981

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

Dear Sir:

With respect to the proposed amendment to the Code of Professional Responsibility, United Transportation Union Local 1177 passed the enclosed Resolution at its last regular meeting on May 4, 1981.

As State Legislative Representative of Local 1177 I would appreciate the opportunity to appear at the hearing scheduled for 9:30 A.M. on June 5, 1981 and speak with regard to the issue.

Sincerely,

Willis G. Croonquist

Willis G. Croonquist
Leg. Representative U.T.U.
Local 1177
Willmar, Minnesota

united transportation union

BE IT RESOLVED that U.T.U. Local 1177 support the Rerat Law Firm, Yaeger & Yaeger Law Firm and other legal firms in their efforts to continue the practice of guarantying loans to disabled railroad workers during the pendency of their claim.

FURTHER BE IT RESOLVED that Local 1177 send a representative to appear at the hearing held before the Minnesota Supreme Court on June 5, 1981 to speak in support of the Minnesota Lawyers Professional Responsibility Boards position on this issue.

(This resolution was unanimously passed at the Regular Meeting of U.T.U. Local 1177 on May 4, 1981.)

(67)

[redacted]

Brotherhood Railway Carmen of the United States and Canada

Affiliated With AFL-CIO and CLC

Hiawatha Lodge No. 615

Minneapolis, Minnesota

May 20 1981

State of Minnesota
In Supreme Court

I as representative of Local Lodge No. 615, Brotherhood of Railway Carmen, Minneapolis, Minnesota wish urge the adoption of amendment of Canon 5, Minnesota Code of Professional Responsibility.

I refer you to File No. 46994 and more specifically to the proposed amendment to DR 5-103(B).

I beleive the proposed change as embodied within DR- 5-103 AVOIDING ACQUISITION OF INTEREST IN LITIGATION A is very necesary to avoid undue duress and hardship upon employees while awaiting settlement of law suits ..

Very frankly without this change and amendment workers are very literally coerced into continuing to work under physical impairment or settling damages for injuries sustained at a very reduced rate favorable to an employer.

When there are times when injuries are sustained and an employee is not at fault; an employer may urge the employee to accept to an offer of a low settlement by withdrawing any monetary assistance should he retain an attorney.

At least with the adoption of the proposed amendment to Canon 5 of the Minnesota Code Of Professional Responsibility the employee has more than bare unemployment benefits, etc,.

I can not see any possible reason why any law suit judged on its merits should not be the ultimate justification of support incompassed within the proposed petition for change of Canon 5.

Naturally employers will not wish to accept support for an employee because there settlements of injuries are increased in cost; and more specifically because that support is greater than they offer.

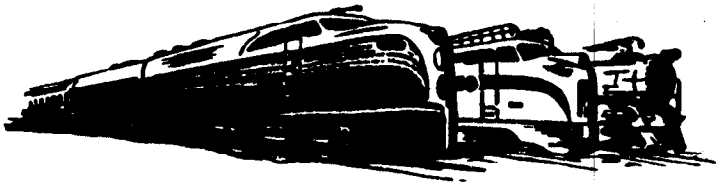
From my knowledge this change in Canon 5 is very critically necesary.

Yours Respectfully
Stanley G. Kluck
Stanley G. Kluck
Local Chairman
Lodge No. 615
Brotherhood of Railway Carmen
Burlington Northern Inc
7105 Perry Place
Brooklyn Center, Minnesota
55429

cc: files

(68)

JOHN G. GOVOENT, JR.
Local Chairman
1610 Rice Creek Road
Fridley, Minn. 55432
574-0564



BROTHERHOOD OF
LOCOMOTIVE
ENGINEERS

DIVISION 150

May 23, 1981

The Minnesota Supreme Court
State Capitol Building
St. Paul, Minnesota 55101

46994

Honorable Justices:

The membership of Division 150 of the Brotherhood of Locomotive Engineers, Burlington Northern Incorporated, voted at our May 5, 1981 meeting to inform the Court of our endorsement of the Petition to amend DR 5-103(B), Minnesota Code of Professional Responsibility.

We would also like to emphasize to the Court our full confidence in the integrity of the Rerat Law Firm. Over the years, the Rerat Law Firm has earned the respect of railway employees. Their well developed expertise has done much to ease the minds of injured railway workers, knowing the firm's total commitment to serve their clients' best interests.

Their Loan Guaranty Program is one way of showing their concern for social responsibility in attorney-client relationships. The Rerat Law Firm deserves to be commended for this program which clearly is ethically correct since it supports the cause of the needy, injured worker, who, denied such aid, would be unable to enforce a just claim.

Not only does the firm fulfill its social obligation, we feel it acts within the letter and spirit of Code Provision DR 5-103(B); the client is ultimately responsible for repayment of his debts.

It is Division 150's hope that the Minnesota Supreme Court will look favorably upon the Petition, thereby insuring that needy clients will not be disadvantaged in their pursuit of justice.

Respectfully yours,

John G. Govoent

John G. Govoent
Local Chairman

5-28 - - copy to each Justice

(70)

Sheet Metal Workers' International Association

:: DISTRICT COUNCIL :: :: NUMBER 2 ::

M. A. MARSHALL
General Chairman
5224 Bison Drive
Lincoln, Nebraska 68516

PAUL E. PHILLIPS
Assistant General Chairman
Secretary - Treasurer
700 West 28th Street
Vancouver, Washington 98660

May 28, 1981

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

Re: #46994 - HEARING ON PETITION
TO AMEND CANON 5, MINNESOTA
CODE OF PROFESSIONAL RESPONSIBILITY

Dear Sir:

Enclosed herein for filing are an original and ten (10) copies of a Brief on behalf of Sheet Metal Workers' International Association, District Council No. 2 on Petition to Amend in the above captioned proceedings.

I would like to be able to appear.

Respectfully submitted,

Michael A. Marshall

Michael A. Marshall
General Chairman
District Council No. 2, SMWIA

Enclosures

5-29-- Copy given to each Justice

Sheet Metal Workers' International Association

:: DISTRICT COUNCIL :: :: NUMBER 2 ::

M. A. MARSHALL
General Chairman
5224 Bison Drive
Lincoln, Nebraska 68516

PAUL E. PHILLIPS
Assistant General Chairman
Secretary - Treasurer
700 West 28th Street
Vancouver, Washington 98660

May 28, 1981

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

Gentlemen:

My name is Michael A. Marshall. I am General Chairman of Sheet Metal Workers' International Association, District Council No. 2, representing members of this Organization who are employed by a number of Midwestern Railroads.

As a District Council representative of a large number of railroad Sheet Metal Workers, I am frequently in contact with, and have worked many times in the past with members who have sustained on-the-job injuries. In cases such as this, the period of time that our members are unable to return to work because of their injuries is usually in direct proportion to the extent of the injuries which they have sustained, and in some cases our members have been permanently disabled. After being off work for even a very short time as a result of an injury, our members generally find themselves confronted with financial obligations which they no longer are able to pay. As the period of time during which they are unable to work lengthens, the more confounding becomes the problem of how they will pay their house payments or rent and feed and clothe their families. By this

(71)

May 28, 1981

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

46994

Re: Change in Minnesota Code of Professional Responsibility Hearing - June 5, 1981

Dear Sir:

Enclosed please find Petition, an original and ten copies for filing.

I plan to attend and speak at the Hearing. Would you please advise as to a time.

Thank you.

Very truly yours,

Robert M. Curran
International Vice President
Brotherhood of Railway, Airline
and Steamship Clerks
720 Empire Building
360 Robert Street
St. Paul, Minnesota 55101

5-29 -- Copy to each Justice

W.T.

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 46994

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

PETITION

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

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

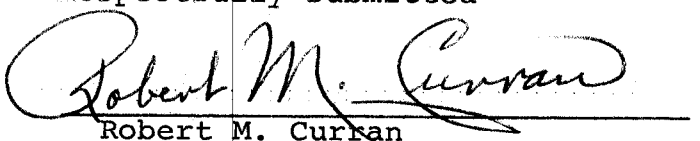
Without these rights of unions and their members and without lawyers willing to advocate them the statutory remedy would be of little avail. Injured railroad workers often receive virtually no compensation while off of the job due to injury. Without lawyers willing to accept these cases on a contingent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

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

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

It is respectfully urged that the Court amend the Code.

Respectfully Submitted



Robert M. Curran
International Vice President
Brotherhood of Railway, Airline
and Steamship Clerks
St. Paul, Minnesota 55101

(69)

O. M. BERGE
PRESIDENT

B. L. SORAH, JR.
SECRETARY-TREASURER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AFFILIATED WITH THE A.F.L.-C.I.O. AND C.L.C.
GRAND LODGE
12050 WOODWARD AVE., DETROIT, MI 48203
OFFICE OF
PRESIDENT

FILE 3220 Gen.

May 22, 1981

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

46994

Re: Minnesota Code of Professional Responsibility Hearing
June 5, 1981

Dear Sir:

Please file the enclosed Petition regarding the hearing on June 5, 1981 in the above entitled matter.

Very truly yours,

O. M. Berge

O. M. Berge, President

5-28 -- Copy given to each Justice

W.T.

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. 46994

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

PETITION

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

The Federal Employers' Liability Act which was enacted in 1908 as part of a series of legislative actions which were intended to alleviate the unhealthy and unsafe working conditions in the railroad industry provides that an injured railroad employee may bring a lawsuit against his employer. The purposes of that act, the humanitarian purposes, are designed as a means of redress for injured railroad employees.

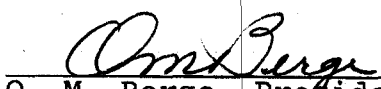
Virginia Bar Association v. Brotherhood of Railroad Trainmen and Michigan Bar Association v. United Transportation Union cases uphold the right of the railroad Brotherhoods to counsel with their members and recommend attorneys to represent them in such claims has long been upheld by the Courts.

Injured railroad workers often receive virtually no compensation while off of the job due to injury. Without lawyers willing to accept these cases on a contingent fee basis ("the poor man's key to the court house"), and without the injured employee being able to obtain some funds to maintain himself and his family, the same rights would be meaningless.

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

It is respectfully urged that the Court amend the Code.

RESPECTFULLY SUBMITTED



O. M. Berge, President
Brotherhood of Maintenance of Way
Employees
Detroit, Michigan 48203

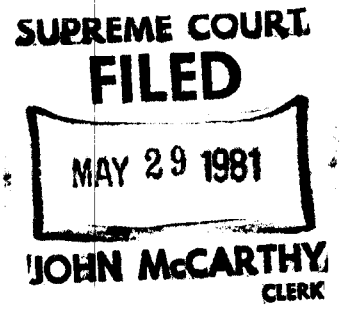
(73)

No. 46994

State of Minnesota

In Supreme Court

In re Hearing on Amendment
to Minnesota Code of
Professional Responsibility



PETITIONER'S BRIEF

Clint Grose
GROSE, VON HOLTUM, VON HOLTUM,
SIEBEN & SCHMIDT, LTD
900 Midwest Plaza East
8th & Marquette
Minneapolis, MN 55402
(612) 333-4500

5-29 -- Copy to each Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGAL ISSUE

Should the Minnesota Supreme Court adopt the change to Disciplinary Rule 5-103(B) proposed by the Minnesota Lawyers' Board of Professional Responsibility, permitting an Attorney to Guarantee a Susbsistence Loan to a Client, under Certain Circumstances?

STATEMENT OF FACTS

This matter relates to a proposed amendment to Minnesota Disciplinary Rule 5-103(B). The Minnesota Lawyers' Professional Responsibility Board has petitioned the Court to amend Cannon 5 of the Minnesota Rules of Professional Responsibility, to make a further exception to DR 5-103(B), which currently restricts the manner in which an attorney may acquire an economic interest in a case that he is litigating. The proposed change would permit the following action:

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

The proposed change would permit an attorney to ease the financial burden on a client of lengthy litigation, which otherwise can exist to chill the exercise of his right to prosecute a claim; encouraging him to unfairly coompromise his claim short of the time necessary to adequately prepare it.

The Supreme Court has ordered a hearing on the petition of the Lawyers Professional Responsibility Board, in its role as administrative authority and promulgating body of rules to govern the practice of law and discipline of the legal profession. The Court adopted the Code of Professional Responsibility Proposed by the American Bar Association in an authorizing order dated August 4, 1970. Periodic amendments to the uniform code have been made.

This latest proposed change affects a rule that previously provided only a single exception to the proscription that attorneys not gain financial interests in their client's case. The rule presently states that:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided that the client remains ultimately liable for such expenses.[1]

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1. DR 5-103(B) (emphasis added).

ARGUMENT

I. A PROBLEM EXISTS IN THE NEED TO PROVIDE A CLIENT WITH ACCESS TO JUSTICE WITHOUT COMPROMISING THE FIDUCIARY LAWYER-CLEINT RELATIONSHIP

The role of the attorney is to provide competent legal assistance to every member of society who requires his counsel for the protection of any of his legal rights.[2] The fiduciary relationship that an attorney holds with a client in the pursuit of this objective, places the lawyer in a position to avail himself of his client's most vital interests. It is fundamental, therefore, that once an individual has secured the services of an attorney, the attorney owes the client the duty of exercising the utmost good faith, integrity, fairness, and fidelity.[3]

The courts, in recognition of this extraordinary duty, proscribe an attorney against the use of his position and status to the detriment of his client, and, to avoid even the appearance of impropriety, the courts further proscribe an attorney from acquiring any interest which would interfere with the exercise of his judgment and resources for the exclusive benefit of his client.[4]

Upon this foundation, the Code of Professional Responsibility developed the tenet that an attorney must not acquire a proprietary interest in the subject matter of the cause he conducts

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2. EC 1-1
3. E. Ent, D. Daar & L. Perlsweig, Lawyer-Client Employment Agreements 143 (1967).
4. EC 5-1

for the client.[5] The accrual of such an interest would introduce an extraneous factor that could interject influences into the attorney-client relationship apart from those solely in the interest of the client.

Nonetheless, the law recognizes that, in the pursuit of the goal of providing the public with access to legal services not otherwise available, an attorney may contract for a contingent fee in a civil case, though the contingency fee arrangement grants an attorney an interest in the subject matter of the claim.[6]

The norms established in the Code, thus recognize exceptions to the literal proscription against acquisition of any interest in a claim. Currently, the disciplinary rules prohibit an attorney from advancing or guaranteeing financial assistance to a client, relating to his claim,[7] but provide certain specific exceptions as well: he may advance or guarantee the payment of court costs, expenses of investigation, and costs of obtaining medical examination and of obtaining and presenting evidence.[8]

Just as the Code recognizes these certain exceptions to the general rule against acquiring an interest in litigation, the change proposed by the Lawyers Professional Responsibility Board to DR 5-103(B) recognizes the importance of providing clients access to a fair and impartial system of justice for redress of grievances on their merits, though the lawyer acquires an "interest" in the litigation.

In our economic situation, with the ponderous cost of living and of medical care, those individuals whose livelihood has been adversely affected by injuries that give rise to legal recourse,

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5. DR 5-103(A)
6. Id.
7. DR 5-103(B)
8. Id.

may have their right to justice on the merits of their claim compromised by the substantial pressure put on them to settle their case because of the financial hardship of waiting during the pendency of litigation until the case can be completely and adequately proven. Such a result is a foreclosure of access to justice, and as significantly compromises the rights of society to gain the services of an attorney as would the elimination of the contingent fee as the basis for representing those who could not otherwise afford the services of an attorney.

In recognition of this problem, several solutions have been suggested from various quarters. The drafters of the American Bar Association's Model Rules of Professional Conduct suggest that a lawyer be allowed to advance only the costs of litigation, but to do so such that the costs of litigation are contingent on the outcome of a case.[9] The current prohibition against that type of advance is that "such an arrangement would foment unwarranted litigation. It is now recognized, however, that lawyers have little incentive to finance baseless litigation and that a client of limited means with a potentially large claim often cannot prosecute the claim unless the lawyer advances litigation expenses."[10]

The change proposed by the Minnesota Lawyers Professional Responsibility Board is not so broad as to remove the client's ultimate responsibility to pay the costs of his case, nor so narrow as to overlook the very real and equally significant costs of mere economic survival during the pendency of a claim. The proposed change is rather one that provides a client with access to legal

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9. Amer. Bar. Ass'n Cmm'n on Eval. of Prof. Stnds, Model Rules of Professional Conduct 31 (Tentative Draft, Jan. 30, 1980).

10. Id. at 33.

services without compromising his right to a settlement on the merits and without removing his ultimate liability for personal and legal expenses. The suggested change also promotes maintenance of the attorney's role as one in the exclusive interest of his client, as no direct financial interest is created. The change which is the subject of the petition before this Court thus accomplishes a major objective of the legal system without compromising other valued tenets.

The potential concern that the proposed change may conflict with other tenets of the Code is clearly resolved upon analyzing the historical development of the current provisions of the Code.

II. ETHICAL PRINCIPLES OF THE PRESENT RULE

A. Historical Development of the Rule

The present rule was adopted by Minnesota from the Code of Professional Responsibility proposed by the ABA in 1970. Disciplinary Rule 5-103(A) went through the ABA drafting process without change.[11] Disciplinary Rule 5-103(B), however, originally read as follows:

> While representing a client in connection with contemplated or pending litigation, alawyer shall not advance or guarantee financial assistance to his client for expenses relating to such litigation or for medical or living expenses during the period of such representation, except that he may advance or guarantee the payment of court costs, expenses of litigation, and the costs of obtaining and presenting evidence.[12]

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11. American Bar Ass'n, Annotated Code of Professional Responsibility 198 (1979). In the tenative draft the section was merely designated as DR VI-2 § a, then renumbered in the preliminary draft as DR 6-102(A) and finally renumbered to 5-103(A) in the final draft.

12. DR VI-2 § b, ABA Tentative Draft of Rules of Professional Responsibility (Oct. 1968).

In the preliminary draft version of January 1969, the words "expenses of medical examination" were added, to make the rule read "expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence."[13] In the final draft,

> The permission for an attorney to provide financial assistance to a client was qualified substantially with the added wording that now requires the client to be held liable for such advanced funds. Also, the scope of permissible financial assistance to the client appears to have been restricted. Both the tentative draft and the preliminary draft stated that it was improper to advance funds for certain expenses: those "relating to (contemplated or pending) litigation: and those for "medical or living expenses." They then listed litigation-related expenses for which funds could properly be advanced (in the preliminary draft: court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence). The final draft and the current test, however, state that during representation of a client in connection with contemplated or pending litigation, no advances for "financial assistance" are permissible except for the litigation-related expenses already enumerated in the preliminary draft.[14]

It is reasonably clear, therefore, that the drafters of the Code recognized the need for the advancement of certain kinds of funds to the client in the course of representation. While the final draft retained the exclusion against financial assistance for non-litigation-related expenses, a further examination of the history of the rule clarifies the reasoning of the drafters.

In the Annotated Code of Professional Responsibility, prepared by the ABA, the current version of DR 5-103(B) contains a footnote qualification to the phrase, "a lawyer shall not advance or guarantee financial assistance to his client."[15] That footnote refers to a canon in the predecessor of the modern Code and to an ABA Formal Ethics Opinion decided thereunder.

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13. American Bar Ass'n., Annotated Code of Professional Responsibility 198 (1979).

14. Id. (emphasis omitted).

15. M. Friedman, Lawyer's Ethics in an Adversary System 196 (1978) (The footnote cites Canon 42 and Ethics Opinion 228).

Interpreting old canons 10[16] and 42,[17] the ABA ethics decision addressed a situation in which plaintiffs' personal injury attorneys followed

> A practice of paying substantial sums of money to their clients on a regular monthly basis during the periods while their suits are still pending. In some cases the payments are limited to an amount covering the subsistence of the plaintiff and members of his family. In others, money is paid in larger amounts. Justification for this is based on the fact that a badly injured client may be unable to work for many months following an accident and that the payments are merely an advance on account of the verdict. However, at least in some cases, the practice enables plaintiffs who might otherwise return to work to refuse to do so, to claim a continuing disability at the time of trial and, hence, to secure a larger verdict.[18]

The Opinion concluded, that

> For a lawyer to make advances to an injured client to cover subsistence for him and for the members of his family while the case is pending, does not constitute the advancement of expenses, the latter term referring to court costs, witness fees and expenses resulting from the conduct of the litigation itself, and not expenses unconnected with the litigation, although resulting from the accident.
>
> For a lawyer to advance such living costs is similar to making an advance on account of the prospective verdict. Clearly there is no expectation of reimbursement except out of the verdict. Accordingly, a lawyer who makes such advances acquires thereby an interest in the subject matter of the litigation which he is conducting, in violation of Canon 10.[19]

The current rule, which was developed from the thought process behind canon 42 and Formal Opinion 288,[20] is thus based on the fear that an advance of funds in anticipation of a verdict might seduce an attorney into proceeding in a less than honest manner with his client's suit--acting in an overzealous way to protect his financial interest in obtaining reimbursement from the prospective recovery.

---

16. Canon 10, entitled "Acquiring Interest in Litigation," provided: The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

17. Canon 42, entitled "Expenses of Litigation," provided: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

18. ABA Formal Ethics Opinion 288 (Oct. 11, 1954).

19. Id.

20. See text accompanying note 15 supra.

Critically, however, the proposed change in DR 5-103(B) does not advocate the actual advance of subsistence funds by an attorney, but rather would only permit an attorney to "guarantee a loan reasonably needed to enable the client to withstand delay in litigation."

Thus, the evil sought to be avoided by the language of DR 5-103(B) is not created by the proposed change, and hence the proposed change is not against the goals and objectives of the drafters of DR 5-103(B). The change is not inconsistent with the tenets of the Code, but rather is consistent with the desire to promote an individual's access to an attorney who can provide him access to a decision on the merits of his claim, rather than through a system where financial pressure is the arbiter of justice.[21]

---

21. The current Rule, as adopted and applied by numerous state and local bar associations has usually been construed to prohibit advancing or guaranteeing subsistence loans for the reasons discussed above. See N.Y. State Bar Ass'n. Op. 133 (Apr. 9, 1970); Va. State Bar Ass'n. Op. 138 (Mar. 30, 1965); Cleveland Bar Ass'n Op. 43, 35 Cleve. B. Ass'n. J. 249 (May 28, 1964); N.Y.C. Bar Ass'n. Op. 781 (May 4, 1953); N.Y.C. Bar Ass'n. Op. 779 (Apr. 6, 1953). The local and state bar associations have particularly discouraged situations in which representation is conditioned on provision of a loan. See, e.g., Va. State Bar Ass'n. Op. 55 (Dec. 14, 1954). Nonetheless, some bar associations have even construed the current code or its forerunner to permit sporadic advances or guarantees when the loan does not preceed or precondition representation, is a lump sum distribution, if the proceeds of the litigation do not collaterize the loan, and if repayment isn't contingent on the outcome of litigation. See Tex. State Bar Ass'n. Op. 230 (Apr. 1959); N.Y.C. Bar Ass'n. Op. 390 (Nov. 10, 1936); Phil. Bar Ass'n. Op. 65-3 (June 28, 1967).

B. Historical Application of the Code

Perhaps the most clear application of the principle of protecting a client's right to a dicision on the merits was made by the State Supreme Court of Louisianna in the case of Louisianna State Bar Ass'n. v. Edwins, 329 So.2d 437 (La. 1976). In that case, an attorney loaned occasional sums of money for his client's subsistence, including money for car tires, two financial notes, a hospitalization and operation unrelated to the accident which was the subject of the attorney's representation, and a hotel bill to allow the client's spouse to be near him when hospitalized. Additionally, the attorney arranged a loan for the client and when he defaulted, the attorney paid the amount due. Altogether, over $4,000.00 was loaned, only about $1,500.00 of which was for expenses of trial. The court noted that the balance was "arguably prohibited by the letter of Disciplinary Rule 5-103(B)."[22] The court went on to state, however, that

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22. Louisianna State Bar Association v. Edwins, 329 So. 2d 437, 440 (La. 1976). The case also involved a further charge of unethical conduct against the attorney relating to additional loans made to a further client. This second client's case involved maritime law, and ethical decisions have nearly been uniform in distinguishing advances to sailors as being inappropriate for fear that such advances will be used to solicit business. See cases cited in note 21 supra. Even in the Edwins decision, the court found the second set of loans to the seaman to be inappropriate.

> Under the circumstances here shown, we are unwilling to hold that the spirit or the intent of the disciplinary rule is violated by the advance or guarantee by a lawyer to a client (who has already retained him) of minimal living expenses, of minor sums necessary to prevent foreclosures, or of necessary medical treatment.
>
> In the first place, the disciplinary rule was adopted to implement Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client." In interpreting the disciplinary rule, we should do so in the light of the canon and the ethical considerations on which it is based. At least two of the ethical considerations point out policies which permit lawyer-client fee arrangements or advances when they represent the only practicable method by which a client can enforce his cause of action. . .
>
> If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount.
>
> We do not believe any bar disciplinary rule can or should contemplate depriving poor people from access to the court so as effectively to assert their claim. Cf. Canon 2: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Nor do we see how a lawyer's guarantee of necessary medical treatment for his client, even for a non-litigation related illness, can be regarded as unethical, if the lawyer for reasons of humanity can afford to do so.[23]

The court ruled that the attorney's acts would not constitute a violation of professional responsibility,

> So long as: (a) the advances were not promised as an inducement to obtain professional employment, nor made until after the employment relationship was commenced; (b) the advances were reasonably necessary under the facts; (c) the client remained liable for repayment of all funds, whatever the outcome of the litigation; and (d) the attorney did not encourage public knowledge of this practice as an inducement to secure representation of others. . .[24]

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23. Id. at 444-445 (emphasis in original)(citations omitted).
24. Id. at 445.

III. MEETING THE GOAL OF JUSTICE ON THE MERITS WITHOUT COMPROMISING AN ATTORNEY'S OBLIGATION TO THE CLIENT

The proposed change has the advantage of allowing an attorney to provide his client the access to a decision on the merits of a case by avoiding the client's need to compromise his settlement due to economic pressures during the pendency of litigation. It further has the advantage of requiring that the client remain ultimately responsible for the loan and does not provide any inducement to the attorney to act in an overzealous manner in order to protect a vested financial interest in a lawsuit.

In conclusion, it enables the attorney to exercise independent professional judgment on behalf of his client--a judgment independent of direct financial interest on the part of the attorney--and it allows the client the right to exercise his independent judgment regarding the appropriateness of a settlement--a judgment independent of financial burdens that threaten the right to a decision on the merits of a claim.

The proposed change to DR 5-103(B) should, therefore, be adopted by this Court.

Respectfully submitted

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Brotherhood Railway Carmen of the United States and Canada

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S42

May 27, 1981

The Honorable Justices of the
Supreme Court of the State of Minnesota
State Capitol
St. Paul, Minnesota 55101

46994

RE: Loans Guaranteed by Attorneys

Dear Justices:

I am the General Chairman of the Brotherhood of Railway Carmen, U.S. and Canada/Burlington Northern Joint Protective Board. The Brotherhood represents thousands of men and women employed in the railroad industry. We strongly urge the honorable Justices of the Minnesota Supreme Court to adopt the change in the Minnesota Code of Professional Responsibility as proposed by the Lawyers Professional Responsibility Board of Minnesota.

A great many serious and disabling injuries are suffered in the course of employment by our members. They are not covered by workers' compensation, but derive their rights from the Federal Employers' Liability Act and therefore, seek redress in the federal and state courts of this country. We have been informed by designated counsel of our union of the hearing to be held on June 5, 1981 in Minnesota and since the proposed change will certainly affect a great many of our members, it seems appropriate that our views on this matter be made known.

Our membership has a great deal of experience with the hardship that occurs to the working men or women when his or her income is disrupted for any substantial period by injury. Many of our members, because of their length of service, may have limited sickness benefits--some have none. Even those with maximum benefits cannot survive long on the meager funds available in the form of such sickness benefits.

Claim agents for the railroads in an endeavor to settle injury claims as soon as possible--many times before the true extent of the injury is known--rightly point out that if a lawyer is hired by the injured worker and the claim sued many months to years will pass before the injured employee will receive anything. The spectre of surviving any substantial period without a regular and sufficient income is frightening for a worker to contemplate and, immediate settlement, fair and adequate or not, is often preferable.

It is also well known that the railroads do not settle such cases until they are reached for trial. Without the availability of loans to maintain the barest of living standard during such time, many, if not most, of our members would be forced to accept improvident settlements. It is also a fact that without a guarantee by the lawyers representing such members, no such loans would be forthcoming.

We, therefore, urgently appeal to the Court to adopt the proposed amendment so that justice need not be sacrificed to need.

Respectfully yours,

Robert P. Wojtowicz

Robert P. Wojtowicz
General Chairman

RPW:cba

5-29-- Copy made for each Justice.

W.T.

(75)

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May 29, 1981

REPLY TO
Saint Paul

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

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

Dear Mr. McCarthy:

Our office represents Michael D. Doshan in a disciplinary proceeding pending before the Court in File No. 81-109. The disciplinary matter involves the interpretation of DR 5-103(B) which is the focus of the captioned rule-making proceeding. We have been advised by the Director of the Lawyers Professional Responsibility Board that a member of his staff will submit a brief and appear in opposition to the proposed change in DR 5-103(B). Accordingly, we believe it is appropriate for us to apprise the court of Mr. Doshan's views on the amendment. Ten copies of this letter are provided for distribution to the Court as a brief in support of the proposed rule change.

Mr. Doshan supports the proposed clarification of DR 5-103(B) because it conveys the intended meaning of the rule better than the present language. As Professor Kenneth F. Kerwin points out in his Statement dated May 15, 1981, the

Louisiana Supreme Court has construed DR 5-103(B) to allow advances for living expenses under certain conditions. In Louisiana State Bar Ass'n. v. Edwins, 329 S.2d 437, 446-447 (La., 1976), the court likened subsistance loans to "expenses of litigation" which are expressly authorized under the rule:

> The advances and guarantees here made are, in our opinion, more akin to the authorized advance of "expenses of litigation" than to the prohibited advances made with improper motive to buy representation of the client or by way of advertising to attract other clients. We note that the disciplinary rule permitting the advances of "expenses of litigation" include certain instances as illustrative, but that it does not clearly exclude other expenses similarly necessary to permit the client his day in court, such as arguably are the present.

329 S.2d at 446-447.

The propriety of lawyers providing financial assistance to needy clients for living expenses during the pendency of litigation has long been established in Minnesota. In Johnson v. Great Northern Ry. Co., 128 Minn. 365, 151 N.W. 125 (1915), the Court stated:

> It is generally held that a person whether an attorney or a layman, who furnishes assistance by money or otherwise to a poor man to enable him to carry on an action, is not guilty of maintenance. 6 Cyc. 865, and cases cited; N.W.S.S. Co. v. Cochran, 191 Fd. 146, 111 C. C. A. 626. It is not against public policy for an attorney to loan his client money to enable him to carry on the suit....

128 Minn. at 369.

This decision has not been overruled or modified. There is nothing to suggest that the adoption of the Code of Professional Responsibility by the Court in 1970 changed the rule enunciated by the Court in the Johnson case. The proper interpretation of DR 5-103(B) as clarified by the proposed amendment is consistent with the Court's opinion in Johnson and supported by it.

We direct the Court's attention to two additional decisions in other jurisdictions which adopt reasoning consistent with the Johnson and Edwins cases. See In Re Ratner, 194 Kan. 362, 399 P.28 865 (1965) and People v. McCallum, 344 Ill. 578, 173 N.E. 827 (1930).

Allowing lawyers to assist needy clients in obtaining loans for living expenses is consistent with Canon 5 of the Code of Professional Responsibility. As Ethical Consideration EC 5-8 states:

> ....the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

The proposed language for DR 5-103(B) recognizes that costs incurred to withstand delays of litigation are a no less appropriate object of attorney assistance than other expenses incurred during litigation such as expert witness fees and transcript costs. The temporary provision of assistance in financing all these litigation related expenses may be essential to the just resolution of a client's cause of action. The adoption of the proposed amendment to DR 5-103(B) will help lawyers meet the objectives of the Code of Professional Responsibility.

We do not wish to make a presentation to the Court at the hearing scheduled for June 5, 1981. We respectfully request the opportunity to make an appearance and will be available

to respond to any questions the Court may have.

Yours very truly,

John B. Van de North, Jr.

JBV/mml

cc: Michael D. Doshan
Bruce Martin
Professor Kenneth Kerwin
G. Thomas MacIntosh
George R. Ramier

5-29 -- Copy given to each Justice
W.T.

(16)

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May 29, 1981

PERSONAL AND CONFIDENTIAL

John McCarthy, Clerk
Minnesota Supreme Court
State Capitol, Room 312
St. Paul, MN 55155

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

Dear Mr. McCarthy:

Enclosed please find an original and nine copies of "Statement of Director on Professional Responsibility in Opposition to Proposed Amendment."

I will be appearing on behalf of the Director on Professional Responsibility at the June 5 hearing.

Very truly yours,

Michael J. Hoover
Director

By Janet Dolan
Janet Dolan
Staff Attorney

JD/rp
Enclosures

5-29-81 -- copy to each Justice

W.T.

STATE OF MINNESOTA
IN SUPREME COURT
FILE NO. 46994

Hearing on Amendment to Minnesota Code of Professional Responsibility.

STATEMENT OF DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY IN OPPOSITION TO PROPOSED AMENDMENT

I. INTRODUCTION

The Director opposes the proposed amendment of DR 5-103.[1]

Litigants often experience economic hardship and the economic disparity of the parties may affect the settlement of some cases. However, the proposed rule change is not an appropriate remedy for these economic problems. The harmful effects of the proposed rule change outweigh the benefits. For purposes of this hearing the Director will focus on the ethical problems he sees created by the proposed rule change.[2]

---

[1]The opinions expressed are the personal opinions of the Director and other signatories. They differ from those of the Board on this particular issue. This variance of opinion is merely a reflection of the distinct functions of the Director and the Board in the disciplinary system as suggested by the ABA Standards for Lawyer Discipline and Disability Proceedings. In the rule-making process the Court benefits most from a variety of viewpoints.

[2]This proceeding will, of course, in no way affect the matters presently pending before the Court involving loan guarantees for clients.

II. PRESENT RULE

DR 5-103(B) of the Minnesota Code of Professional Responsibility, adopted August 4, 1970, provides:

> "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

The predecessor of DR 5-103(B), Canon 42, Canons of Professional Ethics, provided:

> "Expenses of Litigation. A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

While Canon 42 did not specifically prohibit the guarantee of financial assistance, DR 5-103(B) contains such a specific prohibition.

This prohibition is based on the traditional condemnation of champerty, the acquisition of an interest in the subject matter of the litigation.

Many courts have discussed the purpose of this rule and the ethical problems created by the attorney advancing monies or guaranteeing loans to clients. See, e.g., In re Sandpiper, 260 S.C. 633, 198 S.E.2d 120 (1973); In re Berlant, 458 P. 439, 328 A.2d 471 (1974), cert. denied, 421 U.S. 964 (1975); In re Stewart, 121 Ariz. 243, 589 P.2d 886 (1979); Mahoning County Bar Assn. v. Ruffalo, 176 Ohio St.

263, 199 N.E.2d 396, cert. denied, 379 U.S. 931 (1964); Matter of Reaves, 272 S.C. 213, 250 S.E.2d 329 (1978); Matter of Carroll, 124 Ariz. 80, 602 P.2d 461 (1979).

The Stewart Court stated, supra, 589 P.2d at 888:

> "Acquisition by a lawyer of a proprietary interest in a cause of action he is conducting for a client is expressly prohibited by DR 5-103(A), because if an attorney acquires an interest in the outcome of a suit in addition to his fees, it can lead to the attorney placing his own recovery ahead of his client. For example, he might urge a settlement which would be to his best interest but not to the best interest of the client. ABA, Opinions of Professional Ethics, No. 288 (1967); Arizona Ethics Opinion 76-26."

The Carroll Court stated, supra, 602 P.2d at 466:

> "The actions of an attorney in advancing legal expense which can only be recovered from settlement or judgment result in the attorney buying an interest in the litigation. This presents the problem of an attorney possibly acting against his client's best interest to recover his advances rather than being concerned solely with the best interest of his client...."

III. EFFECTS OF PROPOSED RULE CHANGE

A. CONFLICT OF INTEREST

The proposed rule abandons the prohibition of conflict of interest between the attorney and the client. An attorney, with no personal stake in the litigation is best able to represent the interests of the client. The client relies upon the independent judgment of the attorney. The attorney's advice and judgment are based on the client's best interests and not on the personal stake of the attorney in the litigation. See. DR 5-101.

By guaranteeing a loan for a client the attorney has an

additional personal financial stake in the litigation which may well compromise his independent, professional judgment on behalf of his client. The greater the attorney's personal financial risk in the litigation the greater the temptation for him to consider his interests as well as those of the client in rendering professional advice such as when to settle. It is this competition of the attorney's and the client's interests which creates the conflict.

As a result of his financial involvement the lawyer may urge settlement that is adequate to ensure the attorney's recovery but not in the best interest of the client. The attorney's personal financial involvement may result in hasty decisions and undue influence on the client to settle. At critical junctures of the litigation such as settlement it is imperative that the client have professional judgment and advice from his attorney, not pressure and persuasion based upon the attorney's concern for his own financial security. Under the proposed rule the client may be under less pressure from the defendant to settle but under more pressure from his attorney to do so.

B. INDUCEMENT

The guaranteeing of a loan will be an inducement to improperly influence a client's choice of attorney. The proposed rule does not prohibit an attorney from offering the loan guarantee to a potential client. A person with a claim who is in need of financial assistance may seek to employ an

attorney who will guarantee a loan because the client needs financial as well as legal assistance.

The Court in Carroll, supra, 602 P.2d at 467, recognized the inducement effect of advances to clients:

> "We are compelled to point out that the practice of making advances to clients, if publicized, would constitute an improper inducement for clients to employ an attorney. We think that this rationale applies as well to retainer agreements such as those utilized in this case, because such agreements generally are interpreted by lay people to mean that there will be no obligation for costs of the lawsuit at any time unless the lawsuit is successful. It is obvious that as between a lawyer who offers such an agreement and a lawyer who does not, the client will choose the lawyer who offers the lesser financial obligation, regardless of the skill of the lawyers involved, and regardless of the other factors to be considered in the employment of legal counsel."

The same rationale applies to loan guarantees.

Those proposing the rule change may intend that loan guarantees will only be made for a client seeking his attorney's financial assistance to sustain him during the final stages of litigation. However, the proposed rule does not adequately restrict the use of loan guarantees to these situations. It does not prohibit the attorney from initiating the loan guarantee offer. It does not prohibit the attorney from promising a potential client that a loan guarantee will be available at any time. It does not adequately define the "needs" of the client which warrant such a financial commitment by the attorney.

The potential for abuse of the proposed rule should be considered. The attorney seeking clients will be able to

offer a loan guarantee as an inducement and guarantee amounts far in excess of that allowed by the rule. DR 5-103 restrictions on advancement of funds to clients will be meaningless. The potential return in contingent fees will make loan guarantees to clients, even those with questionable claims, a regular cost of doing business. The promise of loan guarantees will become a regular part of legal services offered to potential clients.

C. CLIENT CONTROL OF THE CASE

The client for whom an attorney has guaranteed a loan may well, as a result of his financial obligation to the attorney, compromise many of his rights to control his own lawsuit. Because of his financial entanglements with his attorney, the client may easily feel he has lost his right to abandon his claim, discharge his attorney or accept a settlement offer to which his attorney objects. Likewise, the attorney may find that he or she cannot as easily abide by the judgments and decisions of the client because of his or her increased financial stake in the litigation. Such diminution of the client's control of his case is contrary to the principles of zealous advocacy. See EC 7-8. The client may be forced to sacrifice control of his case for temporary financial security. The economically deprived client who accepts financial assistance from his attorney may find he is deprived of the total control of the suit enjoyed by clients not so indebted to their attorney.

The client who does choose to abandon his claim or discharge his attorney may find the contractual entanglements with his attorney a burdensome problem which adds to the cost of litigation and inordinately delays the completion of his suit.

D. COST OF LEGAL SERVICES

The additional financial commitment of the attorney in the cases of his clients will only add to the financial losses incurred in those cases which are not favorably resolved. These losses will be passed on to all clients in the form of higher legal fees.

Under the proposed rule change the client does remain liable for the loan guarantee and temporary indigency does not mean a client will not be able to repay a loan at a later time. Some clients will be able to pay the loan directly or reimburse the attorney for his liability. However, as with all financial risks, there will be many losses. The greater the financial commitment the less likely the client will be able to repay it.

The Court in Mahoning County Bar Assn. v. Ruffalo, supra, recognized that advances to indigent clients constituted the purchase of an interest in the lawsuit despite the fact the client remained liable for the advances:

> "It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the

> proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons contemplate that this will be proper only where the advance is for "expenses of litigation." 199 N.E.2d at 398.

The abuse of the guarantee exception to advance large sums of money to clients will increase the number of defaults. These losses will become part of the cost of doing business and will be passed on to the general public in the form of higher legal fees.

E. ANTI-COMPETITIVENESS

Litigation is often long and protracted. This means thousands of dollars may be advanced to each client in loan guarantees. The number of attorneys or law firms capable of carrying that amount of debt for any length of time is limited. Practitioners able to compete in the marketplace by guaranteeing loans to clients will be few. As loan guarantees become commonly used by the few, many other practitioners will be squeezed out of the market, unable to provide competitive representation.

The effect will be that fewer practitioners will be providing legal services to the public. The fewer practitioners the higher the cost of providing legal services to the public. In addition to bearing the cost for losses incurred in the loan guarantees the public will also bear the cost of the anti-competitive effect of the proposed rule change.

F. ENFORCEMENT

The proposed rule change may effectively eliminate the enforcement of DR 5-103. What limitations remain will be difficult to monitor and prosecute. If loan guarantees are allowed the attorney seeking clients will have the power to provide whatever financial assistance the client desires. Disciplinary counsel is not in a position to monitor the sustenance needs of clients or the extent to which loan guarantees exceed these needs. Neither will the disciplinary counsel be able to adequately enforce the additional promises made to or commitments extracted from the clients at the time of the loan guarantee, many of which may be contrary to other disciplinary rules. Additional ethical problems created by this rule change will result in more disciplinary complaints, investigations, and dispositions.

G. LANGUAGE OF THE PROPOSED RULE

The proposed rule does not define at what time the loan guarantee may be made or who must initiate the proposal. At a minimum the rule should require that the loan guarantee option be limited to those who are already clients and must be at the client's request.

There is no definition of the expenses to be guaranteed or of the sanction for excess financial support. The needs, at a minimum, should be defined as sustenance, food and shelter. The rule should more clearly prohibit any guarantees above that sustenance level.

IV. CONCLUSION

The rule change has been proposed for humanitarian purposes. However, the financial need of a relatively small number of clients is not the only factor to be considered in deciding whether this proposed rule change should be adopted. All possible ramifications of the rule change must be considered. The Director has presented some of the ethical problems created by this proposal. It is clear the limited benefits of this proposal are far outweighed by the many problems it will create. Therefore the proposed rule change should not be adopted.

Respectfully submitted,

MICHAEL J. HOOVER
DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY
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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AFFILIATED WITH THE A.F.L.-C.I.O. AND C.L.C.

OFFICE OF
VICE PRESIDENT
NORTHWESTERN REGION

F. H. FUNK
VICE PRESIDENT

Suite 623 — Plymouth Bldg.
12 South 6th St.
Minneapolis MN 55402
Phone (612) 338-3058

May 21, 1981 FILE 0-13-54

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

Dear Sir:

As an International Vice President of the Brotherhood of Maintenance of Way Employes and residing in the State of Minnesota, I am concerned about a Petition before the Supreme Court of this State to allow for a change in the Minnesota Code of Professional Responsibility. I understand that this Code now prohibits those who represent our injured brothers from making or guarantying loans during the pendency of their claim or lawsuit. If this is the interpretation of the present Code, then it is perfectly clear the Code needs changing.

I am sure that the Court is aware of the fact that lawsuits of this nature take 2 to 3 years to resolve and during that period of time the injured party may have little or perhaps no means of maintaining himself and his family. In my experience, the railroads frequently influence the railroad retirement board so as to make the limited amount of such benefits unavailable for weeks at a time as a means of pressuring injured men to settle their injury case for relatively little. It is only with direct or guaranteed loans from the lawyer who represents them that these men can avoid succumbing to economic pressure.

In my own behalf and on behalf of all Minnesota members of the Brotherhood of Maintenance of Way Employes I urge the Court to adopt the proposed change in the Code.

Respectfully submitted,

Frank H. Funk

Frank H. Funk, Vice President
Brotherhood of Maintenance
of Way Employes
Minneapolis, Minnesota

opeiul2cs

STATE OF MINNESOTA

IN SUPREME COURT

In Re Hearing on Amendment to
Canon 5 of Minnesota Code
of Professional Responsibility.

No. 46994

O R D E R

Upon the application of Ms. Jane Schoenike, Executive Director of the Minnesota Trial Lawyers Association,

IT IS ORDERED that the time within which to serve and file a written petition in the captioned matter be and is extended to include June 12, 1981.

Dated: 28 May 1981.

BY THE COURT

SUPREME COURT
FILED
JUN 1 1981
JOHN McCARTHY
CLERK

Associate Justice

MINNESOTA TRIAL LAWYERS ASSOCIATION

459 Rice Street
Suite 301
St. Paul, Minnesota 55103

225-6548

May 27, 1981

Mr. John McCarthy
Clerk, Minnesota Supreme Court
Room 230
State Capitol
St. Paul, MN 55155

Re: File #46994

Dear Mr. McCarthy:

The Minnesota Trial Lawyers Association respectfully requests an extension of time to file a written petition with respect to the amendment to DR5 - 103.

The extension of time is requested to allow our full Board of Governors to discuss this issue. The Board will meet next on Friday, June 5, at 5:00 p.m. If you have any questions, please contact the undersigned at your earliest convenience.

Sincerely,

Jane L. Schoenike

Jane Schoenike
Executive Director

(72)

LAW OFFICES
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GARY STONEKING
MARK A. HALLBERG

OF COUNSEL
WALTER ANASTAS

May 27, 1981

C1-84-2140

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

46994

Dear Mr. McCarthy:

Pursuant to the Order of Chief Justice Robert J. Sheran concerning the hearing on Amendment to Minnesota Code of Professional Responsibility under date of April 1, 1981, I am enclosing a Brief in Support of Proposed Amendment DR5-103(B) and would like to be heard on this specific amendment. Ten copies of the brief are enclosed.

Cordially,

CHARLES T. HVASS

CTH/be
Enclosures

5-29 -- Copy to each Justice

(72)

46-994

State of Minnesota
In Supreme Court

In Re Proposed Rule Change to Minnesota Code of Professional Responsibility Disciplinary Rule DR5-103(B)

BRIEF IN SUPPORT OF PROPOSED AMENDMENT TO DR5-103

HVASS, WEISMAN & KING, CHTD.
CHARLES T. HVASS, SR.
715 Cargill Building
Minneapolis, Mn. 55402
Attorneys for United Transportation Union

1981—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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State of Minnesota
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In Re Proposed Rule Change to Minnesota Code of Professional Responsibility Disciplinary Rule DR5-103(B)

BRIEF IN SUPPORT OF PROPOSED AMENDMENT TO DR5-103

STATEMENT

DR5-103(B) should be amended by adding:

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

INTEREST OF THE UNITED TRANSPORTATION UNION

The United Transporation Union (UTU) is a fraternal labor orgainization designated as the bargaining unit for the operating employees on the Burlington Northern, the Milwaukee Road, the Chicago and Northwestern, the Minneapolis Northfield and Southern, the Soo Line and other common carriers by rail throughout the United States. The individual membership in the UTU is currently in excess of 250,000.

In 1970, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, the Brotherhood of Locomotive Firemen and Enginemen and the

Switchmen's Union of North America merged and formed the UTU. Each year 55,000 railroad employees are injured and in excess of 1400 employees are killed in "on the job" railroad accidents,[1] all of which come under the Federal Employers Liability Act. No railroad employee, whose work affects interstate commerce, is covered either under the Minnesota Worker's Compensation Act or under Social Security. Any recovery that a railroad employee makes for his loss of earnings, pain and suffering, etc., or his dependent for wrongful death, is by way of settlement or trial of the claim against the employer and through "on the job" injury benefits or death benefits paid under the Railroad Retirement Act.

APPLICATION OF ECONOMIC PRESSURE BY THE RAILROAD

Following an accident, an initial contact is made with an injured employee by a representative of the employer railroad. The purpose of this contact is to gain information pertaining to the way in which the accident happened, to obtain a statement from the injured employee and to commence some negotiations looking toward eventual settlement of the employee's claim.

As previously stated, all claims come under the Federal Employers Liability Act which does not automatically result in liability but is predicated upon a finding of negligence on the part of the railroad. Generally speaking, an employee may not recover damages unless he proves negligence.

In most railroad accidents, there is some color of negligence on the part of the railroad because the comparative negligence set forth in the FELA is what is termed a "pure form", i.e. if the railroad is negligent then even though the employee is 70% or 80% negligent the em-

[1]Bulletin 48, U.S. Dept. of Transportation, Federal Railroad Administration, Office of Safety, for the year 1979 (latest year available) U.S. — 55,632 non-fatal and 1,429 fatal accidents.

ployee may recover 20% or 30% of the total damages. For this reason, the railroad is usually found liable.

Let's consider a typical case. The average switchman on all of the railroads throughout the United States receives an hourly wage of $10.39 or an annual wage of in excess of $24,500, plus paid vacation.[2] When injured in an "on the job" accident, a switchman, if he has worked for the railroad less than 10 years, will receive sick benefits under the Act of $500.00 a month up to a maximum of 6 months.[3] If he has worked in excess of 10 years, he may receive an additional three to six months more at $500.00 per month, depending upon the number of years in excess of 10 he has worked. The average switchman is married and has two children. Although there are no national statistics on the savings of an average switchman they are probably little or none. Accidental injury to a railroad employee in Minnesota is catastrophic.

Because of the immediate economic hardship that confronts the injured employee, the railroad claims agent, with rare exception, will immediately advance funds on a monthly basis to supplement the meager payments under the Railroad Retirement Act. Ordinarily, the advance will bring the employee's take-home pay to his net pay after taxes, less the deductions that would have been made from his pay for Railroad Retirement and less his personal consumption connected with his work, such as cost of travel, meals, etc. This advance by the railroad is subject to reimbursement or deduction at the time a final settlement is made.

One thing that is required of an injured employee before he receives the $1,000.00 or more monthly payments made by his employer as a supplement to his Railroad Retirement benefits is a statement by the employee that

---

[2]Exhibit A attached (Affidavit of Steven E. Rau).

[3]*See* 45 U.S.C. §228(b)(5) (1981). The regulations in 20 C.F.R. Parts 203, 209, 220, 225, 233 and 335 provide for the specific guidelines to be used in payment of these sick benefits.

he has not retained legal counsel.[4] It is pointed out to the injured employee very clearly that if he retains legal counsel all supplements from the railroad will cease immediately.

THE "OLD CANONS" AUTHORIZED MONETARY ADVANCES BY ATTORNEYS

Prior to the adoption of the "new" Canons of Ethics by the American Bar Association and the subsequent adoption of the ABA Canons by the Supreme Court in Minnesota, it was ethical for an attorney to supplement the income of an injured railroad employee by the attorneys guarantee of a bank loan. *Johnson, et al v. Great Northern Ry. Co.*, 128 Minn. 365, 151 N.W. 125 (1915); accord *People v. McCullum*, 341 Ill. 578, 117 N.E. 827 (1930). The Code of Professional Responsibility became effective for American Bar Association members on January 1, 1970 and thereafter was adopted by this Court as the Code of Professional Responsibility for members of the Bar in Minnesota, effective August 1, 1970. The wording of DR5-103(B) does not on its face authorize loans of money by attorneys to clients in personal injury actions. In other types of actions, hundreds of thousands of dollars have been advanced by attorneys as costs on behalf of a class in various class actions here in Minnesota and payment has been authorized by the Court. *Jorstad v. IDS*, 643 F.2d 1305 (8th Cir. 1981).

If this Court agrees with the interpretation of DR5-103 (B) adopted by the Supreme Court of Louisiana in *Louisiana State Bar Assn. v. Edwin*, 329 So.2d 437 (La. 1976), then the rule, as it is currently worded, authorizes attorneys to advance cost of living expenses to injured employees in actions under the Federal Employers Liability Act. Because a question exists as to whether or not loans for living

[4]Exhibit B (Statement of Elmer E. Berglund, Chairman and State Legislative Director, United Transporation Union).

expenses are authorized under DR5-103(B), a proposed change has been presented to this Court which will provide specifically that such loans for living expenses may be made.

THE INJUSTICE OF A LEGAL SYSTEM THAT PROHIBITS ADVANCES

The UTU has a greater interest in seeing this rule enacted than perhaps any other organization. When a railroad employee is injured on the job, the exclusion provision in any health and accident policy that he has excludes coverage for an on-the-job injury. If he is injured off the job, he at least may have the benefit of certain health and accident policies that he carries. This is not true if the injury is on-the-job.

Injured employees in industries other than the railroad industry, when injured on the job and who may have a third-party action because of some defective appliance, have benefits under the Minnesota Worker's Compensation Act, which pays benefits during the injured employee's period of disability of approximately $1000 per month, based upon the average monthly pay of a switchman's helper. Since the railroads are allowed to advance funds to their injured employees and, of course, they should be, it may also cut off the employee from these advanced funds if he employs an attorney to represent him. The injured employee is placed in that proverbial position between a rock and a hard place and for this reason this rule, if interpreted to prevent loans of money to clients, more effectively than anything else cuts off an injured railroad employee's access to the courts.

Another reason why the proposed change in the rule should be made is because of the additional economic hardship imposed on a railroad employee through the long delay that currently exists both in the State Courts in the Twin Cities and in the Federal District Court for

the District of Minnesota. Currently in Hennepin County (notwithstanding information supplied to the Court Administrator) based upon an actual in-house check of current assignments in Hennepin County, there is a delay of one and one-half (1 1/2) years from the date of filing to the date of trial and the same lapse in Ramsey County.[5] In the United States District Court for the District of Minnesota there is currently a delay (this varies slightly from District Judge to District Judge) of approximately two years.[6] When the railroad is negotiating directly with the employee and the injury extends the negotiation period, the railroad can increase the supplement so that economically the runout does not affect the employee and his family. Railroad Retirement Benefits never last long enough when a railroad employee's claim is placed in suit. Not only does the current rule, as some contend it should be interpreted, deny him the opportunity of supplemental advances, but also denies him all benefits after a 6 month period, if he has retained legal counsel.

The current DR5-103(b), if interpreted as prohibiting monetary advances to injured railroad employees for living expenses, should be changed to allow consultation with legal counsel without the fear of economic retaliation by the railroad. Apparently, not much can be done about court delay, but by amendment to the rule, the legal system, with its ever increasing delay, will not cut into the legal rights of the injured employee.

The rule, to some extent, is an anacronism that went hand in hand with the prohibition against all forms of solicitation. With the advent of *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed. 2d 89 (1964), all forms of solicitation, with the exception of personal solicitation by an attorney, have changed. Today, lawyer advertising has assumed the form of television, radio, newspaper and yellow book solicitation. Further,

[5]See Exhibit A.
[6]See Exhibit A.

direct mailing by the attorney may not be prohibited. At one time, it was felt that advance of living expenses was an aid in solicitation. Any such argument, in view of the current forms of solicitation, ignores reality.

CONCLUSION

Those who favor the continuation of DR5-103(B) in its current form with the suggestion that it be interpreted to prohibit the advancement of funds for living expenses, argue from a selfish motive and desire to use economic leverage and court delay as a means to thwart the ends of justice.

If DR5-103(B) in its present form prohibits economic aid to an injured railroad employee through legal assistance, then the rule should be amended to authorize it.

Respectfully submitted,

HVASS, WEISMAN & KING, CHTD.
CHARLES T. HVASS, SR.
715 Cargill Building
Minneapolis, Mn. 55402
Attorneys for:
United Transportation Union

APPENDIX

EXHIBIT "A"

STATE OF MINNESOTA
IN SUPREME COURT

46-994

In Re Proposed Rule Change to Minnesota Code of Professional Responsibility Disciplinary Rule DR5-103(B)

STATE OF MINNESOTA

ss

COUNTY OF HENNEPIN

AFFIDAVIT OF STEVEN E. RAU

STEVEN E. RAU, being first duly sworn, on oath deposes and says:

That he is a law clerk employed by Charles T. Hvass, Sr., an attorney duly licensed to practice in the State of Minnesota.

That he called the Regional Office of the United Transportation Union in St. Paul and obtained the following information:

(a) That the annual pay of a switchman is approximately $24,500 per year.

That he personally examined the Court files, at random, for five personal injury actions set for jury trial, in Ramsey and Hennepin Counties respectively, on a day certain and determined that the period of time elapsing between the filing of a Complaint and the day certain of a jury trial in Ramsey and Hennepin Counties is approximately 1 1/2 years.

That he called the Clerk of the United States District Court for the State of Minnesota and obtained the information that the period of time elapsing between the filing of a Complaint and the day certain of a jury trial for a personal injury action was approximately two years.

That he obtained the information with respect to railroad retirement sick pay benefits from the local Railroad Retirement Board office.

FURTHER AFFIANT SAITH NOT.

/s/ STEVEN E. RAU

Subscribed and sworn to before me this 26th day of May, 1981.

/s/ BETTY E. EGERTSON
Notary Public
Hennepin County, Minnesota

My Commission Expires April 24, 1986.

EXHIBIT "B"

UNITED TRANSPORTATION BOARD
MINNESOTA LEGISLATIVE BOARD

W. G. CROONQUIST, Vice Chm.
905 15th Avenue S.W.
Willmar, Minnesota 56201
A. L. ZURN, Secretary
1415 East Old Shakopee Road
Minneapolis, Minn. 55420

E. E. BERGLUND, Chairman and
State Legislative Director
212 Lumber Exchange Building
Minneapolis, Minn. 55401
335-6737
May, 1981

STATE OF MINNESOTA IN SUPREME COURT

My name is Elmer E. Berglund and I am the State Legislative Director of the United Transportation Union for the state of Minnesota. I am a fulltime salaried officer of a labor union, nationwide in scope.

I come before this court in support of the proposed amendment to Canon 5 of the Minnesota Code of Professional Responsibility. This amendment has been submitted to the court by the Minnesota Lawyers Professional Responsiblity Board, and the purpose of the amendment, as I understand it, is to permit a lawyer or law firm to guarantee a loan to a client so that his claim, resulting from a personal injury can be successfully pursued, and in the interim, provide the monetary means to keep body and soul together.

For over 30 years, as an active railroader and railroad labor union officer, I have had the opportunity to work with our injured people. When an injured railroad worker makes his move to get legal help, he immediately finds himself cut off from any income coming from the employer. Therefore, without income from some source to provide the needs of the family, he is devastated. The alternative is to settle up with employer and therefore, compromise his case to his own disadvantage.

A loan guarantee by a lawyer or law firm to an injured worker seems to be the right thing to do and I for one am pleased that our members are helped in this manner, for I know of no other way in which such help is given. To deny our injured members such temporary relief would indeed put our members at a distinct disadvantage, due to the economic hardship involved. Our injured railroad workers should not be pressured into settling their claim prematurely because they have not the means to take care of their family's monetary obligations.

For the above reasons and more, I believe the proposed amendment should be adopted by this court.

/s/ ELMER E. BERGLUND, Chairman and
State Legislative Director
United Transportation Union
212 Lumber Exchange Building
Minneapolis, Minnesota 55401

Subscribed and sworn to before me this 26th day of May, 1981.

/s/ DEBORAH STAUCH
Notary Public
Hennepin County, Minnesota

My Commission Expires Oct. 1, 1982.

46994

C1-81-211

(79)

SUPREME COURT
FILED
JUN 2 1981
JOHN McCARTHY
CLERK

STATE OF MINNESOTA

IN SUPREME COURT

HEARING ON AMENDMENT
TO MINNESOTA CODE OF
PROFESSIONAL RESPONSIBILITY

BRIEF OF MINNESOTA STATE BAR ASSOCIATION

CONRAD M. FREDIN
Attorney at Law
811 First National Bank Building
Duluth, Minnesota 55802
Telephone: 218/722-6331
(President, Minnesota State Bar Association)

6-3 -- Copy to each Justice

Minnesota State Bar Association, appearing by authority of its Board of Governors given without any vote being cast contrary to appropriate motion, hereby opposes the proposed amendment to DR 5-103.

The bases of the Bar Association position are as follows:

1. So far as lawyer members are aware, there is no showing of a societal need or demand for this change in rule. Even if there were such a showing, it is not perceived as being sufficiently urgent to justify the unfortunate consequences of taking this step.

2. To place a lawyer in a position of handling a case in part for his own account not only raises a conflict of interest, and the type of business relation proscribed by DR 5-104; but also deprives the client of the independence and dispassionate position that prevents over-involvement in a case.

If, for example, the matter were one of a novel theory or doubtful liability --- although there might be substantial damages --- a lawyer of average means would find himself or herself under considerable internal pressure, perhaps unconscious, to pressure the client into a settlement that would cover the lawyer's exposure, although it might be of disadvantage to the client.

3. Banks, other lending institutions or persons of sufficient capital to advance the substantial loans envisioned under the proposed amendment, are well aware that a guarantee is only as good

as the guarantor. This gives the well-capitalized law firm the advantage of being a deep-pocket litigator to the exclusion of many lawyers of substantial professional ability who lack access to the loan market as guarantors. Young lawyers in particular, of whom there are a substantial number in the state, could well find themselves frozen out of personal injury litigation to the advantage of the more established lawyer or firm.

4. The pernicious effect of this change could be seriously aggravated by the new rules on advertising. The law firm or lawyer holding out to the public the possession of extraordinary ability in a given field can also let it be known that the client will have his living expenses bankrolled by the firm as further proof of its affluence and special ability. The resulting concentration of profitable work would be of substantial disadvantage to the average lawyer taking a much lower keyed position.

5. There should be a better way to work on the problem of delay. One aspect is to ask, "Who benefits from delay?"

Today the cost of money is higher than at any time in the nation's history, exceeding even the rates common during the Civil War. Defendants making fourteen, or fifteen, or sixteen percent interest on their money, and paying no interest on the unliquidated claim which is the subject of this proposed change, have a substantial stake in the law's delays. It might well be that if pre-judgment interest were charged subsequent to the commencement of suit or a joinder of issue at a rate equal to the cost of

money, defendants would no longer have a vested interest in procrastination.

A further step could be taken under existing rules, or existing rules as slightly modified, imposing costs and penalties on the lawyer or client, or both, guilty of procrastination.

Conclusion

For the foregoing reasons, and others which no doubt will be submitted to the Court, Minnesota State Bar Association wishes to go on record as opposed to this change.

Respectfully submitted,

Conrad M. Fredin
Attorney at Law
811 First National Bank Building
Duluth, Minnesota 55802
Telephone: 218/722-6331
(President, Minnesota State Bar Association)

46994

LAW OFFICES
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FRANK J. MURRAY
OFFICE (612) 222-5549
RESIDENCE (612) 646-0443

July 20, 1981

Minnesota State Bar Association
100 Minnesota Federal Building
Minneapolis, Minnesota 55402

Dear Sirs:

In the July 17, 1981, issue of Finance and Commerce there is a classified advertisement under "Position Available" for an attorney office manager for Hyatt Legal Services of Kansas City, Missouri. The ad states that Hyatt Legal Services currently has more than 25 neighborhood law offices throughout Ohio and Pennsylvania, and is in the process of developing a nationwide law firm; they will soon be opening offices in the Minneapolis-St. Paul metropolitan area.

In the July, 1981, Saint Paul telephone directory, published by Northwestern Bell, there is a quarter-page ad for Hyatt Legal Services, with the photograph of Joel Hyatt. Upon inquiry, I was informed by the attorney registration clerk of the supreme court that there is no Joel Hyatt licensed to practice law in Minnesota.

The ad states that Hyatt Legal Services is now serving the Minneapolis-St. Paul area, and lists a telephone number. When I called the number, a recorded message told me that the number is not in service.

It would seem that this venture constitutes a corporate practice of law in the sense that was always proscribed for the two main reasons that it was not conducive to a personal relationship between attorney and client and that it reduced the practice of law to a mere commercial venture. In addition, a non-lawyer may not own an interest in a law practice.

On another matter, I enclose a card I received in this morning's mail by a licensed attorney citing her professional qualifications and soliciting insurance and bond sales. This also apparently violates the canons prohibiting the concurrent practice of law and other business pursuits which solicit the public and which have the effect of hitching two horses to one

wagon, i.e., using the commercial venture to bring in clients for the law practice, and using one's legal credentials to bring in commercial business. Possibly the insurance and bond sales representative is not practicing law and has no connection with any law firm, but the significance of this piece of advertising is that it illustrates how crowded the legal profession is becoming. Presumably, this attorney's becoming a sales associate is a second-choice career. The lesson is obvious - the competition for clients is becoming sharper.

Inevitably, the practice of law will resemble a commercial venture more than a professional pursuit if this trend continues. The choices would appear to be either to create an artificial scarcity of attorneys by restricting admissions to law schools, a choice that in no way improves the delivery of legal services to the public, or to develop standards to insure the integrity of the profession. Action will be necessary because of the concomitant liberality regarding lawyer advertising, the increase in the number of lawyers licensed, and the adaptation of commercial scale management techniques for the practice of law.

It may not be as outlandish as it seems now to say that someday we may go to K-Mart to see our doctor and lawyer and our dentist, while our car is being repaired, all in one convenient stop.

Yours very truly,

Gordon C. Moosbrugger

Gordon C. Moosbrugger

GCM:rm

Enclosure

✓ cc: John McCarthy
Clerk, Minnesota Supreme Court

7-23--Copy given to each Justice

W.T.

"DAVIES for SERVICE SINCE 1916"

Davies and Davies Agency, Inc.

SUITE 350, BAKER BUILDING
706 - 2ND AVE. SO.
MINNEAPOLIS, MN. 55402

PATRICIA A. LIEN
OFFICE: (612) 332-4353
RES: (612) 935-3519

We announce with pride
the appointment of

PATRICIA LIEN
Sales Associate

In keeping with the high standards we have maintained throughout our 65 years providing insurance and surety bonds

Mrs. Lien graduated from Hamline Law School 1978
Admitted to the Minnesota State Bar September 1978

Received American Jurispurdence Award in Contracts

Member of American Bar Association and the
Minnesota Bar Association and the
Association of Minnesota Women Lawyers

When you're looking for enthusiasm and service
...look for Pat and she will look after you