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Constitutional Law - First Amendment - State Prohibition of All Adevertising by a Lawyer Is Unconstitutional

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RECENT CASES

CONSTITUTIONAL LAW—FIRST AMENDMENT—STATE PROHIBITION OF ALL ADVERTISING BY A LAWYER IS UNCONSTITUTIONAL

Appellants were attorneys licensed to practice law in the State of Arizona and were members of the State Bar of Arizona.[1] They purchased newspaper space,[2] advertising their practice[3] and offering "legal services at very reasonable fees."[4] They also printed prices for certain services[5] rendered by the law firm.[6] It was undenied that the advertisement violated the Code of Professional Responsibility, which forbade advertising by lawyers.[7] Based on a complaint filed by the President of the State Bar, a Special Local Administrative Committee recommended that appellants be suspended.[8] Upon the record developed at the initial hearing,[9] appellants sought review before the Supreme Court of Arizona. They argued, among other things,[10] that the Code's ban on advertising violated the Sherman Act[11] and infringed upon their first amendment rights. The

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1. The State Bar of Arizona is controlled by the Supreme Court of Arizona. ARIZ. SUP. CT. R. 27(a) (1973). No person is permitted to practice law in the state or hold himself out as one who may practice law in the state unless he is an active member of the organization. *Id.*

2. Arizona Republic (Phoenix), Feb. 22, 1976, *reprinted in* Bates v. State Bar of Arizona, ——U.S.——, ——, 97 S.Ct. 2691, 2710 (1977).

3. The "Legal Clinic of Bates and O'Steen" accepted only routine matters which were easily handled through the use of paralegals, automatic typewriting equipment, and standardized forms and office procedure. Because the return on each fee charged was low, a substantial volume of business was necessary. *Id.* at 2694.

4. *Id.* at 2710.

5. The services mentioned were the uncontested divorce, uncontested adoption, uncontested personal bankruptcy, and change of name. *Id.*

6. The advertisement stated that "information regarding other types of cases furnished on request." *Id.*

7. 97 S.Ct. at 2694. ARIZ. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) provides as follows: "A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements. . . ." ARIZ. SUP. CT. R. 29(a) (1976).

8. The initial hearing concluded with a recommendation for suspension from the practice of law for not less than six months. Review taken by the Board of Governors of the State Bar resulted in a reduction of the period of suspension to one week. 97 S.Ct. at 2695.

9. A record was developed at the hearing in anticipation of a challenge in the courts to the validity of the rule. *Id.*

10. Additional arguments were based on equal protection, due process and vagueness. These, too, were rejected and were not relied upon in appellants' brief to the United States Supreme Court. Matter of Bates, 113 Ariz. 394, 555 P.2d 640 (1976).

11. The Sherman Act provides in part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

court rejected these claims,[12] but did reduce the sanction from suspension to censure,[13] finding that the advertising was done in good faith to test the constitutionality of the Code's ban on advertising.[14] Appellants appealed to the United States Supreme Court.[15] The Court agreed that the ban on advertising was not a violation of the Sherman Act,[16] but *held*[17] that the state may not prohibit the publication in a newspaper of an attorney's truthful advertisement concerning the availability and terms of routine legal services. *Bates v. State Bar of Arizona*, ——U.S.——, 97 S.Ct. 2691 (1977).

Traditional proscriptions against solicitation, advertising, and self-laudation probably originated in England.[18] The aristocracy, filling the positions in the legal profession, scorned lower class "trade" practices, and because public service was emphasized, earning a living became secondary.[19]

In the United States, the American Bar Association adopted Canon 27 in 1908,[20] dealing with direct and indirect advertising. As originally adopted,[21] Canon 27 stressed that a "well-merited reputation for professional capacity and fidelity to trust"[22] was the most effective

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several States, or with foreign nations, is declared to be illegal: . . . ." 15 U.S.C. § 1 (1970 & Supp. III 1973).

12. Matter of Bates, 113 Ariz. 394, 555 P.2d 640 (1976).

13. Mr. Justice Rehnquist stayed the order of censure pending final determination by the United States Supreme Court. 97 S.Ct. at 2696 n.10 (1977).

14. 113 Ariz. at 400, 555 P.2d at 646.

15. Probable jurisdiction noted, Bates v. State Bar of Arizona, 429 U.S. 813 (1977).

16. The decision of the Court was unanimous in affirming the Supreme Court of Arizona's rejection of the appellants' Sherman Act argument. Bates v. State Bar of Arizona, ——U.S.——, ——, 97 S.Ct. 2691, 2969 (1977). Rejection of this argument was based on the long standing doctrine of Parker v. Brown, 317 U.S. 341, 350 (1943), where the Court found "nothing in the language of the Sherman Act or in its history . . . suggest[ing] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *See also* Peoples Cab Co. v. Bloom, 330 F. Supp. 1235 (W.D. Pa. 1971), *aff'd*, 472 F.2d 163 (3d Cir. 1972).

This state action exception has been interpreted not to be limited to acts of the legislature, providing the regulation is found to be an exercise of a valid governmental function. *See* Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973) (act of state judiciary), *aff'd*, 497 F.2d 1 (4th Cir. 1974), *rev'd on other grounds*, 421 U.S. 773 (1975); Gas Light Co. of Columbus v. Georgia Power Co., 313 F. Supp. 860 (M.D. Ga. 1970) (act of public service commission).

The appellants analogized their situation to that in *Goldfarb*, where a minimum fee schedule for attorneys was held to be anticompetitive activity of the type the Sherman Act proscribed. The Court here, however, distinguished *Goldfarb* by viewing the extent of state action involved in each case. In *Goldfarb*, the State Bar was merely enforcing the minimum fee schedule of a county bar association. In contrast, the restraint complained of in the case at bar involved the affirmative command of the Arizona Supreme Court. 97 S.Ct. at 2696.

17. Although the Court split 5-4 on the first amendment issue, only Mr. Justice Rehnquist's dissent stated that legal advertising of any kind was undeserving of first amendment protection. 97 S.Ct. at 2719. The remaining dissenters implied that certain forms of legal advertising might be constitutionally protected. *Id.* at 2711 (Burger, C.J., dissenting) (publication of probable range of fees); *Id.* at 2717 (Powell, J., Stewart, J., dissenting) (publication of specific hourly rates).

18. R. WISE, LEGAL ETHICS 127 (Supp. 1977).

19. *Id.*

20. Prior to 1908, no general proscription of lawyer advertising existed in the United States. Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1182 (1972). The State of Alabama had a similar provision as early as 1887. *Id.* at 1182 n.7.

21. Canon 27 was amended in 1937, 1940, 1942, 1943 and 1963. *See supra* note 18.

22. H. DRINKER, LEGAL ETHICS 316 n.6 (1953), *citing* ABA CANONS OF PROFESSIONAL

advertisement of a lawyer. The Canon prohibited all advertising, direct and indirect, but permitted the "publication or circulation of ordinary simple business cards. . . ."[23]

In 1969, the American Bar Association abandoned the Canons,[24] substituting the more workable Code of Professional Responsibility.[25] The rule challenged[26] in *Bates* was one of a number of rules under Canon 2, the replacement for Canon 27.

Past constitutional challenges to restrictions on professional advertising have been unsuccessful, the Supreme Court having found the restrictions to be a valid exercise of the police power by the states to protect the public health, safety, welfare and morals.[27] The Court recently announced that the states have an interest in regulating members of the legal profession as well.[28] *Bates*, however, was a case of first impression in that the attack on the advertising ban's constitutionality was based on the first amendment, and not upon the commerce clause or some other constitutional ground.[29]

The decision in *Bates* was greatly facilitated by the Court's holding in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[30] There the Court considered the validity, under the first amendment, of a Virginia statute declaring that a pharmacist was guilty of unprofessional conduct if he advertised prescription drug prices.[31] In finding that the statute was unconstitutional, the Court held that commercial speech[32] was entitled to first amendment protection.[33] This was a holding on a matter of first impression[34] and despite the Court's attempt to limit its opinion to the

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ETHICS No. 27.

23. *Id.*

24. The Canons were outdated. *Preface* to ABA CODE OF PROFESSIONAL RESPONSIBILITY at 1 (1976).

25. The nine Canons of the Code of Professional Responsibility are each followed by numerous Ethical Considerations and Disciplinary Rules, the Rules stating the minimum level of conduct acceptable before a lawyer becomes subject to disciplinary action.

26. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976), the pertinent part of which is cited *supra* note 7.

27. *See* Head v. New Mexico Bd., 374 U.S. 424 (1963) (optometrists); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (opticians); Semler v. Oregon State Bd., 294 U.S. 608 (1935) (dentists).

28. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

29. *See* Virginia State Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (first time such a challenge was before the Court, but involving a pharmacist). Although *Goldfarb* concerned lawyer advertising, the challenge there was grounded on statutory construction of the Sherman Act. 421 U.S. 773 (1975).

30. 425 U.S. 748 (1976).

31. VA. CODE ANN. § 54-524.35 (1974).

32. The Court, for purposes of this case, characterized commercial speech in this statement: "I will sell you the X prescription drug at the Y price." 425 U.S. at 761. This formulation fits the situation of a lawyer advertising his product. Brief for Appellant at 32, Bates v. State Bar of Arizona, 97 S.Ct. 2691 (1977) [hereinafter cited as Brief for Appellant].

33. 425 U.S. at 770.

34. Until *Virginia Pharmacy*, the status commercial speech occupied under first amendment protections was questionable. *Id.* at 758-61. Valentine v. Christensen, 316 U.S. 52, 54 [1942), held that the first amendment imposed "no such restraint on government as respects purely commercial advertising." This decision withstood critical review until the Court, in Bigelow v. Virginia, 421 U.S.

selling of "standardized products,"[35] the way was made clear for a lawyer to challenge the ban on similar legal advertising.[36]

In his opinion for the majority in *Bates*, Mr. Justice Blackmun made a point to narrow the first amendment issue.[37] The case did not address the problems of advertising relating to the "quality"[38] of legal services, to in-person solicitation of clients,[39] or to advertising by lawyers already allowed by the Code of Professional Responsibility.[40]

Restrictions on first amendment freedoms will be allowed only upon a showing of "a compelling state interest in the regulation of a subject within the State's constitutional power. . . ."[41] A number of justifications for regulating price advertising by lawyers were offered in *Bates* to show such a compelling interest. Among those offered and rejected were the adverse effect on professionalism,[42] the misleading nature of attorney advertising,[43] the undesirable effect of stirring up litigation,[44] the undesirable economic effects of advertis-

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809 (1975), limited *Valentine* to say that reasonable regulation of the manner in which commercial advertising could be distributed is permissible. *Id.* at 819. The appellant in *Bigelow* had violated a statute by publishing in his newspaper an advertisement of another providing information about abortions. Because the advertisement conveyed information of "public interest," the Court felt it deserved first amendment protection. *Id.* at 822. On the groundwork of *Bigelow*, the Court in *Virginia Pharmacy* put to rest the idea that commercial speech was unprotected, even if the advertiser's motive was economic. 425 U.S. at 762.

35. "We stress that we have considered in this case the regulation of commercial advertisement by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products. . . ." 425 U.S. at 773 n.25. *See also* the concurring opinion of Mr. Chief Justice Burger. *Id.* at 774.

36. As to the probability of preventing the *Virginia Pharmacy* holding from affecting proscriptions of advertising by members of other professions, Mr. Justice Rehnquist, in his dissent, said as follows: "But if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading surely the differences between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind." *Id.* at 785.

37. 97 S.Ct. at 2700.

38. The advertisement made no claim concerning the quality of the services rendered. *Id.* By narrowing the issue not to include considerations of quality, a legal service could be made to look more like a "standardized product," and therefore outside the disclaimer of *Virginia Pharmacy*. *Supra* note 35.

39. In-person solicitation of clients is prohibited by ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1976). This rule was not being challenged by the appellants.

40. Rule 2-102(A)(6) allows the publication of specified office and biographical information in recognized law lists, law directories and classified sections of the telephone directory.

41. NAACP v. Button, 371 U.S. 415, 438 (1963). *See* Bigelow v. Virginia, 421 U.S. 809, 826; Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

42. 97 S.Ct. at 2701. It was argued that commercialization would undermine the attorney's self-image, his reputation in the community, and his orientation to the service function of his profession. High professional standards are guaranteed, however, by the close regulation professionals are subject to by the state. 425 U.S. at 768. *See* NAACP v. Button, 371 U.S. 415, 438 (1963).

43. 97 S.Ct. at 2703. Appellants argued that it was inconsistent with the first amendment to ban all advertising because some might be misleading. Brief for Appellant at 46, *citing* Hiett v. United States, 415 F.2d 664, 671 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

44. 97 S.Ct. at 2704. *But see* Bhd. of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964), where the Court recognized the view that the public interest is served by the encouragement of litigation.

ing,[45] the adverse effect of advertising on the quality of service rendered,[46] and the difficulties of enforcement.[47] The only claim found to have any merit was that advertising would be misleading if only advertising were considered in selecting an attorney.[48] This was discounted, however, as a justification which underestimated the public.[49]

Although no justification was found to be acceptable for the suppression of all advertising by lawyers, the Court would not give first amendment protection to appellants' advertising until appellants demonstrated specifically that their advertising was protected.[50] The Court thereby refused to apply the first amendment overbreadth doctrine, a court-created exception to the standing rules,[51] to commercial speech.[52] Nevertheless, appellee's arguments that the advertisement was misleading[53] did not convince the Court that the advertisement should be suppressed.

Speech is not absolutely protected by the first amendment.[54] The fact that advertising by lawyers is within the scope of free speech protections does not restrain the states from reasonably regulating the time, place, and manner of advertising,[55] or from suppressing advertising of illegal transactions,[56] or from prohibiting advertising

45. 97 S.Ct. at 2705. The Court stated that the costs of advertising would not distinguish a lawyer from a pharmacist or any other advertiser. *Id.* at 2706.

46. *Id.* Using the same response it gave in *Virginia Pharmacy*, the Court felt that "an attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Id. See* 425 U.S. at 769.

47. 97 S.Ct. at 2706.

48. *Id.* at 2704.

49. *Id. See* 425 U.S. at 769-70. The Court suggested services of the lawyer which may be conducive to advertising: "[T]he routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like. . . ." 97 S.Ct. at 2703.

50. *Id.* at 2707.

51. The traditional rules governing constitutional adjudication include the principle that one may not constitutionally challenge a statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. Because the first amendment requires "breathing space," however, the Court has altered its standing rules to allow first amendment attack on overly broad statutes without requiring the challenging party to show that his conduct could not be regulated by a more narrowly drawn statute. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

The reason for the rule is that an overbroad statute may have a "chilling effect" i.e., protected speech will be muted by the *in terrorem* effect of the statute. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

52. Application of the overbreadth doctrine is manifestly "strong medicine." It has been applied by the Court only as a last resort. *Id.* at 613. "Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." Virginia State Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24.

53. The Arizona State Bar contended that the advertisement was misleading because it used the undefined term "clinic" to describe the law practice, the fee advertised for an uncontested divorce was not indicative of a "very reasonable price," and the advertisement failed to state that certain services advertised could be obtained without the aid of a lawyer. 97 S.Ct. at 2708.

54. Konigsberg v. State Bar of California, 366 U.S. 36, 49 n.10 (1961). Appellants agreed that some restrictions are required and did not ask for absolute protection. Brief for Appellant at 53.

55. 97 S.Ct. at 2709.

56. *Id.*

that is false, deceptive, or misleading.[57]

The stimulus of *Bates* brought an immediate response. On August 10, 1977, only weeks after the *Bates* decision, the American Bar Association's policy-making House of Delegates approved new rules for lawyer advertising.[58] The House of Delegates considered two proposals, "A" and "B," and accepted proposal "A."[59] Proposal "A" describes the types of information publishable.[60] It permits advertising not only in newspapers,[61] but in all print media and in radio broadcasting.[62] Proposal "B," unlike its counterpart, would abandon all specific authorizations and would allow the publication of all information not "false, fraudulent, misleading or deceptive."[63] While the American Bar Association adopted proposal "A," both proposals have been circulated to the state regulatory bodies for their consideration.[64]

North Dakota lawyers, at the time of *Bates*, were subject to the same advertising proscription which brought the challenge to the Supreme Court.[65] The authority to make rules for the conduct of the legal profession of this state is vested in two bodies. The North Dakota Supreme Court has been granted both constitutional[66] and statutory[67] powers to regulate the profession. In practice, however, it has been the State Bar Association of North Dakota[68] which has initiated action to adopt or amend rules of the North Dakota Code

57. *See* Virginia State Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, and Mr. Justice Stewart's concurring opinion at 777.

58. *House of Delegates Adopts Advertising D.R. and Endorses a Package of Grand Jury Reforms*, 63 A.B.A.J. 1234 (1977).

59. *Id.*

60. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1977). Proposal "A" begins with a general standard that prohibits "a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." 63 A.B.A.J. 1234, 1235 (1977), *citing* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1977). This proposal is termed "restrictive regulatory." 63 A.B.A.J. 1234 (1977). The categories of information which may be published can be described as office, biographical and fee information, and are set forth in detail. *Id.*

61. The holding in *Bates* was limited to publication in newspapers. 97 S.Ct. at 2709. Mr. Justice Powell and Mr. Justice Stewart, however, were not reassured by the majority's limited holding when in dissent both said as follows: "[I]t is clear that today's decision cannot be confined on a principled basis to price advertisements in newspapers. . . ." *Id.* at 2718 n.12.

62. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1977) allows publication or broadcast of information "in print media distributed or over radio broadcasts in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides. . . ." The mechanics for authorizing other electronic broadcast media as means for advertising, e.g., television, is provided in ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C) (1977).

63. 63 A.B.A.J. 1234 (1977). This proposal is termed "directive." *Id.*

64. *Id.*

65. N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (Jan. 1977).

66. The constitution provides that the "supreme court shall have authority . . . to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law." N.D. CONST. art. IV, § 87.

67. The North Dakota Century Code also grants authority to the North Dakota Supreme Court to regulate the legal profession. N.D. CENT. CODE § 27-02-07 (1974).

68. The State Bar Association of North Dakota was created by the legislature of North Dakota in 1921. N.D. CENT. CODE § 27-12-01 (1974). Every licensed member of the legal profession of North Dakota is a member of the State Bar Association of North Dakota. N.D. CENT. CODE § 27-12-02 (1974).

of Professional Responsibility.[69]

On September 17, 1977, the Executive Committee of the State Bar Association of North Dakota adopted proposal "A" during a short transitional period while the Ethics Committee considers and makes a recommendation concerning alternative language which would make clear that advertising in any electronic media is improper.[70]

The choice of Proposal "A" seems more desirable than Proposal "B." While "A" is written positively, "B" is stated negatively.[71] Under "B," the enforcement problems discussed in *Bates*[72] would be more acute because of the lack of clear-cut authorizations; after-the-fact determinations would be more numerous. Furthermore, the lack of clear, affirmative standards might pose notice problems when the State Bar Board attempts to enforce the rule against a North Dakota lawyer charged with violating it.

The reason for the temporary adoption of Proposal "A" in North Dakota was that the Ethics Committee was considering an amendment to the proposal which would allow advertising in print media, but would exclude advertising in *all* electronic broadcast media.[73] Proposal "A" was so amended,[74] and final action on the proposal, before sending the new rule on to the North Dakota Supreme Court, was to have occurred at the regular meeting of the Executive Committee on October 13, 1977.[75] Adverse response from the electronic broadcast media in North Dakota to the amendment delayed final action, until all interests could be heard.[76] As of this writing, the interim rule remains in effect.

Lawyer advertising, under either proposal, will be most advantageous to those lawyers practicing in heavily-populated, metropolitan regions. Similarly, the consumer in those same areas will be most aided by such advertising. Even in the major population centers of North Dakota, the attorney remains visible by his service affiliations and is known by his reputation. It is doubtful that a

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69. Although no express authority permits the State Bar Association of North Dakota to adopt rules of conduct for the legal profession of North Dakota, such authority may be implied from the express authority to keep a standing committee on ethics. STATE BAR ASSOCIATION OF NORTH DAKOTA CONST. BY-LAWS art. VII, § 1.

70. State Bar Association of North Dakota, news release, Sept. 20, 1977.

71. *See supra* notes 60-63 and text accompanying.

72. 97 S.Ct. at 2706-07.

73. State Bar Association of North Dakota, news release, Sept. 20, 1977.

74. The proposed North Dakota rule would be the same as ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1977), except that it would delete all language permitting advertisement by "radio broadcast." N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (proposed).

In addition, proposed Ethical Consideration 2-2 was amended by the addition of the following statement: "It is considered that laypersons in receiving relevant lawyer advertising will be adequately served by print media." Letter from R. C. Heinley, chairman, Ethics & Internal Affairs Committee to Robert P. Schuller, Executive Director, State Bar Association of North Dakota (Oct. 7, 1977).

75. State Bar Association of North Dakota, news release, Sept. 20, 1977.

76. Telephone interview with Robert P. Schuller, Executive Director, State Bar Association of North Dakota (Oct. 20, 1977).

noticeable number of North Dakota lawyers will utilize the new rule and advertise. As North Dakota becomes more populated and more urbanized, however, the opportunities for advertising may become important and useful to both the lawyer and the consumer.

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CONSTITUTIONAL LAW—COURTS—ALL STATE COURT JURISDICTION GOVERNED BY "MINIMUM CONTACTS"

Plaintiff filed a shareholder's derivative suit against Greyhound Corporation, Greyhound Lines, Inc., and twenty-eight present or former corporate officers and directors.[1] In conjunction with the filing of the shareholder's derivative suit plaintiff filed a motion for the sequestration[2] of the property of defendants located in Delaware.[3] The Delaware Supreme Court upheld the procedure of the Delaware sequestration statute.[4] On appeal to the United States Supreme

1. Plaintiff was a nonresident of Delaware. Greyhound Corporation was incorporated under the laws of Delaware with its principal place of business in Phoenix, Arizona. Greyhound's wholly owned subsidiary, Greyhound Lines, Inc., was incorporated in California and had its principal place of business in Phoenix, Arizona. None of the twenty-eight present or former corporate officers or directors were residents of Delaware. The actions, upon which the shareholder derivative suit was based, occurred in Oregon.

2. DEL. CODE tit. 10, § 366 (1975). This is the Delaware sequestration statute. It allows a Delaware court to seize any or all property of a nonresident defendant in order to compel appearance. The property may be sold under the order of the court, if the defendant does not appear or otherwise defaults, to pay the demand of the plaintiff. If the defendant enters a general appearance, he may upon notice to the plaintiff petition the court for release of the property. It appears from the Delaware statute that the defendant may either default and lose the property or make a general appearance and submit himself in full to in personam jurisdiction.

3. DEL. CODE tit. 8, § 169 (1975). This statute places the situs of stock, of corporations incorporated in Delaware, in Delaware. The Court of Chancery attached such stock as defendants owned in Greyhound Corporation pursuant to DEL. CODE tit. 10, § 366 (1975). Delaware is the only state which has the situs of stock in the state of incorporation; this makes Delaware the situs of a great deal of corporate stock. The other forty-nine states have adopted U.C.C. § 8-317(1) (1972 version), which states as follows:

> Attachment or levy upon security (1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

This statute is found at N.D. CENT. CODE § 41-08-33 (1968).

4. Greyhound Corporation v. Heitner, ——Del.——, 361 A.2d 225 (1976). Appellants contended that the sequestration procedure did not accord them due process, that the property seized was not capable of attachment in Delaware, and that they did not have sufficient contacts with Delaware to sustain jurisdiction of that state's courts under the rule of International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See infra* notes 14-17, and text accompanying.

> The Delaware Supreme Court, in rejecting appellants' contentions, stated as follows: [J]urisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contacts by defendants with this forum. Under 8 Del. C. § 169 the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . (is) in this State," and that provides the initial basis for jurisdiction.