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Point/Counterpoint: Lawyer Advertising - We Will Hand You No Line before Its Time

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POINT/COUNTERPOINT

LAWYER ADVERTISING

We Will Hand You No Line Before Its Time

John A. Lynch, Jr.*

Frankly my dear, I don't like it! All of that lawyer advertising. Perhaps the lawyers are not completely to blame. After Congress banned cigarette advertising in the electronic media,¹ it was perhaps inevitable that the electronic media would turn to hemorrhoidal remedies, feminine hygiene products, veg-o-matics and finally to lawyers for their advertising revenue.

Whatever the cause, the good citizens of Baltimore have been subjected to a barrage of execrable television advertising by lawyers. First and foremost, there is that bearded fellow who often has sirens in the background and who advises us to drive carefully on holiday weekends. (To drive, perchance to crash, aye, there's the rub).² Then there are those gentlemen who want to help us across the board of "The Game of Law." How Baltic Avenue!

Let us not forget the former football behemoth who, mercifully, does not confuse his commercials by referring to his counsellor as "everything you ever wanted in a lawyer—and less."

Of course, the blight is not confined to television. Tear sheets now appear on M.T.A. buses for the convenience of passengers. And remember, "If you've got a phone, you've got a lawyer!"

Lawyer Advertising: Why it was prohibited, why it is permitted and why it is done.

Perhaps the best thing that may be said about lawyer advertising is that, unlike acid rain or the gypsy moth, it *can* be stopped at the border. Last year the Supreme Court of Canada, in *Attorney General of Canada v. Law Society of British Columbia*,³ upheld the right of a provincial bar to prohibit lawyer advertising. The advertising involved in the disciplinary proceedings against the attorney was tame indeed. The lawyer's newspaper advertisement, in addition to listing the prices of certain services and his office hours, recited the following:

DONALD E. JABOUR

Barrister & Solicitor wishes to announce the opening of a new concept of law office

LEGAL SERVICES AT PRICES
MIDDLE INCOME FAMILIES
CAN AFFORD

Buying or selling a home. Writing a Will. Motor vehicle accidents or offenses. Landlord/tenant problems. Family matters. Incorporations. Estates. Court appearances.

These are the kinds of situations where middle income families need legal assistance. Now it is available at moderate costs with pre-set fees for many services.⁴

Prior to the interlocutory appeals, the provincial bar had recommended suspension of the attorney for six months.⁵ While the Canadian decision may indicate in an abstract way that the prohibition of lawyer advertising is not inherently incongruous in a western democracy with a tradition of free speech, our own Supreme Court, in the landmark decision of *Bates v. State Bar of Arizona*,⁶ saw the matter differently. The Canadian court implied that it, too, would have been unable to uphold a prohibition of lawyer advertising if the Canadian right to free speech were "entrenched beyond the reach of Parliament or legislature, as has been done for example in the First Amendment to the United States Constitution."⁷

The author is not alone in finding most lawyer advertising noisome, crass and undignified. The Supreme Court of Tennessee has held:

We are not prepared to reject these time-honored traditions. The law is an ancient, honorable and learned profession and its practitioners are not tradesmen in the marketplace. The role of the huckster, the hawkster and the peddler ill becomes a member of a dignified profession.⁸

The Supreme Court in *Bates* held, ap-

propriately, that the interest of maintaining the dignity of the legal profession pales beside the First Amendment interests, even as to legal advertising which involves merely commercial rather than political or association overtones.⁹ The Court held: "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."¹⁰ The Court hinted that the bar's failure to advertise has hurt its image,¹¹ and that resistance to advertising in the past appears to have stemmed from a stuffed-shirt sentiment that advertising would benefit only the wrong sorts of lawyers and clients. Perhaps the classic example of this stuffed-shirt mentality was expressed by Henry Drinker in his classic work on professional ethics:

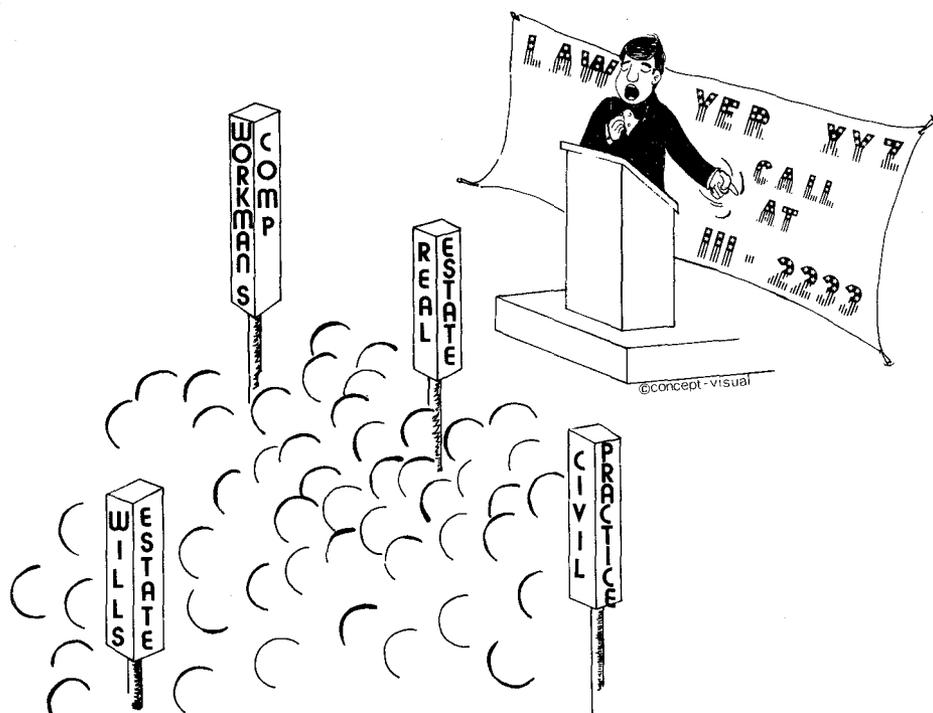
While extensive advertising would doubtlessly increase litigation, this has always been considered as against public policy. Also, many of the *most desirable clients*, imbued with high respect for their lawyer and his calling, would have no use for a lawyer who does not maintain the dignity and standards of his profession and would instinctively resent any attempt by another lawyer to encroach on their relation (emphasis added).¹²

There was perhaps a feeling that most of the good clients were already taken and that those who were not could find counsel at their country clubs, thank you. Such compositeness was largely punctured by *Bates*.

Reading *Bates*, one might get the impression that lawyer advertising is somehow in the public interest because it provides consumers with valuable information and takes the mystique out of choosing a lawyer. One can imagine that, for many persons, choosing a lawyer for the first time and being too embarrassed to ask when the "meter" will start to run is reminiscent of the scene in the "Summer of '42" in which the teenage boy in the drugstore tries to buy contraceptives for the first time.

In addition to holding that lawyer advertising might do some good, the Court in *Bates* also held that: lawyer advertising was not inherently misleading; it would not adversely affect the administration of justice by stirring up litigation; it would not have an adverse effect on the price and quality of legal services; and deceptive advertising was preventable.

At bottom, however, advertising usually does not stem from humanitarian motivations. The decision to advertise is an economic one.¹³ A lawyer who advertises will want to do so effectively—in a manner which brings clients into his office. Such a lawyer will be motivated to ad-



vertise in a manner calculated to make the public remember his or her name when the services of a lawyer become necessary. If advertising of products and other services is any indication, the slick and the clever will predominate in legal advertising. If legal advertising on television is any indication, perhaps that day may not come too soon in the Baltimore area. But slogans which constitute good advertising may not constitute good reasons for choosing a lawyer.

Perhaps recognizing this, the Supreme Court in *Bates* sharply limited the types of services, the advertising of which is afforded First Amendment protection:

The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name and the like. . . .¹⁴

Often such services do not "pay" unless performed in a setting which emphasizes mass-production and de-emphasizes lawyer-client contact. Such cases do not generally comprise the sort of practice that would motivate a person to go to law school; they are often the kinds of cases for which a law school graduate settles. The bar is stuffed to the gunwales with lawyers, many of whom must look to the other side of the tracks for clients. *Bates*

clearly indicates the side of the tracks for which lawyer advertising is intended.

Maryland Regulation of Lawyer Advertising

Like it or not, lawyer advertising is constitutionally protected and is here to stay. Not all lawyers will advertise, and most who do will do so in a dignified and restrained fashion in the print media. Recognizing that the legal profession, like all others, has its share of (to put it delicately) sleazebags, the Supreme Court (not putting it exactly that way), held that the states may regulate lawyer advertising.¹⁵ The Court held in *Bates* that misstatements tolerated in other commercial advertising "may be found quite inappropriate in legal advertising."¹⁶ Thus, in legal advertising, Joe Namath really *does have to wear the party hose*. Quality-of-service claims ("You always get your way at Budd and Beaujolais"), in-person solicitation and electronic-media advertising were areas singled out by the Court as appropriate subjects for restrictions.

In response to *Bates*, the American Bar Association, in 1980, adopted a Model Code of Professional Responsibility which permits advertising in print media and on radio and television.¹⁷ The Model Code requires that the advertising be done in a "dignified manner."¹⁸ The Code lists twenty-five types of information which may

be provided in the advertisement, most of which relate to biographical data, type of practice, and the terms upon which services will be provided.¹⁹ With respect to solicitation as a form of advertisement or promotion, the Code, with limited exceptions, generally prohibits a lawyer from recommending his services to someone who has not sought his advice or from compensating anyone who has recommended his employment to another.²⁰

While Maryland has adopted limitations on solicitation of clients which are virtually identical to those of the ABA Model Code,²¹ it has avoided the Model Code's specificity as to the manner and content of lawyer advertising. The Maryland Code of Professional Responsibility provides very simply that lawyer advertising shall not be deceptive or misleading.²² Maryland wisely eschewed the Model Code's cookbook approach to regulation of lawyer advertising. Even though the Supreme Court purported to sanction some regulation of lawyer advertising in *Bates*, it and other federal courts have struck down several state regulations since *Bates*.²³ It is probably impossible to define "routine" legal services, and Maryland has wisely avoided doing so. Even if legal services billed at fees exceeding \$100 per hour may ever be called "routine," clients who can afford to pay such fees would not be attracted by television antics or neon signs. Lawyers capable of performing such services will not advertise. Not all states have left the choice of advertising methods to the judgment of lawyers. For instance, New Jersey prohibits advertising on television.²⁴ Utah, ever the party-pooper, has proscribed the use of promotional items such as matchbooks and inscribed pens and pencils.²⁵ Maryland's sole focus in regulating lawyer advertising is the prevention of misleading the public. While this goal is commendable, Maryland's failure to regulate in any way the methods or the tone of advertising may be contrary to the interests of the public and of the bar. One can only hope that members of the bar will have the good sense not to use "sandwich-men," celebrity clients, or the bosoms of Baltimore Street dancers to market their services. If any member does, and the advertising is not deceptive or misleading, there is nothing to stop him.²⁶ Before discussing the problems which excesses in advertising may cause for the public and the bar, it would be useful to examine Maryland's regulation of solicitation and advertising.

Solicitation

In-person solicitation presents the opportunity for the most egregious overreaching of members of the public by law-

yers. Recognizing this, the Supreme Court in *Ohralik v. Ohio State Bar Ass'n*,²⁷ has permitted the states to proscribe in-person solicitation for pecuniary gain. *Ohralik's* wretched factual situation (which included a hospital visit, the "signing up" of clients with adverse interests, and surreptitious taping of the clients from under a rain coat) amply illustrates the justification for curbing such solicitation, and Maryland wisely does so. Regulation of solicitation is relevant to advertising because carefully targeted mailed or hand-distributed advertisements may be virtually indistinguishable from informing a stranger that he has a legal problem and volunteering to represent him. The latter is not permissible under the Maryland Code of Professional Responsibility.²⁸ Although the Maryland rule against solicitation specifically provides that it does not preclude commercial advertising which is otherwise permissible,²⁹ Maryland is quite likely to restrict written solicitation of individuals under the guise of advertising.

Courts in other states have grappled with the problem of carefully targeted advertising. In *Koffler v. Joint Bar Ass'n*,³⁰ the Court of Appeals of New York, holding that the invasion of privacy and overbearing persuasion of in-person solicitation were not present, permitted direct mail solicitation of clients. Nevertheless, because of potential conflicts of interest, the same court, in *Greene v. Grievance Committee*,³¹ later upheld prohibition of such solicitation through third parties.

Cogently, the Supreme Court of Florida recognized the obvious in prohibiting direct mail solicitation:

We do not perceive that a citizen receiving a letter written on stationery carrying an attorney's letterhead would be bold enough to discard it after only a casual perusal. Read it he must, for letters from attorneys carry a special aura of respect because of the state's power that attorneys can invoke.³²

Although the prohibition was subsequently vacated, the principle remains correct. A written "advertisement," targeted to a susceptible individual who has not expressed a desire to retain the attorney who has issued the advertisement, possesses the potential for overreaching the addressee.

The Committee on Ethics of the Maryland State Bar Association has addressed the problems of solicitation through advertising in several informal opinions. In a lengthy informal opinion, the committee has recognized that mailed communications present the possibility for abuse.³³ Nevertheless, the opinion permits mailing to individuals and organizations "chosen on the basis of geo-

graphic or demographic characteristics" or to groups of people whose characteristics suggest that they may be likely to need certain broad categories of legal services.³⁴ An earlier informal opinion, however, held that lawyers could not pass out their own brochures door-to-door.³⁵ Opinion 81-21 states that lawyers may hand out their own brochures as long as they state that the brochures are informational only. The Committee has held that a prepaid legal services program may not use a paid salesperson.³⁶ In two opinions which are difficult to reconcile, the Committee held that a lawyer admitted in Maryland and a neighboring jurisdiction could not mail solicitations to Maryland residents charged with traffic violations in the neighboring jurisdiction,³⁷ but that another lawyer could send residents of a housing development which was being converted to condominiums a letter informing them that he does real estate closings.³⁸ Although the Committee held that it was not improper for a law firm, on the reverse side of its business card, to disperse advice in the area of workers' compensation law, it suggested that the firm might be precluded from representing persons who received such advice.³⁹

Unfortunately, it is possible that Maryland lawyers generally will not have a clear idea as to what sort of advertising or promotion constitutes impermissible solicitation until specific disciplinary proceedings reach the courts. Nevertheless, it is important to recognize that artfully targeted mailings may possess the potential for the unfair exertion of an attorney's position over the public which, after all, is what the prohibition against solicitation is designed to prevent.

Misleading and Deceptive Advertising

As indicated earlier, *Bates* permits closer scrutinizing of the truth of claims in legal advertising than in advertising generally. On at least two occasions, the Committee on Ethics of the Maryland State Bar Association has indicated that this will be the rule in Maryland.⁴⁰ Auto makers and the producers of products, such as Geritol, have experienced counsel, trade associations and many years of court and regulatory battles to tell them what is misleading in their contexts. Lawyers are simply told that they must be more Catholic than the Pope about their advertising claims.

A few legal truth-in-advertising cases have reached the courts and perhaps they provide some guidance for would-be lawyer advertisers. In *Eaton v. Supreme Court of Arkansas*,⁴¹ the Supreme Court of Arkansas upheld the issuance of a private reprimand to a lawyer who had placed an advertisement in a mailed package which included, *inter alia*, a "coupon for french

fries with the purchase of a hamburger . . . a discount from a 'Figure Salon and Health Spa' on a one month membership . . . [and] a special on seamless guttering."⁴² Although the lawyer's advertisement offered no discount, the envelope read:

VALUABLE COUPONS from
local businesses

Save! Save! Save!
USE THESE⁴³

The court regarded the advertisement as misleading and uninformative.

In *Roemer v. Albany County Bar Ass'n*,⁴⁴ the lawyers advertised that they provided a wide range of legal services at one-third to one-half less than the current rates for legal fees in Albany County. The problem was that there were no such ascertainable "current" rates for legal services. The court held that no action should be taken against the lawyers because they were ignorant of the contents of the circular. Presumably, such a defense would be unavailing in Maryland.⁴⁵

In *Zimmerman v. Office of Grievance Committees*,⁴⁶ the court ordered censure of an attorney because of his advertising. The Yellow Pages of his local telephone directory divided the practice of law into twenty-five areas. He had himself listed in all twenty-five, although he had had no experience in several areas. In exotic specialties such as admiralty, antitrust and trade regulation, immigration and naturalization, juvenile law, labor law, securities law and taxation, he was the only lawyer listed. Further, the lawyer had himself listed under his first name, Aaron, rather than his last name, Zimmerman, which caused him to be listed first in every category. The court refused to accept the lawyer's explanation that he was associated with a firm, the members of which could assist him in all of his purported areas of practice, since the lawyer was holding *himself* out to the public and not the firm.

In *State ex rel. Oklahoma Bar Ass'n v. Schaffer*,⁴⁷ the Supreme Court of Oklahoma dismissed a disciplinary proceeding against a lawyer who advertised that he would file court papers or otherwise begin the performance of legal services on behalf of clients within five days of the initial conference or such services would be performed at no charge. The court held:

The state surely has no demonstrable interest in suppressing delivery of free legal service or in discouraging expeditious lawyer performance.⁴⁸

As with the question of solicitation, the Maryland Bar has grappled with the issue

of truth in advertising informally for the most part.⁴⁹ The Committee on Ethics has tentatively concluded that the listing of a lawyer in a directory intended for circulation entitled *The Best Lawyers in America* is "likely to be misleading," but that a lawyer does not run afoul of DR 2-101 as long as he or she does not actively participate in having his or her name listed.⁵⁰ The Committee held that advertising oneself as "First on the Maryland Bar Exam" could conceivably be misleading in the absence of a date of the examination⁵¹ and that advertising at all in the county telephone directory might be misleading if the attorney does not have a regular office in that county.⁵²

A recurrent question with respect to truth in advertising is the extent to which one may advertise the specific areas of the law in which he practices. It would not be unreasonable for a member of the public to regard such advertising as a claim to a specialty, and for the most part, the bar has no means of certifying specialists. It appears that the Committee on Ethics would not regard as misleading an advertisement that one practices more frequently in one or more areas of the law.⁵³ It also appears that use of the term "specialist" would not be proscribed if one could demonstrate that the designation is truthful.⁵⁴

It is very clear that lawyers must examine the contents and context of their advertising. Maryland's Code of Professional Responsibility gives them little room for error; after all, lawyers are neophytes in the world of advertising.

Special Problems of Advertising for the Legal Profession

Legal advertising poses two distinct challenges to the legal profession: preserving the nature of the attorney/client relationship, and preserving respect for the administration of justice.

The Attorney/Client Relationship

The advent of lawyer advertising means that an individual can choose his lawyer the same way he chooses his toothpaste. The individual is no longer limited to selecting a fellow club or church member, lodge brother or second cousin. He may select someone who has simply caught his attention, a complete stranger. The interposition of paralegals and sophisticated office equipment between the lawyer and the client can insure that the lawyer remains a complete stranger. Medical professionals have greatly depersonalized the practice of medicine, and they have paid dearly for it in malpractice insurance premiums. Advertising is often part of a strategy which emphasizes mass

production of "routine" services. A \$195.00 divorce is not usually routine to the party, however, and office procedures, such as the returning of client phone calls, should be designed with sensitivity. This is the rule for all types of law practice, but failure to follow it can cause particularly severe problems in a practice limited to "routine" legal services.

Maintaining Respect for the Administration of Justice

Maryland has not placed many restrictions on lawyer advertising. For the most part, the protection of the dignity of the practice of law has been placed into the hands of individual lawyers. In some instances, it has not been placed into very good hands. Some legal advertising in Maryland already approaches the "Crazy Eddie" variety. If the public becomes imbued with the notion that the practice of law is just another carnival, its respect for the administration of justice will be impaired.

Lawyers must also consider the effects of their advertising on persons who intend to become lawyers. Many come to law school with very high ideals and a sincere desire to serve the public interest. Many maintain this spirit. If they are bombarded with huckstering about "The Game of Law," they may decide that the law is not the game for them.

Lawyers in Maryland have been given great freedom with respect to advertising. It can only be hoped that they will see it as in their own interests to exercise that freedom responsibly.

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Footnotes

- ¹ 15 U.S.C. § 1335 (1976).
- ² With apologies to William Shakespeare, *Hamlet*, Act III, Scene i.
- ³ 137 D.L.R. 3d 1 (1982).
- ⁴ *Id.* at 9.
- ⁵ *Id.* at 10.
- ⁶ 433 U.S. 350 (1977).
- ⁷ *Law Society of British Columbia*, 137 D.L.R. 3d at 43.
- ⁸ *In re Petition for Rule of Court*, 564 S.W. 2d 638, 641 (Tenn. 1978). In *McClellan v. Mississippi*, 413 So. 2d 705, 708 n.2 (Miss. 1982) the Supreme Court of Mississippi regarded the view that lawyer advertising is repulsive as characteristic of "attorneys of the so-called 'Old School'."
- ⁹ See *NAACP v. Button*, 371 U.S. 415 (1963).
- ¹⁰ *Bates*, 433 U.S. at 364.
- ¹¹ *Id.* at 370.
- ¹² H. Drinker, *Legal Ethics*, 211-12 (1953).
- ¹³ See H.G. Christensen, *Advertising by Lawyers*, 4 UTAH L. REV. 619 (1978).
- ¹⁴ *Bates*, 433 U.S. at 372.

¹⁵ *Id.* at 383.

¹⁶ *Id.*

¹⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1980).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at DR 2-103(A), (B).

²¹ Md. R.P. app. F, DR 2-103, 2-104 (Supp. 1982).

²² *Id.* Cf. DR 2-101(A).

²³ *In re R.M.J.*, 455 U.S. 191 (1982); See also, *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir.), cert. denied, 439 U.S. 966 (1978); *Lovett and Linder, Ltd. v. Carter*, 523 F. Supp. 903 (D.R.I. 1981); *Durham v. Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980), aff'd., 698 F.2d 1218 (6th Cir. 1982).

²⁴ See *In re Professional Ethics Ad. Comm. Op.*, 89 N.J. 74, 444 A.2d 1092, appeal dismissed, ___ U.S. ___, 103 S.Ct. 285 (1982).

²⁵ See *In re Utah State Bar Petition*, 647 P.2d 991 (Utah 1982).

²⁶ See MSBA Comm. on Ethics, Informal Op. Dkt. No. 81-34.

²⁷ 436 U.S. 447 (1978). As to situations where pecuniary gain is not involved, see *In re Pri-mus*, 436 U.S. 412 (1978).

²⁸ Md. R. P. app. F, DR 2-103, 2-104 (Supp. 1982).

²⁹ Md. R. P. app. F, DR 2-103(A) (Supp. 1982).

³⁰ 51 N.Y.2d 140, 432 N.Y.S.2d 872, 412 N.E.2d 927 (1980), cert. denied, 450 U.S. 1026 (1981).

³¹ 54 N.Y.2d 118, 444 N.Y.S.2d 883, 429 N.E.2d 390 (1981), cert. denied, 455 U.S. 1035 (1982).

³² *The Florida Bar v. Schreiber*, 407 So.2d 595, 598 (Fla. 1981), vacated, 420 So.2d 599 (1982) (in light of *RMJ*, n. 23 *supra*).

³³ Dkt. No. 81-21, at 3 (1981).

³⁴ *Id.* at 4.

³⁵ MSBA Comm. on Ethics, Informal Op. Dkt. No. 79-37 (1979).

³⁶ MSBA Comm. on Ethics, Informal Op. Dkt. No. 82-12 (1982).

³⁷ MSBA Comm. on Ethics, Informal Op. Dkt. No. 80-61 (1980).

³⁸ MSBA Comm. on Ethics, Informal Op. Dkt. No. 81-27 (1981).

³⁹ MSBA Comm. on Ethics, Informal Op. Dkt. No. 81-40 (1981).

⁴⁰ MSBA Comm. on Ethics, Informal Op. Dkt. Nos. 83-1 (1983), 81-70 (1981).

⁴¹ 270 Ark. 573, 607 S.W.2d 55 (1980), cert. denied, 450 U.S. 966 (1981).

⁴² 270 Ark. at 577, 607 S.W.2d at 59.

⁴³ *Id.*

⁴⁴ 71 A.D.2d 967, 419 N.Y.S.2d 790 (1979).

⁴⁵ Md. R. P. app. F, DR 2-101 (Supp. 1982).

⁴⁶ 79 A.D.2d 263, 438 N.Y.S.2d 400 (1981).

⁴⁷ 648 P.2d 355 (Okla. 1982).

⁴⁸ *Id.* at 359.

⁴⁹ *In Matter of Oldtowne Legal Clinic*, 285 Md. 132, 400 A.2d 1111 (1979).

⁵⁰ MSBA Comm. on Ethics, Informal Op. Dkt. No. 79-55 (1979).

⁵¹ MSBA Comm. on Ethics, Informal Op. Dkt. No. 79-57 (1979).

⁵² MSBA Comm. on Ethics, Informal Op. Dkt. No. 81-66 (1981).

⁵³ MSBA Comm. on Ethics, Informal Op. Dkt. No. 81-10 (1981).

⁵⁴ MSBA Comm. on Ethics, Informal Op. Dkt. No. 81-23 (1981).