ATTORNEY ADVERTISING IS HERE TO STAY

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It has been almost five years since the United States Supreme Court decided *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), in which it held that newspaper advertisements listing the prices for routine legal services and the lawyers' availability to perform such services were entitled to First Amendment protection. Since *Bates*, the Minnesota Supreme Court has substantially amended the Disciplinary Rules under Canon 2 of the Code of Professional Responsibility. As a result of the amendments, only in-person and telephonic solicitation are prohibited. Advertisements and written solicitations, even those directed to a specific client for a specific matter, are permitted so long as they contain no false or misleading information.

Prior to *Bates*, the legal profession had a long history of prohibiting most forms of advertising and virtually all solicitation. Many lawyers were disappointed in the *Bates* decision and still regard advertising as a deleterious influence on the professionalism of the bar. Other attorneys have not fully grasped the impact of the national and local changes in regulation and continue to file complaints with my office about advertisements and direct mail solicitations which are clearly permissible under current rules.

Recent cases in the United States Supreme Court and in the Minnesota Supreme Court demonstrate that the courts will not be retreating from the recent holdings and Code amendments. Lawyers may continue to have personal feelings about the wisdom of the decisions. They may also refrain from advertising or solicitation in their own businesses. It is, however, time for all lawyers to accept the decisions as the law of the land and to familiarize themselves with the new regulations.

On December 24, 1981, the Minnesota Supreme Court decided *In Re Appert and Pyle,* a disciplinary case. In *Appert and Pyle,* the Supreme Court held that direct mail solicitation and the distribution of brochures describing Respondent's availability for certain kinds of cases were entitled to constitutional protection. In dismissing the disciplinary petitions, the Court embraced fully the principles embodied in *Bates,* making clear that discipline is appropriate only when letters or brochures contain false, fraudulent, deceptive or misleading information. In the final paragraph of its opinion in *Appert* and *Pyle,* the Court stated:

"We view the right of the general public to know of the availability of professional services as

the principal interest involved in advertising for such services. Advertisements designed to achieve less important objectives will be subject to a more critical scrutiny. Overbearing and intrusive practices such as personal solicitation, direct or indirect, and the giving of value in exchange for a favorable commendation or reference are not permitted. We insist on affirmative adherence to the principle that false, misleading, or deceptive statements constitute a serious violation of professional ethics and will require severe sanction. Conduct that the advertising attorney knows or should know is an interference with an existing professional relationship is prohibited. Claims of special expertise in advertisements may be found to be material representations giving rise to a warranty of competence or information that is false, deceptive or misleading."

The Minnesota Court has responded to *Bates* by promulgating rules which accept the fact that attorney advertising is here to stay and which regulate only obvious or highly predictable abuses. Not every jurisdiction has reacted in the same way. Consequently, the United States Supreme Court had before it another advertising case, *In Re R.M.J.,* 80-1431 (January 25, 1982), in which Missouri's severe restrictions on attorney advertising were struck down.

Following *Bates*, Missouri promulgated rules which prohibited direct mail advertising, prohibited the listing of courts in which lawyers were admitted to practice, and specified the language to be used in advertising areas of practice. In *R.M.J.,* Missouri sought to discipline a lawyer who used direct mail advertising. His advertisements referred to his admission to practice in the United States Supreme Court and listed his areas of practice as including "Workman's Compensation" rather than the approved "Worker's Compensation." The United States Supreme Court unanimously reaffirmed state power to regulate lawyer advertising that is "inherently misleading or that has proven to be misleading in practice" if the restrictions are no broader than necessary to prevent deception. The specific Missouri restrictions were stricken as inappropriate because the record failed to establish that the lawyer's statements were misleading, that the restrictions promoted a substantial state interest, and that only an absolute prohibition would be sufficient to cure possible deception.

Minnesota's Disciplinary Rules are drafted to avoid the problems encountered by Missouri in *R.M.J.* Those Rules can be summarized as follows:

1. Lawyers may advertise.

2. Lawyers may engage in direct mail and other written solicitation.

3. Advertising and permitted solicitation must refrain from utilization of false, fraudulent, deceptive or misleading information.

4. In person and telephonic solicitation, direct or indirect, is prohibited.

5. The giving of value in exchange for a favorable recommendation or reference is not permitted.

Questions of taste, dignity, and self-laudation are not usually relevant to the question of whether discipline is appropriate.

There is currently a de-emphasis in regulation of the "commercial" aspects of the profession for both constitutional and practical reasons. The constitutional reasons have been discussed above. Practical reasons require that overtaxed disciplinary resources be directed toward maintaining the integrity of the profession leaving to some extent the commercial aspects of practice to regulation by the marketplace.

In any event, the point to be made herein is that courts have decided advertising is here to stay. All attorneys should familiarize themselves with the new regulations and direct complaints to the disciplinary board only when a written communication contains false or misleading information or when an impermissible means of solicitation is utilized.

NOTICE

The Lawyers Professional Responsibility Board is considering the question of whether *Northwestern National Bank v. Kroll*, 306 N.W.2d 104 (Minn. 1981), totally prohibits the assertion of any lien for fees against a homestead. *See also*, DR 5-103(A). Code of Professional Responsibility.

The Board expects to consider this matter at its June meeting. All lawyers are invited to comment on this issue by writing by May 15, 1982, to:

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