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SOLICITATION AFTER AN AIR DISASTER: THE STATUS OF PROFESSIONAL RULES AND CONSTITUTIONAL LIMITS

LINDA S. ALTHOFF

POSING AS A Catholic priest, a "veteran ambulance chaser" consoles the relatives of victims of the Northwest Flight 255 crash in Detroit. After gaining the confidence of these families, he refers them to his friend, a lawyer. Detroit authorities are investigating the incident as possible fraud.¹

A well-known Dallas personal injury lawyer sets up a booth in the lobby of the hotel in which families of Delta 911 crash victims are staying.² Another prominent attorney opens up a temporary office in Dallas immediately after the crash, but denies that he is an ambulance chaser because, he says, he always arrives *before* the ambulance.³ At least three Texas lawyers face disbarment for seeking business through runners following that Delta crash.⁴

The catalogue of anecdotes portraying the lawyer as a vulture grows with each air tragedy.⁵ The stories are re-

¹ See *Defrocking A Fraud*, TIME, Sept. 28, 1987, at 31. The man known as Reverend John Irish has been observed at disaster sites in at least seven states. Irish has not been charged with a crime as of this writing. *Id.*

² See *Jet Victims' Families Caught in Damage Claims Tug-of-War*, Dallas Morning News, Aug. 8, 1985, at 23A, col. 2.

³ Messing, *The Latest Word on Solicitation*, FLA. BAR J., May, 1986, at 17. Messing attributed this statement to Melvin Belli, but said Belli indicated that "the statement, if made by him, was meant tongue in cheek." *Id.* at 22 n.2.

⁴ See Gest and Seamonds, *A Lawyers' Rush for Judgments*, U.S. NEWS & WORLD REP., Aug. 31, 1987, at 23. Runners are agents of lawyers, hired to gather information and prospective clients after an accident.

⁵ An editorial cartoon in the Miami Herald depicted lawyers after the Delta

ported in news magazines and newspapers with an attitude of scorn, but authors make little attempt to explain the system of ethical rules and court decisions that govern these lawyers' activities.⁶ The professional journals frequently reflect the same scorn,⁷ but the developing nature of the law on lawyer advertising and solicitation forces even these authors to hedge and speculate as to lawyers' liability.⁸

The uncertainty of the law forces the courts and the legal profession to reexamine questions thought settled long ago. Ought lawyers to solicit employment? If not, how can rules draw a clear line between permissible advertising and impermissible solicitation? If lawyers may solicit, how can the legal system safeguard the legitimate interests of the lawyer, the client, the state, and the profession?

Recent tragedies in the airline industry can provide more than distasteful caricatures of attorneys. Using these accidents as a point of reference can give a practical framework to an ethical and constitutional analysis of solicitation practices. This comment will briefly summarize the development of the solicitation rules of the legal profession⁹ and the interpretation of those rules by the Supreme Court.¹⁰ Next, the comment will discuss the various interests at stake in the issue of solicitation.¹¹ Finally, the comment will examine the legal and ethical status of

crash as vultures, members of the law firm of "Pickem, Pickem, Scavage and Bone . . . Don't Call Us — We'll Call You!" Messing, *supra* note 3, at 17 (quoting Miami Herald, Aug. 16, 1985, at 20A).

⁶ See, e.g., Gest and Seamonds, *supra* note 4, at 23. In a full page article, the only attempt at legal background is one sentence: "Advertising for clients is allowed in most states, but seeking them directly violates ethics codes." *Id.*

⁷ See Messing, *supra* note 3, at 17.

⁸ Messing cites recent case law as leaving "a large question as to what conduct must be permitted." *Id.* at 18.

⁹ See *infra* notes 13-46 and accompanying text for a discussion of the professional rules of ethics and solicitation.

¹⁰ See *infra* notes 47-101 and accompanying text for a discussion of the Supreme Court's parameters for solicitation.

¹¹ See *infra* notes 102-117 and accompanying text for a discussion of the interests at stake in solicitation.

various modes of solicitation employed after an air disaster.¹²

I. LEGAL BACKGROUND

A. *The Profession's Rules*

The early Greeks and Romans were among the first to impose rules against lawyer advertising and solicitation.¹³ The area of divorce especially concerned the ancients. They believed an attorney's intrusion promoted dissolution of marriages and breakdown of families.¹⁴ The English tradition similarly regarded advertising and solicitation as unworthy of the legal profession.¹⁵ Indeed, the English barristers, frequently sons of wealthy families, rarely needed to be concerned with attracting clients to earn a living.¹⁶

Necessity always colors what the American tradition adopts from its ideological ancestors. The reality in pre-20th century America was that the law was not simply a profession of the rich.¹⁷ Especially on the expanding frontier, where formal education and mass media information were minimal, struggling lawyers had to inform settlers of their legal rights and of the services lawyers could perform for them. One result of that reality was that lawyers frequently advertised for and solicited clients

¹² See *infra* notes 118-187 and accompanying text for a discussion of three modes of solicitation as they might be employed after an air disaster.

¹³ Address by Blake Tartt, Texas Bar Foundation Conference (Dec. 6, 1985), reprinted in Texas Bar Foundation Conference Materials 2 (March 1986).

¹⁴ *Id.*, Conference Materials, (citing L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (1981)).

¹⁵ *Id.* According to another commentator, these early barristers were "a select fraternity who lived together and met one another every day, both at dinner and in court, on a friendly basis." *Id.* at 2-3 (quoting H. DRINKER, LEGAL ETHICS (1976)).

¹⁶ *Id.*; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977) (explaining that "[e]arly lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession.").

¹⁷ Tartt, *supra* note 13, Conference Materials at 3.

in the 1800's.¹⁸

At the turn of the century, however, states began to limit these practices by adopting new rules of professional conduct that the national bar had promulgated.¹⁹ The Canons of Professional Ethics represented the 20th century view of the American Bar Association (ABA) toward solicitation: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."²⁰ Indeed, advertising and all other forms of "self-laudation," according to this rule, "offend the traditions and lower the tone of our profession and are reprehensible."²¹ Rooted in the European belief that the legal profession was a higher calling than a simple trade that must rely on such indignities, this rule governed professional conduct — the way lawyers saw themselves and the way others saw them — for more than sixty years.

In 1969, the ABA's Model Code of Professional Responsibility (Model Code or Code) replaced the old Canons as the primary professional statement of the rules on solicitation.²² Disciplinary Rule 2-103 of the Code forbids a lawyer's recommending himself or a working associate for employment unless the prospective client has sought his advice.²³ Disciplinary Rule 2-104 restates the tradi-

¹⁸ *Id.* The standard anecdote here is that Abraham Lincoln and his partner advertised their services in Illinois in 1848. *Id.*

¹⁹ CANONS OF PROFESSIONAL ETHICS (1908). The ABA adopted the first thirty-two Canons at its thirty-first annual meeting at Seattle, Washington, on August 27, 1908. Fifteen more Canons were adopted between that date and 1970. *See id.* at note i.

²⁰ *Id.* at Canon 27.

²¹ *Id.*

²² MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). The ABA originally approved the Model Code in 1969, and amended it most recently in 1981. Citations to the Code reflect those amendments. The Code includes Canons, Disciplinary Rules (DR), and Ethical Considerations (EC). Only the Disciplinary Rules are binding on an attorney. *Id.* at Preliminary Statement, para. 5.

²³ *Id.* DR 2-103(A) states: "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." The reference to DR 2-101(B) is to twenty-five categories of adver-

tional ban against solicitation. It forbids a lawyer's accepting employment resulting from in-person unsolicited advice to a layperson.²⁴ Enumerated exceptions to the general ban on solicitation include accepting employment from those with existing relationships with the lawyer, employment resulting from legal service activities, and employment from persons contacted to join a class action suit the lawyer is litigating.²⁵

Underlying this rule is Canon 2 of the Code: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."²⁶ Thus, the professional rule against solicitation rests, at least a little ironically, upon the need for accessible legal representation.²⁷ The

tising that the ABA has approved. *Id.* These categories include general background information about the attorney and office administration, and heavily restricted statements of fees and rates. *Id.*

²⁴ *Id.* DR 2-104(A) states:

A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through

(4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Id.

²⁵ *Id.*

²⁶ *Id.* at Canon 2. The Canons are "statements of axiomatic norms," which express the general standards lawyers are expected to meet. *Id.* at Preliminary Statement.

²⁷ *Id.* at EC 2-3.

line of acceptability is drawn between educating laymen in recognizing legal problems, and initiating personal contact with a non-client for monetary gain.²⁸ The qualifying factor in such cases is the lawyer's motive.²⁹ Because of the difficulty of determining motives after the fact, the Code instructs the lawyer to refuse compensation whenever he has advised a person to seek legal representation.³⁰

Rule 7.3 of the ABA Model Rules of Professional Conduct represents the most recent, and most exhaustive, attempt by the ABA to enunciate a rule concerning solicitation.³¹ The rule prohibits solicitation that includes personal contact, telephone or telegraph contact, or targeted mailings.³² The rule permits advertisements or mailings distributed generally to persons not known by the lawyer to need his legal services.³³ The rule also allows more direct contact of the lawyer's family or prior

²⁸ *Id.*; see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 320 (1968) ("It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity.").

²⁹ MODEL CODE, *supra* note 22, at EC 2-3.

The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another.

Id.

³⁰ *Id.* at EC 2-4.

³¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983). That rule states:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Id. The Model Rules were adopted by the House of Delegates of the ABA on August 2, 1983. *Id.* at i.

³² *Id.* at Rule 7.3.

³³ *Id.*

clients.³⁴

Not only does Rule 7.3 outline the solicitation ban with more precision than its earlier counterparts, but the Comment following the rule also explains in depth the reason for the proscription.³⁵ The ABA points out the potential for abuse inherent in direct solicitation of laymen known to need legal representation.³⁶ This kind of contact sets up a confrontation between a trained advocate with conflicting self interest, and a vulnerable prospective client with an impaired ability to determine his own interest.³⁷ Such a confrontation is "fraught with the possibility of undue influence, intimidation, and overreaching,"³⁸ and is unnecessary in our system because of the ability of lawyers to communicate legitimate information through advertising.³⁹ The ABA expresses a preference for public communication rather than private contact because of the need to prevent false and misleading statements.⁴⁰

There remains one further professional position on the ethics of solicitation. The American Lawyer's Code of Conduct⁴¹ offers an alternative to the ABA's Model Code and Model Rules. The American Trial Lawyers Association (ATLA),⁴² author of this alternative view, disagrees

³⁴ *Id.* But see DR 2-104(A)(1), *supra* note 24, which allows solicitation of a "close friend" and "one whom the lawyer reasonably believes to be a client."

³⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment.

³⁶ *Id.* at para. 1.

³⁷ *Id.* The Comment specifically expresses concern that the prospective client "may have impaired capacity for reason, judgment and protective self-interest." *Id.*

³⁸ *Id.* at para. 2.

³⁹ *Id.* The revised rule as to lawyers' advertising is Rule 7.2, which states in pertinent part: "Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3." The *Bates* decision (discussed in notes 48-55 and accompanying text) recognized a limited right of attorneys to advertise, within the bounds of truthfulness. The "requirements of Rule 7.1" referred to in this rule are simply those of truthfulness. *Id.* at Rule 7.1.

⁴⁰ *Id.* at Rule 7.3 comment, paras. 4-5.

⁴¹ AMERICAN LAWYER'S CODE OF CONDUCT (Revised Draft 1982). A Public Discussion Draft of this Code was first published in June, 1980. See *id.* at Chairmen's Introduction.

⁴² The American Trial Lawyers Association, as the name implies, is a profes-

on the fundamental approach the ABA takes toward legal ethics and toward the role of the lawyer in our constitutional system. The difference is clear in the approach taken by the ATLA in Chapter VII of its Code, titled "Informing the Public About Legal Services."⁴³ Subject only to restrictions relating to misrepresentation, harassment, violation of valid time and place restrictions, and interference with another's legal obligations, the lawyer is *encouraged* to advertise and to solicit clients.⁴⁴ The ATLA sees the lawyer, first and foremost, as defender of the advocacy system, as "the citizen's champion against official tyranny."⁴⁵ In that framework, solicitation becomes an appropriate vehicle for informing the public of its need for legal assistance, and of the availability and cost of that assistance.⁴⁶ These rules provide an important counter-

sional association of lawyers with trial practice. The largest group within the association is plaintiffs' lawyers.

⁴³ AMERICAN LAWYERS CODE, *supra* note 41. Chapter VII includes the following rules:

7.1 A Lawyer shall not knowingly make any representation that is materially false or misleading, and that might reasonably be expected to induce reliance by a member of the public in the selection of counsel.

7.2 A lawyer shall not advertise for or solicit clients in a way that violates a valid law imposing reasonable restrictions regarding time and place.

7.3 A lawyer shall not advertise for or solicit clients through another person when the lawyer knows, or could reasonably ascertain, that such conduct violates a contractual or other legal obligation of that other person.

7.4 A lawyer shall not solicit a member of the public when the lawyer has been told that person or someone acting on that person's behalf that he or she does not want to receive communications from the lawyer.

7.5 A lawyer who advertises for or solicits clients through another person shall be as responsible for that person's representations to and dealings with potential clients as if the lawyer acted personally.

Id.

⁴⁴ *Id.* at Chapter VII comment ("Lawyers are therefore encouraged to advertise and to solicit clients, subject only to [restrictions cited in text]."). Solicitation is defined in this comment as "spoken communication, in person or by telephone, intended to induce the other person to become a client." *Id.*

⁴⁵ *Id.* at Preface.

⁴⁶ *Id.* at Chapter VII comment.

part to the ABA majority view, and may eventually provide a blueprint for ABA and state rule modification.

B. *The Supreme Court's Parameters*

Attorney regulation and discipline are functions of the Bar Associations and courts of the individual states.⁴⁷ A ban on soliciting prospective clients, however, is essentially a limitation on an attorney's right to speak freely. As a consequence, the Supreme Court has addressed this issue as a constitutional one.

The uneasy distinction between advertising and solicitation⁴⁸ calls for a brief discussion, first, of the Court's most significant advertising decisions. *Bates v. State Bar of Arizona*⁴⁹ first recognized an attorney's right to advertise the cost of routine legal services.⁵⁰ Lawyers Bates and Van O'Steen had placed an advertisement for their Phoenix legal clinic in a daily newspaper, listing their fees for certain services.⁵¹ Facing suspension for violating Arizona Disciplinary Rule 2-101(B),⁵² the lawyers challenged the

⁴⁷ See MODEL RULES at Preamble, para. 9, stating:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

Id.

⁴⁸ See *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 147, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875 (1980), *cert. denied*, 450 U.S. 1026 (1981). The court stated:

Not all solicitation is advertising, though all advertising either implicitly or explicitly involves solicitation. To "solicit" means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing while "advertising" is the calling of information to the attention of the public, by whatever means.

Id. (citations omitted).

⁴⁹ 433 U.S. 350 (1977).

⁵⁰ *Id.* at 384. The Court specifically reserved for a later time the related issue of solicitation. *Id.* at 366.

⁵¹ *Id.* at 354.

⁵² *Id.* at 355. Arizona's DR 2-101(B) provided in part:

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, radio or television an-

constitutionality of the advertising ban.⁵³ The Supreme Court addressed and rejected six justifications offered for this ban,⁵⁴ and ruled that the First Amendment protected "truthful advertisement concerning the availability and terms of routine legal services."⁵⁵

In re R.M.J.,⁵⁶ a Missouri case decided five years after *Bates*, involved attorney advertisements that included information not expressly permitted by state disciplinary rules.⁵⁷ The Supreme Court reversed Missouri's reprimand of R.M.J.,⁵⁸ and set forth the test it would use to determine when a state can regulate commercial speech.⁵⁹ Under this test (generally referred to as the *Central Hudson* test), a state can prohibit false and misleading advertisements entirely.⁶⁰ The state can regulate potentially misleading information, but restrictions can be "no broader

nouncements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. at 355.

⁵³ *Id.* at 356. The lawyers relied on *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (holding that pharmacists' advertising prescription drug prices was protected commercial speech). *Id.* at 364.

⁵⁴ *Id.* at 368-79. The court rejected in turn the following arguments of state interests: 1) the adverse effect on professionalism; 2) the inherently misleading nature of attorney advertising; 3) the adverse effect on the administration of justice; 4) the undesirable economic effects of advertising; 5) the adverse effect of advertising on the quality of service; and 6) the difficulties of enforcement. *Id.* Summarizing, the court was not "persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys." *Id.* at 379.

⁵⁵ *Id.* at 385. The *Bates* decision was 5-4.

⁵⁶ 455 U.S. 191 (1982).

⁵⁷ *Id.* at 198. Missouri had revised its Rule 4 regulating lawyer advertising after *Bates*, and the authors had attempted to "strike a midpoint between prohibition and unlimited advertising." *Id.* at 193. Under the revised rule, lawyers could publish ten categories of information (including fees for routine services) in newspapers, periodicals and telephone directories. *Id.* at 194. R.M.J. was charged with advertising both unlisted practice areas and states in which he was licensed. He also had not included a required disclaimer of expertise. *Id.* at 198.

⁵⁸ *Id.* at 203-04.

⁵⁹ *Id.* at 203. The Supreme Court adopted its test for commercial speech regulation from *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁶⁰ *Id.*

than reasonably necessary to prevent the deception.”⁶¹ When the speech is not potentially misleading, the state may interfere only if it has a substantial interest in the regulation.⁶² Any restrictions in this category must be “narrowly drawn,” and the state may impose them only to the extent that the restrictions further that substantial interest.⁶³

Against this backdrop in 1978, the Supreme Court decided companion cases dealing with attorney solicitation. The two cases appear to define the opposite ends of the solicitation spectrum. In *Ohralik v. Ohio State Bar Association*,⁶⁴ the Supreme Court dealt with a classic set of “ambulance chasing” facts.⁶⁵ Ohralik, an Arizona attorney, visited the young victim of an auto accident in the hospital, offered his services to her, took pictures of her in traction, and surreptitiously tape recorded a conversation with her parents.⁶⁶ He then visited the injured passenger from the same accident, told her of the possibility of a recovery from the driver’s insurance policy, and recorded her acquiescence to his offer to represent her.⁶⁷ The Ohio Supreme Court found Ohralik’s conduct violated Disciplinary Rule 2-103(A)⁶⁸ and Disciplinary Rule 2-104(A),⁶⁹ and suspended him indefinitely.⁷⁰

Ohralik claimed the First Amendment protected his solicitation of the two young women as it did *Bates’* advertis-

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 436 U.S. 447 (1978).

⁶⁵ Black’s Law Dictionary defines ambulance chasing as “the practice of some attorneys, on hearing of a personal injury which may have been caused by the negligence or wrongful act of another, of at once seeking out the injured person with a view to securing authority to bring action on account of the injury.” BLACK’S LAW DICTIONARY 74 (5th ed. 1979).

⁶⁶ *Ohralik*, 436 U.S. at 449-51.

⁶⁷ *Id.* at 452-53. Both women eventually discharged Ohralik and settled their claims with the insurer. Ohralik filed breach of contract suits against both, relying on the tape recordings. *Id.* at 453.

⁶⁸ *Id.* at 454.

⁶⁹ *Id.* at 455.

⁷⁰ *Id.* at 454.

ing.⁷¹ Justice Powell, however, writing for the majority, declared that, "in-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."⁷² Though a commercial deal may involve protected speech, the level of appropriate judicial scrutiny lessens.⁷³ The Court determined that the pressures and demands of in-person solicitation may actually frustrate the individual's interest in informed and reliable decision-making, which supported the *Bates* decision.⁷⁴ Moreover, the Court concluded that the state's compelling interest in preventing "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" requires a prophylactic ban on soliciting.⁷⁵ The Court held that even if the lawyer's conduct did not harm, it is disciplinable if it was the kind of conduct *likely* to harm. Therefore, the absence of explicit proof or findings of harm or injury are immaterial.⁷⁶ In summary, the Court determined that a state may prohibit a lawyer's commercial speech for pecuniary gain, which is not visible or otherwise open to public scrutiny, without offending the Constitution.

In the companion case, *In re Primus*,⁷⁷ a South Carolina attorney associated with the American Civil Liberties Union wrote to a young woman and offered her representation.⁷⁸ The prospective client had been sterilized as a

⁷¹ *Id.* at 455. Ohralik claimed that apprising the women of their legal rights and of the availability of a lawyer to pursue their claims was "presumptively an exercise of his free speech rights," and that those rights could not be curtailed unless he had caused "a specific harm that the State has a compelling interest in preventing." *Id.*

⁷² *Id.* at 457.

⁷³ *Id.*; see *supra* notes 58-63 and accompanying text for a discussion of the *Central Hudson* test for commercial speech regulation.

⁷⁴ *Ohralik*, 436 U.S. at 457-58. Justice Powell concluded that such solicitation "is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the availability, nature, and prices of legal services" *Id.*

⁷⁵ *Id.* at 462.

⁷⁶ *Id.* at 468. This ruling countered Ohralik's claim that his solicitation was "pure," i.e. that none of the evils that the rule proscribes were present in his conduct. *Id.* at 464.

⁷⁷ 436 U.S. 412 (1978).

⁷⁸ *Id.* at 415-17. The ACLU learned of the Medicaid sterilizations through

condition of continued assistance from Medicaid.⁷⁹ The South Carolina Bar accused Primus of violating Disciplinary Rules 2-103(D)(5)(a) and (c),⁸⁰ and privately reprimanded her.⁸¹

The Court determined that Primus' case was significantly different from *Ohralik's*.⁸² Here, the Court characterized the speech at issue as political, not commercial.⁸³ The proffered litigation fell within the realm of associational freedoms because it was a means of advancing a civil liberty.⁸⁴ Justice Powell, writing again for the majority, stated that for such litigation to be effective, legal assistance must be made available to suitable litigants.⁸⁵ In attempting to reach those suitable litigants, the attorney will only be disciplined if she *in fact* engages in the vexatious conduct the disciplinary rule is intended to prevent.⁸⁶ Here, there was no such harm, and so the Court reversed the decision of the South Carolina Supreme

newspaper reports in 1973. Primus was the ACLU representative at a local meeting for the sterilized women, where she met the prospective client. *Id.* at 416.

⁷⁹ *Id.* at 416.

⁸⁰ *Id.* at 418-19. South Carolina's DR 2-103 was essentially the same as the Model Code's DR of that number. See *supra* note 23 for the text of the model rule.

⁸¹ *Primus*, 436 U.S. at 421.

⁸² *Id.* at 435. Justice Powell, distinguishing the cases, stated:

The approach we adopt today in *Ohralik* . . . cannot be applied to Primus' activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, Primus may not be disciplined unless her conduct in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.

Id. Justice Powell further stated that while a state may regulate "in a prophylactic fashion," when speech simply proposes a commercial transaction as in *Ohralik*, "[i]n the context of political expression and association . . . a State must regulate with significantly greater precision." *Id.* at 438-39.

⁸³ *Id.* at 431 (concluding that, "[f]or the ACLU . . . litigation is not a technique of resolving private differences; it is a form of political expression and political association.").

⁸⁴ *Id.* at 431.

⁸⁵ *Id.* Powell implies that the assistance must be made available by someone other than "a group that exists for the primary purpose of financial gain through the recovery of counsel fees." *Id.*

⁸⁶ *Id.* at 434. Thus, associational speech is contrasted with commercial speech, which the Bar can regulate even if no "vexatious conduct" is present. See *supra* note 76.

Court.⁸⁷

These cases, then, provide the Supreme Court's parameters to attorney solicitation. At one extreme is *Ohralik*, forbidding in-person solicitation for pecuniary gain under circumstances likely to result in deception or improper influence. At the other extreme is *Primus*, allowing written solicitation of an individual by a non-profit organization, to further an ideological goal. Between these two extremes, where most solicitation cases fall, the law is still uncertain.

Since establishing these outer limits, the Court has addressed two cases in the middle ground. In *Zauderer v. Office of Disciplinary Counsel*,⁸⁸ the Supreme Court held that an advertisement directed toward women injured by a particular intra uterine device was not misleading, and therefore was protected speech unless the state could establish that prohibiting such speech directly advanced a substantial governmental interest.⁸⁹ The Court saw no substantial interest in the *Zauderer* case.⁹⁰ The ad, it said, was not invasive of privacy, did not carry the coercive force of personal contact, was conducive to reflection by the consumer, and was not to be faulted for "stirring up" what could be meritorious litigation.⁹¹ The First Amendment, it appears, protects truthful advertising, directed specifically toward those who may have a meritorious claim. Surely, such "advertising" would be classified by most observers as solicitation.⁹²

The Court extended its *Zauderer* ruling in *Shapero v. Kentucky Bar Association*.⁹³ Shapero, a Kentucky attorney, applied to the state bar's Advertising Commission for

⁸⁷ *Primus*, 436 U.S. at 439.

⁸⁸ 105 S. Ct. 2265 (1985).

⁸⁹ *Id.* at 2277.

⁹⁰ *Id.*

⁹¹ *Id.* at 2277-78.

⁹² See, e.g., Weston, *Protected Solicitation Becomes More Personal: Zauderer v. Office of Disciplinary Counsel*, 31 St. Louis U.L.J. 167, 179 (1986) (concluding that "the Court's determination that attorneys have a right to solicit particular clients represents an important expansion of the legal profession's right to advertise").

⁹³ 108 S. Ct. 1916 (1988).

approval of a mailing to persons known to be suffering foreclosure on their homes.⁹⁴ While the Commission did not find the proposed letter false or misleading, it disapproved the mailing as violative of Kentucky Supreme Court Rule 3.135(5)(b)(i).⁹⁵ The Commission suggested, however, that this rule violated the principles of *Zauderer* and ought to be changed.⁹⁶ The Kentucky Supreme Court deleted the rule, replaced it with ABA Model Rule 7.3, and disapproved Shapero's letter.⁹⁷

The Supreme Court, on appeal, reversed the Kentucky court, noting first that the inefficiency of general mailings is not somehow constitutionally preferable to mailings intended to reach those in need of legal aid.⁹⁸ Besides accomplishing what they intend, these mailings are far less dangerous than in-person solicitation.⁹⁹ What dangers do exist in written solicitation can be regulated in much less

⁹⁴ *Id.* at 1919. The letter offered free information to recipients who called and mentioned the letter. *Id.*

⁹⁵ *Id.* The Kentucky rule provided:

A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Id. at 1919-20 n.2.

⁹⁶ *Id.* at 1920.

⁹⁷ *Id.* The Court did not specify how Rule 7.3 "cured" the problem of its former rule. *Id.*

⁹⁸ *Id.* at 1921-22. Justice Brennan, writing for the majority, stated:

The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who *actually* "need legal services of the kind provided [and advertised] by the lawyer." . . . [T]he State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

Id. (emphasis original).

⁹⁹ *Id.* at 1922. Answering Kentucky's concern over the large type used in the letter, Justice Brennan asserted that "a truthful and non-deceptive letter, no matter how big its type and how much it speculates can never 'shou[t] at the recipient' or 'gras[p] him by the lapels,' as can a lawyer engaging in face-to-face solicitation." *Id.* at 1924 (citation omitted).

restrictive ways than prohibition.¹⁰⁰ While *Shapero* includes a lengthy dissent,¹⁰¹ it is clear the majority of justices are now willing to extend First Amendment protection to truthful targeted mailings.

II. INTERESTS AT STAKE IN SOLICITATION

A. *The State's Concern*

Justice Powell in *Ohralik* spoke of the state's general interest in protecting consumers and regulating commercial transactions.¹⁰² States also have a particular interest in maintaining the standards of the licensed professions, especially those of attorneys because of their essential role in administering justice.¹⁰³ To that end, the state's interest is also identified as "adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed."¹⁰⁴ By inference, the state's interest coincides with the prospective client's interest, at least in the protection of the prospective client from the overreaching lawyer.

B. *The Prospective Client's Concern*

To be sure, the prospective client's interest overlaps somewhat with the state's. A person in need of legal services seeks protection from the harms of overreaching. Essentially, the prospective client is a victim protecting his privacy.¹⁰⁵

And yet, the client's interest must by its nature be more than mere self-protection. Only lawyers, those from

¹⁰⁰ *Id.* at 1923-24 (dismissing the State's argument that such regulation could be overly burdensome for the bar).

¹⁰¹ *See id.* at 1925-31 (Justice O'Connor, joined by Justices Rehnquist and Scalia, calling for the overturning of *Bates* and its progeny).

¹⁰² *Ohralik*, 436 U.S. at 460.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 464.

¹⁰⁵ Arguably, invasion of privacy may be the only legitimate argument against solicitation. The lawyer's conflicting pecuniary motive and his ability to overreach a client in need are certainly potential dangers in all lawyer-client relationships whether solicited or unsolicited.

whom the client seeks to be protected, can provide the services he needs.¹⁰⁶ He needs identification of and answers to his legal problems. He needs to choose one from many attorneys. In short, he needs information, and must rely on the legal community to give it to him. The claim of the soliciting attorney is that he provides that needed information.¹⁰⁷ The challenge, then, becomes reconciling the layperson's potentially conflicting interests. The regulations must allow a client to gain necessary information and to maintain the privacy that a soliciting attorney's "vexatious conduct" may threaten.¹⁰⁸

C. *The Bar's Concern*

The legal profession's primary interests in the solicitation issue are dispensing the information the prospective client requires, and maintaining the integrity of the profession. Both the Model Code and the Model Rules acknowledge the duty to inform the public.¹⁰⁹ The Rules, drafted post-*Bates*, point to truthful advertising as the way to disseminate that information.¹¹⁰ Both see accepting employment after offering unsolicited advice as a distortion of the informative role of attorneys.¹¹¹

Maintaining the integrity of the profession includes, but is not necessarily limited to, preventing the potential distortions of the soliciting lawyer. According to the bar, the

¹⁰⁶ The conflict is stated in the reverse in *Ohralik*. "Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive." 436 U.S. at 465.

¹⁰⁷ See, e.g., *id.* at 455 (Ohralik claimed he merely, "apprised the women of their legal rights and of the availability of a lawyer to pursue their claims.").

¹⁰⁸ The term "vexatious" conduct, which Justice Powell uses in *Ohralik*, 436 U.S. at 462, and *Primus*, 436 U.S. at 413, has its roots in *Bates*, 433 U.S. at 379.

¹⁰⁹ See MODEL CODE, *supra* note 22, at Canon 2, and MODEL RULES, *supra* notes 31 and 39, at Rules 7.1-7.3.

¹¹⁰ MODEL RULES, *supra* note 31, Rule 7.3 comment, para. 4 ("the use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely.").

¹¹¹ See *supra* notes 23 and 31 respectively for the texts of MODEL CODE DR 2-103(A) and MODEL RULE Rule 7.3.

reputation of the profession requires a dignified posture. Even the appearance of harm may damage that reputation.¹¹² The public must have confidence in lawyers as a group. If the common perception is that lawyers are preying on the public rather than serving it, the profession will be unable to hold that confidence.

Another concern for the bar is for the lawyer who abides by the profession's ethical rules. The soliciting attorney undercuts not only the non-solicitor's reputation, but also his employment opportunities. The ABA seeks to remove this penalty by enforcing rules strictly against lawyers reaping the advantages of solicitation.

Finally, it is important to address a less laudable interest of the profession. There is no question that the bar establishment can, through bans on solicitation, prevent newcomers to the profession and sole practitioners from attracting the business of the prospective client.¹¹³ Solicitation is obviously an alternative to the traditional white, male, large-firm-dominated networks that most often bring attorneys and clients together.¹¹⁴ By denying this or

¹¹² *Bates* seems to reject this argument when it used to limit truthful commercial speech. *Bates*, 433 U.S. at 370-71 (concluding that "the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the professions' failure to reach out and serve the community").

¹¹³ See *In the Matter of Amendment to S.J.C. Rule 3:07, DR 2-103 and DR 2-104*, 495 N.E.2d 282, 287-88 (Mass. 1986). While the majority of the Massachusetts court eventually rejected this argument as subordinate to preventing the dangers of direct solicitations, three concurring justices predicted that the First Amendment would soon protect such solicitation, at least partly because of this policy issue. *Id.* at 292.

¹¹⁴ *Id.* See generally Elkind, *The Hustlers*, 1985 TEX. MONTHLY Aug. 157, 272-73. In a section entitled "Hustling for Business," Elkind describes the workings of large Texas firms' client development committees, which unabashedly solicit business clients for their firms. *Id.* at 272. Speaking at a Texas Bar Association Conference on lawyer soliciting and advertising, Elkind described who is doing this soliciting:

Law firms have always had men who attracted business — rainmakers. What's changed is that large firms — the very best firms — are no longer waiting for business to be attracted; instead, they're out on the street trying to scare it up. My point is that solicitation is no longer heretical; it is common, everyday practice.

Address by Peter Elkind, Texas Bar Foundation Conference (Dec. 6, 1985), *re-*

other avenues of legal match-ups, the bar regulates the opportunities, and hence the make-up, of its membership.

D. *The Soliciting Lawyer's Concern*

On the purest level, the lawyer's interest is in providing the layperson in need of legal assistance with an offer of that assistance.¹¹⁵ The complexity of our legal system means many legal victims may not even know they have been victimized, let alone how to seek redress. The solicitor, obligated by his professional duty to educate the public and to make legal services available when needed,¹¹⁶ serves an important function.

Nor should the pecuniary interest of the soliciting lawyer be judged an illegitimate one. In *Bates*, the Supreme Court stated that neither attorneys nor their clients engage in the "self-deception" that attorneys are not paid for their services.¹¹⁷ Approaching prospective clients known to be in need of representation serves the very real interest of non-establishment lawyers in developing a client base and, thereby, a livelihood.

printed in Texas Bar Foundation Conference Manual 2-3 (March 1986). Another commentator crystallizes the point:

All lawyers engage in some marketing activities, whether through public speaking, community activities, "rain-making" at social functions, mass communications using print or broadcast media, or directed mailings. The real debate over advertising and solicitation is whether those lawyers whose marketing techniques have not yet been authorized will be permitted to communicate with the large segment of Americans not now represented by lawyers.

Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Anti-Trust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 531 (1986).

¹¹⁵ See *supra* note 76 for a discussion of "pure" solicitation claimed in *Ohralik*.

¹¹⁶ MODEL CODE, *supra* note 22, at Canon 2; see *supra* note 26 and the accompanying text for the text of Canon 2 of the Model Code.

¹¹⁷ *Bates*, 433 U.S. at 369-70; see also Address by W. Jacobs, Texas Bar Foundation Conference (Dec. 6, 1985), reprinted in Texas Bar Foundation Conference Manual 1 (March 1986). Jacobs, Director of the Cleveland Federal Trade Commission Office, discusses the origins of squeamishness concerning attorney fees, stating, "[t]his historical anomaly can be traced back to the early days at English Court when barristers wore their purses tied to the back of their belts. Their clients could slip the barristers' fee into the purse without any face-to-face exchange or acknowledgement of the commercial transaction." *Id.*

III. SOLICITATION MODES: AFTER THE CRASH

Solicitation of prospective clients can take various forms. After an airline accident, these activities generally fall into three categories: directed advertising, targeted mailings, and in-person contact. The issues involved are successively more controversial and less settled at each step.

A. *Directed Advertising*

The 1987 crash in Detroit of Northwest Airline Flight 255 left over one hundred and fifty dead, and prompted lawyers' advertising in that city's newspapers.¹¹⁸ Typically, the ads warned families of victims against accepting settlements from the airline and urged them to contact the attorney for more information.¹¹⁹

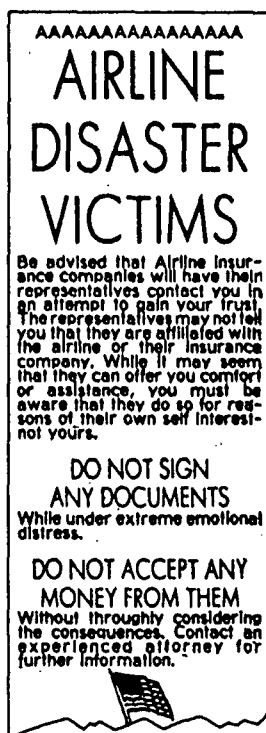
This kind of advertising, directed to a particular group of prospective clients and recommending employment of the attorney doing the advertising, does not fall under any of the approved exceptions of Disciplinary Rule 2-101(B)

¹¹⁸ See *Gest and Seamonds*, *supra* note 4, at 23.

¹¹⁹ *Id.* The Gest article reprints the following ad, without the name of the attorney:

of the Model Code.¹²⁰ It appears to violate the anti-solicitation provisions of Disciplinary Rules 2-103(A)¹²¹ and 2-104(A)¹²² because these persons are unknown and have not sought any advice.

The Model Rules substantially loosen advertising restrictions upon attorneys. Rule 7.2(a) allows a lawyer to "advertise services through public media, such as a . . . newspaper or other periodical."¹²³ However, that same provision limits such advertising to "written communication not involving solicitation defined in Rule 7.3".¹²⁴ Ap-



Id.

¹²⁰ MODEL CODE DR 2-101(B) lists the acceptable pieces of advertising information, which lawyers must present "in a dignified manner." *Id.*

¹²¹ See *supra* note 23 for the text of DR 2-103(A).

¹²² See *supra* note 24 for the text of DR 2-104(A).

¹²³ See *supra* note 39 for the text of Rule 7.2(a).

¹²⁴ *Id.*

plying that definition, these lawyers did not address their advertisements to their family or former clients. The lawyers' pecuniary gain probably motivated placement. And finally, the lawyers circulated them generally to persons known to need the offered services in this particular matter. It is clear that the ads qualify as solicitation under the Rules.¹²⁵

The prohibition the ABA would put on these ads, however, would probably not withstand constitutional scrutiny. Presuming that the information offered is true and not misleading,¹²⁶ a court would have to apply the principles of *Zauderer* to the ad.¹²⁷ The Detroit advertisements would seem to fall squarely within that case's holding that a state may not discipline an attorney for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice.¹²⁸ As in *Zauderer*, it is unlikely that the state could advance a substantial interest here (as it would have to under the *Central Hudson* test)¹²⁹ that would allow regulation of the attorneys' speech.

The directed advertisement that attorneys used in De-

¹²⁵ Justice White in *Zauderer*, 471 U.S. at 646 n.13, disagrees with this conclusion that the ads would be forbidden solicitation, saying that the rules eschew all regulation of the content of advertising that is not false or misleading.

¹²⁶ The danger that the ads warn of, that airlines will solicit releases from potential plaintiffs, receives credence from Justice Powell in *Ohralik*:

In recognizing the importance of the State's interest in regulating solicitation of paying clients by lawyers, we are not unmindful of the problem of the related practice . . . of the solicitation of releases of liability by claims agents or adjusters of prospective defendants or their insurers. Such solicitations frequently occur prior to the employment of counsel by the injured person and during circumstances posing many of the dangers of overreaching we address in this case. Where lay agents or adjusters are involved, these practices for the most part fall outside the scope of regulation by the organized Bar; but releases or settlements so obtained are viewed critically by the courts.

Ohralik, 436 U.S. at 459 n. 16.

¹²⁷ See *supra* notes 88-92 and the accompanying text for a discussion of the *Zauderer* case.

¹²⁸ *Zauderer*, 471 U.S. at 649.

¹²⁹ See *supra* notes 58-63 for an explanation of the *Central Hudson* test for regulation of commercial speech.

troit satisfies the majority of legitimate interests of the various parties to the crash. Again assuming that the information given in the ad is not misleading, it serves the informative goals of the consumer, the bar, and the individual attorney well. The lack of intrusion protects the privacy of the victim. And finally, the ad encourages a matching of potential clients with willing attorneys.

The only apparent danger in the directed advertisement is that of misrepresentation. The public nature of the newspaper medium obviates this danger.¹³⁰ The bar can watch and discern misleading statements as to expertise or fees and avoid the resultant risks to consumers, honest lawyers, and the reputation of the profession.¹³¹ Because of the commercial nature of this speech, such misrepresentations would clearly not be constitutionally protected.¹³² With a public record and clear constitutional grounds, the state courts could easily support disciplinary actions against violators.

B. *Targeted Mailings*

The New York Times released a list of victims of the crash in Dallas of Flight 191 on August 4, 1985, two days after the accident.¹³³ Florida families reported receiving solicitation telegrams from Texas lawyers shortly thereafter.¹³⁴ This kind of targeted mailing represents a more personal contact with an air crash victim than does a newspaper ad. As a result, the legal and ethical status of the contact is less clear.

The Model Code's Disciplinary Rule 2-103(A) makes no distinction between writings and in-person contacts in

¹³⁰ *Zauderer*, 471 U.S. at 649.

¹³¹ *Id.* at 645-46 (stating that "[i]n short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity . . .").

¹³² See *supra* notes 58-63 and accompanying text for a discussion of the *Central Hudson* test. If the speech is false, disciplinary rules may prohibit it entirely under the *Central Hudson* test. *R.M.J.*, 455 U.S. at 203-04.

¹³³ New York Times, Aug. 4, 1985, at 26, col. 1.

¹³⁴ See *Messing*, *supra* note 3, at 17.

forbidding self-recommendation.¹³⁵ Model Rule 7.3 expressly includes telegrams and other written contacts in its definition of prohibited solicitation.¹³⁶ Moreover, the Model Rules directly address the kind of telegram described above, saying, “[d]irect mail solicitation cannot be effectively regulated by means less drastic than outright prohibition.”¹³⁷ The comment argues that the private nature of the communication would preclude effective regulation, and the result could be a dissemination of false and misleading materials.¹³⁸

Again, the courts appear to take a different position from the ABA on constitutional grounds. The Supreme Court recently refused certiorari in the New York case, *Matter of Von Wiegen*.¹³⁹ Attorney Von Wiegen sent letters to 250 victims of a collapsed sky-walk in Kansas City, Missouri, offering to represent them on a contingency basis.¹⁴⁰ The trial court found that state disciplinary rules prohibited Von Wiegen’s actions,¹⁴¹ but the New York Court of Appeals held that “the blanket prohibition of

¹³⁵ MODEL CODE DR 2-104(A), in contrast, speaks specifically only to in-person solicitation. See *supra* note 24 for the text of DR 2-104(A).

¹³⁶ See *supra* note 31 for the text of Rule 7.3.

¹³⁷ MODEL RULES Rule 7.3 comment. Paragraph 5 addresses and rejects two proposals for “less drastic” regulation:

One proposed safeguard is to require that the designation “Advertising” be stamped on any envelope containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer disciplinary agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers’ mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client’s underlying problem. Without such knowledge they cannot determine whether the lawyer’s representations are misleading. In any event, such review would be after the fact, potentially too late to avert the consequences of disseminating false and misleading material.

Id.

¹³⁸ *Id.*

¹³⁹ 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985).

¹⁴⁰ *Id.* at 166, 470 N.E.2d at 839, 481 N.Y.S.2d at 41.

¹⁴¹ *Id.* at 168, 470 N.E.2d at 840, 481 N.Y.S.2d at 42.

mail solicitation of accident victims violates respondent's rights of expression under the 1st and 14th Amendments,"¹⁴² because the elements of intimidation and duress, which formed the bases of the *Ohralik* ban, were not present in solicitation by mail.¹⁴³

The New York court applied the *Central Hudson* test¹⁴⁴ to determine the validity of Von Wiegen's mailing. The court considered four potential state interests in such a ban and dismissed each of them as insufficient to override the attorney's right to protected speech. First, fears of commercialization of the profession are unreasonable, the court said, where attorney action "serves the recognized purpose of informing those in need of the cost and availability of legal services."¹⁴⁵ To the second argument of privacy invasion, the court answered that the offending writing can be easily transferred "from envelope to wastebasket," without a risk of undue pressure.¹⁴⁶ The third risk, that of stirring up litigation, is real according to the court. However, in the *Von Wiegen* case (as in the case of

¹⁴² *Id.* at 170, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

¹⁴³ *Id.* Nevertheless, the court remanded to determine Von Wiegen's discipline because it found his representations to be false. *Id.*

¹⁴⁴ *Id.*; see *supra* notes 58-63 for a discussion of the *Central Hudson* test.

¹⁴⁵ *Von Wiegen*, 63 N.Y.2d at 175, 470 N.E.2d at 844, 481 N.Y.S.2d at 46.

¹⁴⁶ *Id.* One critic of the *Von Wiegen* decision claims that "each letter which reaches an accident victim and is thrown away in disgust contributes to the quiet but steady erosion of the state interest in maintaining public confidence in licensed professionals." Note, 51 J. AIR L. & COM. 661, 703 (1986). Justice Blackmun rejected this argument in *Bates*, at least so far as advertising is concerned:

In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of attorney who structures his social and civic associations so as to provide contacts with potential clients.

Bates, 433 U.S. at 369. The Justice's final sentence quoted above refers to the acceptable forms of solicitation discussed in note 114 *supra*. Whether because of this perceived double standard, or because of the public's need for legal information, the *Bates* court ruled this concern with the dignity of the profession insufficient to justify regulating truthful commercial speech.

an air crash) the litigation was not likely to be frivolous; those contacted probably did have a claim and a right to information about that claim.¹⁴⁷ Finally, the court also saw the potential for deception as a genuine concern here because of the lack of public scrutiny of the mailing,¹⁴⁸ and the particular dangers of personal injury litigation.¹⁴⁹ The court concluded, however, that there are less restrictive alternatives available to the state that could prevent deceptive mailings.¹⁵⁰ The court held that direct mail solicitation of accident victims is not inherently misleading, and therefore the state cannot ban it completely.¹⁵¹

The Supreme Court's implicit acceptance of *Von Wiegen*'s reasoning has underscored its precedential value.¹⁵² *Adams v. Attorney Registration and Disciplinary Commission*¹⁵³ is an Illinois case that relied on *Von Wiegen* to enjoin a prohibition on targeted mailings by that state's Code of Professional Responsibility.¹⁵⁴ Echoing the New York court's arguments, the Seventh Circuit Court of Appeals affirmed the district court's decision, stating that such mailings are not so likely to involve harassment, overreaching, or duress as are in-person contacts.¹⁵⁵ "It is easier," the court remarked, "to throw out unwanted mail than an uninvited guest."¹⁵⁶

The district court's opinion also provides enlighten-

¹⁴⁷ *Von Wiegen*, 63 N.Y.2d at 176, 470 N.E.2d at 844, 481 N.Y.S.2d at 46.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 176, 470 N.E.2d at 844, 481 N.Y.S.2d at 46-47. The court found that there was a greater perception of deceit in personal injury litigation because greater sums of money are involved, the representation is less routine, contingency fees are involved, and there have been abuses in this area in the past. *Id.*

¹⁵⁰ *Id.* at 176, 470 N.E.2d at 844, 481 N.Y.S.2d at 47. The court concluded that filing requirements may "help sanitize statements made in the solicitation of personal injury cases." *Id.*

¹⁵¹ *Id.* at 174, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.

¹⁵² *Committee on Professional Standards v. Von Wiegen*, 472 U.S. 1007 (1985) (denying certiorari and giving tacit approval to the *Von Wiegen* decision).

¹⁵³ 617 F. Supp. 449 (N.D. Ill. 1985), *aff'd*, 801 F.2d 968 (7th Cir. 1986).

¹⁵⁴ *Id.*, 617 F. Supp. at 454. Plaintiffs challenged DR 2-103(b)(2), which prohibits direct mail advertising by a lawyer to persons known to require a specific legal service. They did not challenge any other part of the rule. *Id.* at 451.

¹⁵⁵ *Id.*, 801 F.2d 968, 973.

¹⁵⁶ *Id.*

ment as to ABA distinctions between general and targeted mailings.¹⁵⁷ The *Adams* court could not find "a principled reason" for upholding that distinction.¹⁵⁸ Plaintiff Adams sent solicitation letters to people confronting mortgage foreclosures.¹⁵⁹ The court reasonably concluded, however, that if a prospective client were to receive such a letter, "his reaction to it will in no way be affected by whether the rest of the world, or only those facing foreclosures, also receive the letter."¹⁶⁰ Because the state can regulate the content of these letters as to truthfulness, a prophylactic ban on targeted mailings is not reasonably related to a state's interest in preventing consumer deception.¹⁶¹

If any questions remained regarding the legality of targeted mailings, the Supreme Court's *Shapero* decision appears to answer them.¹⁶² The Court considered Model Rule 7.3 directly, and held that states could not ban truthful targeted mail solicitation.¹⁶³ The relevant inquiry for

¹⁵⁷ See, e.g., MODEL RULES, *supra* note 31, at Rule 7.3 comment, para. 6, which states:

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore more closely resemble permissible advertising rather than prohibited solicitation.

Id.

¹⁵⁸ *Adams*, 617 F. Supp. at 455.

¹⁵⁹ *Id.* Adams and the three other attorneys who sought the injunction with him each specialized in an area of the law and obtained lists of persons who might be in need of his services "from an agency responsible for keeping track of those with such a problem." *Id.* at 451.

¹⁶⁰ *Id.* at 455.

¹⁶¹ *Id.* Illinois Rule 2-103(e) provided that: "A copy of any written private communication recommending or soliciting any professional employment, together with the name and address of each person to whom the communication is sent, shall be filed with the Attorney Registration and Disciplinary Commission within thirty days after it is sent." *Id.* at 450-51.

¹⁶² See *supra* notes 93-101 and accompanying text for a discussion of *Shapero*.

¹⁶³ *Shapero*, 108 S. Ct. at 1920. Justice Brennan dismissed the argument that

the Court was not whether some potential client's "condition" might be vulnerable to overreaching, but whether the solicitation poses "a serious danger" that lawyers will exploit that vulnerability.¹⁶⁴ In assessing the danger of such exploitation, "the mode of communication makes all the difference."¹⁶⁵ As long as the "mode of communication" is a writing it can be regulated by the states and need not be banned.¹⁶⁶

In the case of targeted mailings to air disaster victims and their families, various interests are served. Targeted mailings arguably satisfy informative goals better than directed advertising because the information more surely finds its way to those who need it. *Von Wiegen's* wastebasket argument seems to satisfy the interests in preventing intrusion.¹⁶⁷ And the distance between solicitor and solicited allows for the reflection necessary to avoid overreaching and duress by the attorney.¹⁶⁸

As the courts point out, the danger of deception is somewhat greater because telegrams or writings are of a private nature.¹⁶⁹ Those courts, however, seem comfortable that safeguards available in the form of filing require-

differentiates between targeted "advertising" and targeted "solicitation", *id* at 1922, and uses the term "solicitation" throughout the opinion to describe Shapero's activities. See, e.g., *id* at 1922 and 1923.

¹⁶⁴ *Id.* at 1922.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1922-24.

¹⁶⁷ See *supra* note 146 and accompanying text.

¹⁶⁸ See *Shapero*, 108 S. Ct. at 1923 ("A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded."); see also *Adams*, 617 F. Supp. at 454 ("A letter, even if a private communication, is a means of conveying information that is more conducive to reflection, and the exercise of choice on the part of the consumer than is personal solicitation by the attorney." (citing *Zauderer*, 471 U.S. at 642)).

¹⁶⁹ See *Shapero*, 108 S. Ct. at 1923 (admitting a personalized letter could lead the recipient to overestimate the lawyer's knowledge of the case, or suggest the recipient has a more serious problem than she actually does); see also *Von Wiegen* 63 N.Y.2d at 176, 470 N.E.2d at 844, 481 N.Y.S.2d at 46 (stating "the potential for deception . . . is also a genuine concern here because these mailings are not subject to the public scrutiny that a newspaper or television advertisement would receive").

ments can sufficiently regulate content.¹⁷⁰ Finally, the very written nature of the mailing provides a verifiable record of attorney representations and will dissuade solicitors tempted to mislead.¹⁷¹

C. *In-Person Solicitation*

The issue that remains most unsettled and unsettling is that of face to face contact by an attorney with the vulnerable accident victim. Any revision of solicitation rules must deal with solicitation at the airport or at a victim's family's home or hotel.

In-person solicitation of strangers by an attorney in this kind of circumstance clearly violates Disciplinary Rules 2-103(A)¹⁷² and 2-104(A)¹⁷³ of the Model Code. Similarly, Model Rule 7.3 clearly prohibits this activity.¹⁷⁴ Careful reading of the case law, however, encourages consideration of circumstances, conduct, and motivations before presuming that the First Amendment does not protect this attorney speech.¹⁷⁵ Between the poles of *Ohralik* and *Primus* there is room for discussion on the validity of in-person solicitation.¹⁷⁶ Indeed, because the *Ohralik* facts were so harsh, the holding of that case does not foreclose all options. A narrow reading of the case might determine that the Constitution protects solicitation *except* when it is in person, for pecuniary gain, *and*, done under circumstances likely to pose dangers that the state has a right to prevent. The last criterion is subject to a showing that the attorney's right to speak overrides the state's in-

¹⁷⁰ See *Adams*, 801 F.2d at 974 (stating that the lawyer can label his targeted mailings as advertising, and the Bar can mandate that he file the mailing with it).

¹⁷¹ *Id.*

¹⁷² See *supra* note 23 for the text of DR 2-103(A).

¹⁷³ See *supra* note 24 for the text of DR 2-104(A).

¹⁷⁴ See *supra* note 31 for the text of Rule 7.3.

¹⁷⁵ See, e.g., *Zauderer*, 471 U.S. at 637 (concluding that, "[m]ore subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech . . .").

¹⁷⁶ See *Adams*, 801 F.2d at 972 (reminding the Bar that, "*Ohralik* is the only recent Supreme Court case to bar a form of attorney advertising.").

terest.¹⁷⁷ Moreover, courts are rejecting traditional state interest arguments whenever rules can construct less restrictive alternatives.¹⁷⁸ Regulations of time, place, or manner, which leave content uncensored, may be preferable constitutionally¹⁷⁹ and may provide the basis for arguments that in-person solicitation for employment can be done under circumstances *not* likely to pose dangers to legitimate state interests.

Face to face solicitation sharpens each of the parties' interests in the transactions. As courts point out, the trained advocate is more intimidating in person and can demand unreflected assent in person that he cannot demand by mail.¹⁸⁰ Those arguing against solicitation frequently cite the intrusion into the victim's privacy as more offensive in a face to face encounter.¹⁸¹ On the other hand, the informative role of the attorney is heightened when he can hear firsthand the details of the individual's problem and respond immediately to his questions.¹⁸²

One cannot overlook the ever present danger of misrepresentation. Without a writing, lawyer accountability for misleading statements is more difficult to achieve. But careful scrutiny can uncover the fraudulent behavior that might follow on the heels of an air disaster.¹⁸³ Indeed, a

¹⁷⁷ Justice Marshall, in his concurring opinion in *Ohralik*, warned that "[w]here honest, unpressured 'commercial' solicitation is involved . . . it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment ordinarily protects." 436 U.S. at 476 (Marshall, J., concurring).

¹⁷⁸ See *Shapero*, 108 S. Ct. at 1929 (O'Connor, J., dissenting) (arguing that an "inappropriate skepticism" about state regulations had led the Court to reduce the argument to a simplistic weighing of benefits and dangers of advertising).

¹⁷⁹ Time, place and manner restrictions do not limit the content of speech. Indeed, they must remain neutral as to the speech involved. Restrictions must only be reasonable. See *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980).

¹⁸⁰ See *Ohralik*, 436 U.S. at 457 (stating that "[i]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.").

¹⁸¹ *Id.* at 465-66.

¹⁸² *Id.* at 458, 465.

¹⁸³ One critic of the solicitation ban believes problem solicitors could be policed

lifting of the solicitation ban would remove the need for surreptitiousness because soliciting could be done in the open.

Time, place, and manner restrictions may also be a means of avoiding some problems inherent in these circumstances.¹⁸⁴ Designating areas of the airport or hotel as legal information areas, where attorneys could meet with prospective clients, would provide safeguards against deception and intrusion. The presence of more than one attorney, with all conducting business in the open, should provide another check on unscrupulous conduct.¹⁸⁵ Finally, the rules could prohibit attorneys from soliciting for a designated period of time after the crash so as to avoid intrusion into the most vulnerable and private time for victims and their families.¹⁸⁶ Cooperation from airlines and the media could result in the withholding of passenger and casualty lists for this period of time.¹⁸⁷ These restrictions would be far less offensive to the First Amendment than a prophylactic ban on speech and would allow the legal process to serve the interests of all parties.

IV. CONCLUSIONS

Determination of the effectiveness and validity of anti-solicitation rules in the context of an air crash depends ultimately on whom the rules are meant to protect. If the primary goal of the rules is to prevent crash victims from being victimized a second time at the hands of attorneys,

"by means less restrictive than an outright ban; for example by application of such contract principles as fraud, undue influence, and unconscionability." See *Maute*, *supra* note 114, at 524.

¹⁸⁴ See *supra* note 179.

¹⁸⁵ The presence of state Bar officials could provide the policing necessary for time, place and manner restrictions. After the Delta 1141 crash in Dallas, the presence of Bar officials apparently deterred most soliciting. See *State Bar Praises Conduct of Lawyers After Delta Crash*, Dallas Morning News, Sept. 6, 1988, at 15A, col. 1.

¹⁸⁶ See, e.g., *Elkind Address*, *supra* note 114, at 3 (calling for a ten day cooling off period after an accident before allowing some solicitation).

¹⁸⁷ Reciprocal efforts would be necessary from the airline industry and its insurers whose involvement in solicitation of releases is acknowledged as a problem in *Ohralik*. See *supra* note 125 for the text of Justice Powell's comments.

then time, place and manner restrictions should afford sufficient protection while allowing the prospective client access to the information he requires. If the primary goal is actually to limit participation in the profession by unconnected newcomers and sole practitioners or to reinforce the elitist aspect of the profession over the service aspect then the rules cannot be supported on any grounds.

A recognition that consumers are best protected by being fully informed underpins the Supreme Court's commercial speech doctrine. The legal profession must create opportunities to maximize information for crash victims through thoughtful regulations that will allow full access to that profession and its services. Carefully planned and overseen, solicitation may be the best means of achieving the legitimate interests of victim and attorney.¹⁸⁸

The complexities of our legal system demand that attorneys inform the public. Those who cling to outmoded views of propriety may doom consumers to the truly improper solicitors who now have no scrupulous competition or incentive to solicit well. Given the presence of these dangers within our system, the legal profession faces the choice of developing its own plan for modified solicitation now or accepting a plan that the courts create for it in the future.

¹⁸⁸ Justice Blackmun's optimistic observation in *Bates* as to the nature of attorney behavior is as applicable to solicitation as it is to advertising. He begins by questioning the contradictory arguments of the Bar against advertising:

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

Bates, 433 U.S. at 379.