Casenotes and Statute Notes

James Cramer
Cynthia J. Harkins
Robert Randel Kibby

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In July of 1981, the sky-walk inside the Hyatt Regency Hotel in Kansas City, Missouri, collapsed, killing or injuring more than 250 people.¹ Soon after, Eric P. von Wiegen, a New York attorney, solicited by direct mail the victims and families of those injured or killed in the tragedy.² Mr. von Wiegen sent two separate notices informing the victims that a litigation coordinating committee established on their behalf was organizing an initial free consultation with Mr. von Wiegen.³ In response to Mr.

² Id.
³ Id. at 178-79, 470 N.E.2d at 846-47, 481 N.Y.S.2d at 48-49. The first notice read as follows:

ATTENTION HYATT REGENCY DISASTER VICTIMS [:]
A Litigation Coordinating Committee has been formed to protect the rights and preserve the claims of all persons injured and the families of those deceased in the disaster of July 17, 1981.
An attorney has agreed to provide free legal consultation to assist any persons with questions as to their rights and possible claims arising from this incident.
If you have any questions concerning sources of income available such as social security disability and survivor benefits or questions pertaining to the probate of an estate, transfer of property or your claims against the hotel property owner and builder call collect (518) 842-6716 or (518) 382-0438 or drop a card to Diane Frost at the above address.
A committee person will be available to assist in the completing of and filing of documents, obtaining accident reports, death certificates, to provide other assistance, information, and help obtain the services you need. This is a volunteer group and services provided by committee persons are free.
von Wiegen's actions, the Committee on Professional Standards, Third Judicial Department of New York (the

Initial reports released to the media by the hotel representatives imply the accident was the victim's fault. This is absurd. Your interest is not being represented by anyone at the accident site at this time. However, by uniting together each person's claim can be preserved and results of any onesided investigation can be nullified.

Sincerely,
/s/Diane Frost
Diane Frost
Committee Coordinator

The second notice stated:

ATTENTION HYATT REGENCY DISASTER VICTIMS [:]

Many of you have requested representation by attorney Eric P. von Wiegen who volunteered initial FREE consultation concerning your claims against the Hyatt Regency, and others responsible for the death and injuries caused in this disaster.

He has agreed to represent victims or their surviving family members on a contingent fee basis of twenty-five percent (25%) of the sum recovered, after the reimbursement of reasonable and necessary cost [sic] incurred in making the recovery. The cost [sic] will be pro-rated among those persons represented by Mr. von Wiegen and will be deducted from any sum recovered, before an attorney's fee is charged.

Because of Mr. von Wiegen's experience in the practice of personal injury litigation involving multiple defendants, and based on conversations with potential experts, it is his opinion that the liability of the defendants is clear. His usual and customary attorney's fee in such instances is twenty-five percent (25%). However, he has advised us that should client representation exceed twenty-five persons, his fee shall be twenty percent (20%) to each client represented and shall be charged as outlined above.

Mr. von Wiegen is an experienced personal injury attorney, licensed to practice in the states of New York and Michigan. He has and does represent clients in many of the other states. If you wish to discuss this matter please call COLLECT 518-382-0438 8:30 a.m. to 5:30 p.m. EST, or COLLECT 518-842-6716 evenings to 11:00 p.m. and weekends.

Sincerely,
/s/Diane Frost
Diane Frost
Committee Coordinator

63 N.Y.2d at 178-79, 470 N.E.2d at 846-847, 481 N.Y.S.2d at 48-49 (showing photocopies of the notice as an appendix to the opinion). Diane Frost was actually Mr. von Wiegen's secretary, and she and Mr. von Wiegen were the only members of the committee. Id. at 176, 470 N.E.2d at 845, 481 N.Y.S.2d at 47.

4 Under the New York Court Rules, the Third Judicial Department has established a twenty member Committee on Professional Standards which is charged
Committee) commenced a disciplinary action\(^5\) against him before a referee.\(^6\) One count in the disciplinary proceeding against Mr. von Wiegen alleged that the direct mail solicitation of the victims and their families violated a New York disciplinary rule.\(^7\) The referee in the disciplinary

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\(^5\) In re von Wiegen, 63 N.Y.2d at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42. The procedure for investigating alleged misconduct and instituting disciplinary proceedings is set out in N.Y. Court Rules §§ 806.4, 806.5 (McKinney 1979).

\(^6\) 63 N.Y.2d at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 41. Under the rules covering disciplinary proceedings against attorneys, the court may itself hear issues of fact which arise in the proceeding or refer such issues to a referee, who hears them and reports back. N.Y. Court Rules § 806.5 (McKinney 1979).

\(^7\) 63 N.Y.2d at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42. Three counts were filed in the original action on April 20, 1982. Id. at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42.

The committee alleged that Mr. von Wiegen violated § 479 of the New York Judiciary Law and various sections of the New York Code of Professional Responsibility. (New York adopted the American Bar Association's Model Code of Professional Responsibility, with few variations). Id. at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42. Count I charged him with direct mail solicitation in violation of disciplinary rule 2-103(A)(C)(E). Id. at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42. The relevant portions of DR 2-103 read as follows:

(A) A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or an associate to a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision.

(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer’s services or those of the lawyer’s partner or associate, or any other affiliated lawyer as a private practitioner, except as authorized in DR 2-101, and except that:

1. The lawyer may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

2. The lawyer may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if: (a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and (b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.


Count II charged Mr. von Wiegen with deception and misrepresentation in vio-
proceeding concluded that neither New York's Disciplinary Rule (DR) 2-103(A,C,E) nor Section 479 of the New York Judiciary Law prohibits direct mail solicitation of a targeted group of accident victims. The Appellate Division of the New York Supreme Court disagreed with the referee's ruling. The Appellate Division held that the prohibition of direct mail solicitation of accident victims is a time, place, and manner regulation of commercial speech and is justified because of the substantial state interest involved. Both parties appealed, thus presenting to New York's highest court the question of the constitutionality of the Code of Professional Responsibility's prohibition against the direct mail solicitation of targeted groups such as accident victims. Held, reversed and remanded: A blanket prohibition of direct mail solicitations targeted to accident victims violates an attorney's rights of expression under the First and Fourteenth Amendments of the United States Constitution. In re von Wiegen, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984).

Id. at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42. The disciplinary proceeding resulted in the attorney's suspension from the practice of law for six months because the referee found fraud and deception under Count II. See supra, note 7. The court found that neither Count I nor Count III could be sustained, and consequently, no disciplinary sanctions were imposed under those counts. Id.


Id. at 628, 474 N.Y.S.2d at 148. A "time, place, and manner" regulation of speech is not an infringement on the right to free speech if reasonable and related to a substantial state interest. In re R.M.J., 455 U.S. 191, 201 n.13, 207 (1982) (a regulation limiting the cases of recipients of a general mailing is unconstitutional). See also infra notes 119-160 and accompanying text.

Id. at 628, 474 N.Y.S.2d at 148.
I. Legal Background

A. United States Supreme Court

Modern regulations of attorney advertising find their roots in ancient common law beliefs connecting attorney advertising with unprofessional behavior. In 1908, the American Bar Association initially instituted a formal ban on attorney advertising and solicitation. Although some critics argued it was unnecessary and counterproductive, the ban went unchallenged since advertising, as a form of commercial speech, was assumed to have been outside the protection given by the First Amendment.

The belief that commercial speech is not entitled to First Amendment protection arose from the Supreme Court's decision in Valentine v. Christensen. In Valentine, the Court upheld the constitutionality of a municipal ordinance which forbade the distribution of "commercial and business advertising matter" in the streets. While the

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12 See Note, Attorney Solicitations of Clients: Proposed Solutions, 7 Hofstra L. Rev. 755, 757 (1979)(citing Zimroth, Group Legal Services and the Constitution, 76 Yale L.J. 966, 969 (1967) (showing solicitation proscription has roots in Greek, Roman, and English Common Law)).

13 ABA Canons of Professional Ethics No. 27 (1908).

14 See, e.g. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 711-12 (1977); Wilson, Madison Avenue, Meet the Bar, 61 A.B.A. J. 586 (1975).

15 Commercial speech is that which does "no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (City ordinance forbidding newspapers to carry sex-designated advertising job columns held constitutional).

16 Breard v. Alexandria, 341 U.S. 622 (1951)(holding door-to-door magazine subscription solicitation was commercial speech outside of the First Amendment's protection); Valentine v. Christensen, 316 U.S. 52, 54-55 (1942)(stating "purely commercial advertising is not protected").

The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I.

17 316 U.S. 52 (1942).

18 Id. at 53 n.1 (quoting NEW YORK CITY SANITARY CODE § 318). The plaintiff attempted to distribute handbills which advertised a tour of a submarine which he had moored at a New York pier. Id. The Police Commissioner advised the plaintiff that distribution of the handbills would violate the sanitary code, but plaintiff
Court noted that municipalities may not proscribe the communication of information or dissemination of opinion, it held that the Constitution does not impose any similar restraint on governmental regulation of “purely commercial advertising.” The holding in Valentine has generally been read as placing commercial speech outside the umbrella of First Amendment protection. Despite the brevity of the opinion and its absence of authority, Valentine is considered to be the foundation of the commercial speech doctrine.

In 1951, nine years after Valentine, the Court in Breard v. City of Alexandria gave further support to the belief that commercial speech does not enjoy First Amendment protection. The Court upheld as constitutional an ordinance which prohibited door-to-door solicitation by salesmen without the consent of the homeowners. Because selling brought into the speech “a commercial feature,” the Court held the ordinance did not violate the First Amendment.

learned that he could distribute handbills solely devoted to “information or public protest.” Plaintiff then attempted to distribute a double-faced handbill consisting of the advertisement on one side and a protest against the City Dock Department on the other side. Although he was advised that a distribution of the new handbill would constitute a violation of the code, plaintiff nevertheless attempted distribution and was restrained by the police.

19 Id. at 54. The Court stated that although public streets are proper places for distribution of information and opinion, municipalities may reasonably regulate the exercise of free speech in the public interest. However, a municipality may not go so far as to prohibit the dissemination of information in the streets. Id.

20 Id. The Court noted that the City’s prohibition against distribution of commercial advertising did not amount to interference with a lawful business, but was instead a reasonable exercise of a city’s power to prevent an undesirable invasion of the public use for which streets are intended. Id.


24 Id. at 645. Because the salesman in question sold magazine subscriptions, the Court stated that the constitutionality of the ordinance turned on a test weighing a homeowner’s desire for privacy against a publisher’s right to distribute his publication as he sees fit. Id. at 644.

25 Id. at 642.

26 Id. at 645.
In *Murdock v. Pennsylvania*, the Court began to chip away at the belief that commercial speech enjoyed no First Amendment protection. Only one year after *Breard*, the Court, in *Murdock*, found that solicitation of money would not classify the speech as "commercial" if the speaker's primary motive lies elsewhere. As a result, a tax on the sale of religious literature by Jehovah's Witnesses was invalidated because the group's primary motive was to disseminate religious beliefs rather than earn money.

Following *Murdock*, the "first crack in the theoretical wall" of commercial speech came in *New York Times Co. v. Sullivan*, which upheld the right of a newspaper to publish a paid political advertisement. In *Sullivan*, the Court concluded that the advertisement in question was not commercial speech because it communicated ideas and opinions about matters of great public interest. By stating that an expression is not considered commercial speech simply because it is a paid advertisement, the Court negatively defined commercial speech.

In *Bigelow v. Virginia*, the Supreme Court attempted to dispel the belief that commercial speech is unprotected by the First Amendment. In *Bigelow*, the Court considered

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27 319 U.S. 105 (1943).
28 *Id.* at 110-12 (noting that seeking money for religious literature does not convert evangelism into a commercial venture).
29 *Id.* at 114-17.
32 *Id.* at 292.
33 *Id.* at 266. The paid advertisement in *Sullivan* solicited contributions for Dr. Martin Luther King and the civil rights movement. The ad consisted of copy charging the Montgomery, Alabama, police force with brutality and harassment of civil rights protesters in 1960. *Id.* at 256-58.
34 *Id.* at 266. The Court stated that because the publication "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern," the advertisement was not commercial speech. *Id.* See also Note, supra note 22 at 685.
36 *Id.* at 818. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976) (allowing pharmacists to advertise prescription drug prices). In his opinion for the court, Justice Blackmun expressed the view
the plight of a Virginia newspaper editor who had published an advertisement for an abortion referral service. The newspaper editor had been convicted of violating a Virginia statute prohibiting the publication of any item which would encourage the procuring of abortions.\(^3\) The Court applied a balancing test weighing the First Amendment interest of a newspaper editor against the public interest which the statute allegedly served.\(^3\) The Court held that the statute infringed on the editor’s right to free speech because the State had questionable interests whereas the defendant, as a newspaper editor, had a substantial First Amendment interest.\(^3\) Thus, the Court provided the paid advertisement, which was clearly commercial speech,\(^4\) with First Amendment protection because it communicated information in the public interest.\(^4\) However, the Court hesitated to extend its ruling beyond the facts of the case.\(^4\)

Only one year after Bigelow, the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.\(^4\) affirmatively granted commercial speech First Amendment protection. In Virginia Pharmacy a consumer group challenged a Virginia statute prohibiting licensed pharmacists from advertising the prices they

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\(^2\) 421 U.S. at 759.

\(^3\) 421 U.S. at 812-13 (quoting Va. Code Ann. § 18.1-63 (1960)). The statute simply said that any person who, by publication or advertisement, encouraged the procuring of an abortion would be guilty of a misdemeanor.

\(^4\) 421 U.S. at 822.

\(^4\) Id. at 825, 827.

\(^5\) Id. at 821-22. The Court stated that the advertisement in question not only "propose[d] a commercial transaction," thereby meeting the test of commercial speech set out in Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973), it also communicated information in the public interest. 421 U.S. at 822. By so stating, the court went further than in New York Times v. Sullivan, see supra notes 31-34, where it held that because the advertisement related to a public concern, it did not constitute commercial speech. 376 U.S. at 266. See supra note 34.

\(^4\) 421 U.S. at 825.

\(^4\) Id. at 825 & n.10.

\(^4\) 425 U.S. 748 (1976).
charged for prescription drugs. Consequently, the Court faced for the first time issues concerning both the protection of purely commercial speech and the regulation of professionals.

The Court concluded, despite its earlier decisions to the contrary, that commercial speech deserves the protection of the First Amendment. In reaching this conclusion, the Court applied a balancing test weighing society's strong interest in the free flow of commercial information against the state's strong interest in maintaining the professionalism of its licensed pharmacists. The Court concluded that because of the importance of the individual and societal right to know about the cost of prescription drugs, the commercial speech contained in drug price advertisements falls within the scope of First Amendment protection.

The Court noted that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate," and "society also may have

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44 Id. at 749-50. The Virginia statute in question stated: "Any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for drugs . . . which may be dispensed only by prescription." Va. CODE § 54-524.35 (1974) (repealed 1977).


46 425 U.S. at 770.

47 Id. at 761-70.

48 Id. at 770. It should be noted that the same statute analyzed in Virginia Pharmacy had been held constitutional in an earlier suit brought by a pharmacist. Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969). The Court in Virginia Pharmacy placed emphasis on the district court's statement that since the plaintiffs in this case were consumers, they "were asserting an interest in their own health that was 'fundamentally deeper than a trade consideration.' " 425 U.S. at 755 (quoting the district court's opinion in Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 686 (E.D. Va. 1974)). The Court implied that because these plaintiffs were prescription drug consumers and not pharmacists, the possibility of later commercial gain did not taint their argument. Consequently, their case asserting a "right to know" was given more credence than the same argument espoused by a pharmacist/plaintiff. 425 U.S. at 754-55.
a strong interest in the free flow of commercial information." The Court reasoned that the free flow of commercial information is indispensable to the private economic decisions which operate to allocate resources. Since the allocation of resources is a central concern of a free enterprise economy, the Court concluded that it is in the public's best interest to allow the free flow of commercial information so that economic decisions might be more intelligent and well-informed.

Balanced against the public's right to know was the state's interest in maintaining a high degree of professionalism on the part of its licensed pharmacists. The state's arguments for maintaining the ban were spurned by the Court, which observed that the state could continue to regulate professionalism regardless of whether or not pharmacists were allowed to advertise prescription drug prices. The Court reasoned that because the advertising ban did not prevent a pharmacist from acting unprofessionally if he so chose, the ban on advertising did not truly insure professionalism. Consequently, the individual

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49 425 U.S. at 763-64.
50 Id. at 765.
51 Id. The Court made the interesting argument that advertising promotes the public interest through the dissemination of information. The Court stated:

Advertising, however tasteless and excessive it sometimes may seem, is none the less dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id.
52 Id. at 766.
53 See id. at 766-67, where the Court noted that the many special skills a licensed pharmacist brings to the job justifies a strong state interest in maintaining professionalism.
54 Id. at 768-69.
55 Id. at 769. The Court observed that a ban on advertising fails to prevent a pharmacist from cutting corners if the pharmacist is so inclined. Additionally, the advertising ban insulates these unprofessional pharmacists from price competition, thereby allowing excessive profits in addition to inferior service. Id.
and societal right to know outweighed the state interest in maintaining professionalism.\textsuperscript{56}

The Court also noted that while protected from complete prohibition by the First Amendment, commercial speech may nevertheless be subject to certain regulations.\textsuperscript{57} The Court gave examples of three forms of permissible commercial speech regulation: (1) reasonable regulation of the time, place, and manner of commercial speech,\textsuperscript{58} (2) prohibition of advertising that is false or misleading in any way,\textsuperscript{59} and (3) prohibition of advertisements which propose transactions that are themselves illegal.\textsuperscript{60} The Court stated that none of these regulations were before the Court nor were foreclosed by their decision.\textsuperscript{61}

Although the opinion may have given hope to some advocates of attorney advertising, the Court carefully limited the holding to the facts of the case. The Court noted that its holding regarding advertising of products sold by pharmacists might not apply equally to the regulation of advertisements of legal services by attorneys.\textsuperscript{62} The Court pointed out that attorneys and doctors do not deal in standardized products.\textsuperscript{63} Instead, they render a variety of services.\textsuperscript{64} As a result, the Court opined, the nature of

\textsuperscript{56} See id. at 770.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 771. In earlier decisions, the Court upheld the constitutionality of time, place, and manner regulations of any protected free speech "provided that they [were] justified without reference to the content of the regulated speech, that they serve[d] a significant governmental interest, and that in so doing they [left] open ample alternative channels for communication of the information." Id.
\textsuperscript{59} Id. The Court specifically reaffirmed the state's power to regulate commercial speech that is deceptive or misleading even though not provably false. Id. Additionally, in a footnote, the Court states that commercial speech should be afforded a different degree of protection since it is not as susceptible as non-commercial speech to the chilling effect and since its truth may be more easily verified than the truth of non-commercial speech. Id. at 771 n.24.
\textsuperscript{60} Id. at 772.
\textsuperscript{61} Id. at 770.
\textsuperscript{62} Id. at 773 n.25.
\textsuperscript{63} Id. See also id. at 773-75 (Burger, C.J., concurring); id. at 783-85 (Rehnquist, J., dissenting).
\textsuperscript{64} 425 U.S. at 773 n.25.
medical and legal services enhances the potential for advertisements by those professions to mislead or confuse consumers.\textsuperscript{65}

After granting commercial speech First Amendment protection in 1976, it took only one year for the Court to extend the same protection to an attorney's right to advertise. In \textit{Bates v. State Bar of Arizona},\textsuperscript{66} two Arizona attorneys opened a legal clinic in Phoenix designed to provide legal services at modest fees to clients who had little income but did not qualify for governmental legal aid.\textsuperscript{67} Since the attorneys relied on a high volume of routine legal business to make their clinic profitable, they placed an advertisement in the \textit{Arizona Republic} listing their fees for certain routine legal services in the hopes that the advertisement would generate business.\textsuperscript{68} Arizona's DR 2-101(b) prohibited attorneys from advertising their services through various segments of the media, including newspaper advertisements.\textsuperscript{69} As a result of the advertisement, the two attorneys received sanctions from a disciplinary committee, and the Arizona Supreme Court upheld the disciplinary sanctions imposed for the attorneys' violation of DR 2-101(B).\textsuperscript{70} In their argument to the United States Supreme Court, the attorneys argued that although their conduct violated DR 2-101(B), the rule was an unconstitutional restriction of commercial speech.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{65} Id.
\item \textsuperscript{66} 433 U.S. 350 (1977). The \textit{Bates} Court relied heavily on the reasoning of \textit{Virginia Pharmacy}. In fact, after summarizing the \textit{Virginia Pharmacy} decision the Court stated that it relied on \textit{Virginia Pharmacy} "because the conclusion that Arizona's disciplinary rule [prohibiting attorney advertising] is violative of the First Amendment might be said to flow \textit{a fortiori} from it." \textit{Id}. at 365.
\item \textsuperscript{67} Id. at 354.
\item \textsuperscript{68} Id. The advertisement is reproduced in the Supreme Court Reporter as an appendix to the Court's opinion. \textit{Id}. at 385. The advertisement lists routine legal services such as uncontested divorces and name changes along with the prices the clinic charged for legal consultation on these matters. \textit{Id}. at 355 (quoting the text of the Disciplinary Rule in the opinion and note 5 of the opinion).
\item \textsuperscript{69} Id. at 356.
\item \textsuperscript{70} Id. at 355. Most states have adopted the disciplinary rules set out in the Model Code of Professional Responsibility. In 1976, the Arizona version of DR 2-101(B) provided:
\end{itemize}
As in *Virginia Pharmacy*, the Court applied a balancing test to determine the constitutionality of the rule. On one side, the state presented a six-point analysis urging the validity of the regulation. The state argued that: (1) attorney advertising would undermine the attorney's sense of dignity and self-worth thereby degrading the legal profession; (2) attorneys' services are so highly individualized that advertisements which focus on price would be inherently misleading since (a) they overlook the relevant factor of skill, and (b) the consumer could not ascertain his own needs; (3) advertising would stir up litigation; (4) increased overhead costs for advertising would be passed on to consumers through increased fees; (5) advertising would discourage quality service since attorneys would be encouraged to provide a standard package of services to clients, whether or not it fit

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(B) 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 announcements, 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. 

ARIZ. REV. STAT. ANN. § 29(a)(Supp. 1976)(amended 1979). The remainder of subdivision (B) states exceptions to the general prohibition — none of which are relevant here.

72 433 U.S. at 379.
73 Id. at 368-79.
74 Id. at 368.
75 Id. at 372. The Court reasoned it was more logical to provide the consumer at least some of the necessary commercial information needed to make informed economic decisions than it was to deny the consumer that information on the ground that it is incomplete. *Id.* at 374-75.
76 Id. at 376. Although the Court stated that lifting the ban on advertisements might result in more of the population choosing to use judicial machinery, it went on to say that this result may be welcomed with respect to certain segments of the population. As the Court put it:

> Advertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability in terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable.

*Id.* at 376-77.
77 Id. at 377. The Court noted that in other service industries advertising operates to lower fees through increased competition. *Id.*
the client's needs;\textsuperscript{78} and (6) a general restriction against advertising lends itself to tighter enforcement than would a less restrictive alternative.\textsuperscript{79}

The Court weighed the public's need for accurate information and right to know about the cost and availability of legal services against the state's six-point argument in favor of the ban.\textsuperscript{80} The Court stated three general principles in discussing the public's need for information regarding the availability and terms of legal services: (1) the public has the right to make an informed, intelligent choice concerning legal counsel; (2) the legal profession suffers from an adverse public image, which may be due in part to the belief that attorneys' fees are too high; and (3) advertising may reduce prices, and thus will promote the use of legal counsel among the middle class.\textsuperscript{81} Relying on the defendant-attorneys' First Amendment arguments, the Court held that the public's need for accurate information and right to know about access to the legal system outweighed all of the state's arguments and, therefore, the First Amendment prohibited blanket suppression of attorney advertising.\textsuperscript{82} The Court, however, carefully tailored its holding to the facts\textsuperscript{83} and restated some of the permissive ways to restrict and regulate commercial speech initially set out in \textit{Virginia Pharmacy}.\textsuperscript{84} In addition,

\textsuperscript{78} \textit{Id.} at 378. The Court rejected this argument by stating "restraints on advertising . . . are an ineffective way of deterring shoddy work." \textit{Id.} at 378.

\textsuperscript{79} \textit{Id.} at 379. In rejecting this final argument, the Court stated: "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." \textit{Id.}

\textsuperscript{80} \textit{Id.} at 368-79.

\textsuperscript{81} \textit{Id.} at 365, 377. \textit{See also} Whitman, and Stoltenberg, supra note 45, at 458 n.64.

\textsuperscript{82} 433 U.S. at 381-82.

\textsuperscript{83} \textit{Id.} at 384. The Court was careful to state its holding in terms of the particular facts of the case, stating that the only constitutional issue addressed was whether a state can prevent an attorney from publishing a truthful advertisement of the availability and terms of routine legal services. \textit{Id.}

\textsuperscript{84} 433 U.S. at 383-84. The Court set out as permissive restrictions: (1) time, place, and manner restrictions (citing \textit{Virginia Pharmacy}); (2) restraint of advertising that is false, deceptive or misleading (again citing \textit{Virginia Pharmacy}); and (3) transactions that are themselves illegal (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973)).
the court expressly reserved the question of the permissible scope of regulation of in-person solicitation of clients by attorneys.\textsuperscript{85}

With the ban against attorney advertising lifted, attorneys began to explore new avenues of opportunity, including the use of direct mail solicitation.\textsuperscript{86} Companion cases decided on the same day, \textit{Ohralik v. Ohio State Bar Association}\textsuperscript{87} and \textit{In re Primus},\textsuperscript{88} helped to define the limits of the Bates holding and restrict the total range of advertising alternatives available to attorneys. These two cases, \textit{Ohralik} and \textit{In re Primus}, defined what activities would be permissible on opposite ends of the solicitation spectrum. \textit{Ohralik} defined the in-person end of the solicitation spectrum involving face-to-face contact between the attorneys and their potential clients. At the other end of the solicitation spectrum are innocuous mailings by an attorney who, as discussed in \textit{In re Primus}, stands to gain little personal benefit.

In \textit{Ohralik},\textsuperscript{89} the attorney personally solicited two young auto accident victims at their homes and in the hospital.\textsuperscript{90}

\textsuperscript{85} 433 U.S. at 366.
\textsuperscript{86} See generally Note, Direct Mail Solicitation by Attorneys: Bates to R.M.J. 33 SYRACUSE L. REV. 1041, 1054-61 (1982)(citing Bishop v. Committee on Professional Ethics, 521 F. Supp. 1219 (S.D. Iowa, 1981) (striking down an Iowa rule prohibiting direct mail advertising by attorneys); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980) (disallowing the case of an advertisement included in a pack of advertisements mailed to 10,000 homes); Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978) (dismissing a complaint against attorneys who engaged in mass mailing to real estate agents); Alison v. Louisiana State Bar Ass'n, 362 So.2d 489 (La. 1978) (holding a mailing to employers of a group legal plan subject to state prohibition); \textit{In re Appert}, 315 N.W.2d 204 (Minn. 1981) (holding unconstitutional a mass mailing warning of Dalkon Shield dangers); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978) (rejecting direct mail advertisements to clients of splinter group of attorney's former firm)).
\textsuperscript{87} 436 U.S. 447 (1978).
\textsuperscript{88} 436 U.S. 412 (1978).
\textsuperscript{89} 436 U.S. 447 (1978).
\textsuperscript{90} Id. at 449-52. The Court noted with disapproval the lawyers' actions: He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interest. He solicited Carol McClintoch in a hospital room where she lay in traction, and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing
The attorney defended his actions by saying that in-person solicitation constitutes commercial speech and is therefore protected by the First Amendment. The Supreme Court disagreed, holding that the attorney’s actions were so blatantly unprofessional that the state had a strong interest in preventing such solicitation. Consequently, the Court held the disciplinary rule restricting methods of soliciting clients not offensive to the Constitution. The Court noted that the personal, face-to-face solicitations involved in this case were quite different than the type of advertising which the Court had approved in Bates.

The Court also noted that the proposed state interest in preventing in-person solicitation greatly exceeded the state interest in maintaining professionalism that previously failed the balancing test in Bates. The essential role of attorneys in the administration of justice justifies the state’s strong interest in maintaining professional

from his prior inquiries that she had just been released. He employed a concealed tape recorder. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert’s lawyer.

436 U.S. at 467.

Id. at 455.

Id. at 465-67.

Id. at 477.

Id. at 455. The Court noted that in-person solicitation introduces elements of overbearing persuasion and undue influence not typically associated with public advertisement. In-person solicitation strips the recipient of any opportunity for detached reflection and rational comparison. The Court particularly noted that in-person solicitation provides a one-sided presentation which often demands speedy and uninformed decision making. The Court contrasted the overbearing persistence of an in-person solicitation with the freedom provided by a public advertisement which leaves the potential client free to act upon it or not. Id. at 457.

436 U.S. at 460. The Court noted “The State interests implicated in this case are particularly strong.” Id. The Court alluded to the special State responsibility to maintain standards among professionals licensed by the State. Id. See supra notes 66-85 for a discussion of Bates.
standards for them. Consequently, the courts deem the face-to-face solicitation disapproved of in Ohralik more offensive to the state's interest in protecting the attorney's role than the simple printed advertisement approved of in Bates.

Ohralik clearly limited attorneys' rights to solicit clients. The case presented the most blatant scenario of unprofessional conduct: an ambulance chasing attorney harassing distressed accident victims. Some critics have, as a result, questioned the value of the Ohralik opinion in contributing to a greater understanding of the nexus between commercial speech, the First Amendment, and attorney advertising.

While Ohralik addressed the "in-person" end of the solicitation spectrum, In re Primus involved the opposite, "general mailing" end of the spectrum. In Primus, a South Carolina attorney, who was also a cooperating attorney for the American Civil Liberties Union (ACLU), advised a meeting of women about their legal rights. The women had been sterilized or threatened with sterilization as a condition of continuing to receive public medical assistance under the Medicaid program. After the meeting,

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96 436 U.S. at 460. In addressing the unique role attorneys play, the Court noted: "The interests of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)). Id. at 460.

97 Id. at 464-66 (arguing that the potential for harm in face-to-face solicitation is significantly greater than the type of advertising approved of in Bates).

98 For specific acts which the Court noted with disapproval, see supra note 90.


101 Id. at 414. As a "cooperating lawyer" employed by the ACLU, Ms. Primus received no salary nor handled any litigation for the ACLU. Id. at 415, n.3.

102 436 U.S. at 415-16. An officer of a local organization serving indigents contacted the Carolina Council on Human Relations, a non-profit organization with which the attorney was affiliated. At the officer's request, the attorney arranged a meeting among women who had been sterilized or threatened with sterilization while on public assistance in Aiken County, South Carolina. See Three Carolina Doctors are Under Inquiry in Sterilization of Welfare Mothers, New York Times, July 22, 1973, at 30, col. 1 (Article cited by the court at 436 U.S. 416 n.4.)

103 436 U.S. at 415.
the attorney sent a letter to one of the women advising her of the availability of that free legal representation through the ACLU.\textsuperscript{104} The Disciplinary Board of the South Carolina Supreme Court charged the attorney, Edna Primus, with solicitation in violation of state disciplinary rules.\textsuperscript{105}

The Supreme Court held that Ms. Primus's actions were much different from the in-person solicitation behavior proscribed in Ohralik.\textsuperscript{106} The Court did not analyze the case as a commercial speech case.\textsuperscript{107} Instead, relying primarily on \textit{NAACP v. Button},\textsuperscript{108} the Court approached the case as involving only political speech.\textsuperscript{109} Noting the

\textsuperscript{104} \textit{Id.} at 416-17. The letter written on August 30, 1973, was addressed to one of the women and primarily involved a pending interview with a women's magazine which was doing a feature story on the sterilization problem. The last paragraph of the letter, however, stated:

\begin{quote}
About the lawsuit, if you are interested, let me know, and I will let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.
\end{quote}

\textit{Id.} at 417 n.6.

\textsuperscript{105} \textit{Id.} at 417. The disciplinary board charged the attorney with violation of disciplinary rules DR 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the Supreme Court of South Carolina. See 436 U.S. at 418. These rules, which follow the Model Code of Professional Responsibility, primarily state that an attorney should not assist organizations for the purpose of promoting his own legal services, and that an attorney should not give unsolicited advice to a layman to seek counsel and then accept employment resulting from that advice. For the full text of these rules, see 436 U.S. at 418-19 nn.10, 11.

\textsuperscript{106} 436 U.S. at 422.

\textsuperscript{107} Andrews, \textit{Lawyer Advertising and the First Amendment}, 1981 Am. B. Found. Research J. 967, 976 n.48 (Andrews notes that since \textit{Primus} was a political speech case, the State could prohibit the activity involved only if the solicitation was false, misleading or deceptive).

\textsuperscript{108} 371 U.S. 415 (1963). In \textit{NAACP v. Button}, activities by the attorneys and staff of the National Association for the Advancement of Colored People (NAACP) were held to be "modes of expression and association protected by the First and Fourteenth Amendments. . . ." \textit{Id.} at 428-429. In that case, the staff attorneys had arranged a meeting with parents and children to explain the necessary steps that had to be taken to achieve desegregation. \textit{Id.} at 421. The Supreme Court held that solicitation of prospective desegregation litigants was within the right to engage in association for the advancement of political goals and ideas so that the state of Virginia could not prohibit such solicitation under its power to regulate the legal profession. \textit{Id.} at 428-30.

\textsuperscript{109} See Andrews, \textit{supra} note 107, at 976 n.48.
unique purpose and goals of the ACLU, the Court characterized the ACLU litigation as not "a technique [for] resolving private differences" but rather a "form of political expression and political association." The Court noted that Ms. Primus did not undertake the solicitation for personal pecuniary gain, but rather for the advancement of political expression. Therefore, the solicitous activity deserved the broad, comprehensive protection granted to political expression and association by the First Amendment and not the comparatively limited protection typically afforded commercial speech. As a result, the Court held that the application of South Carolina's disciplinary rules violated the First and Fourteenth Amendments.

Since the Court did not analyze Primus as a commercial speech case, and since Ohralik involved such blatantly

111 Id. at 428 (citing NAACP v. Button, 371 U.S. at 429, 431).
112 Id. at 422.
113 Id. at 431. In granting political speech status to Ms. Primus' solicitation, the Court noted the particular aims of the ACLU:

Appellant's letter of August 30, 1973, to Mrs. Williams thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. (citations omitted)

Id.

114 See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). In commenting on the different degree of protection between commercial and political speech, the Court in Ohralik noted:

To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the amendments' guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization we instead have afforded commercial speech a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

Id. at 456.

115 Id. at 439.
116 See supra note 107.
unprofessional activity, the two cases contributed little to the advertising privileges granted to attorneys in *Bates*. However, the cases did promulgate the idea that the privileges granted in *Bates* failed to grant absolute license to solicit at will; and combined, *Primus* and *Ohralik* help to define the ends of the solicitation spectrum. As a result of *Ohralik* and *Primus*, commentators understood *Bates* to clearly allow advertising, yet continue to prohibit solicitation. Consequently, the next logical step for the Court was to determine whether an attorney's use of mailings constitutes advertising (allowable under *Bates*) or solicitation (prohibited under *Ohralik*).

The Supreme Court's most recent statement on the propriety of attorneys' use of direct mailings came in *In re R.M.J.* A Missouri disciplinary committee charged an attorney with mailing announcement cards to persons other than "lawyers, clients, former clients, personal friends, and relatives" in violation of a disciplinary rule. The Court held that the absolute prohibition against mailing announcement cards to persons other than those listed in the disciplinary rule violated the First Amendment.

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117 See *supra* note 89-94 and accompanying text for a discussion of the attorney's in-person solicitation behavior in *Ohralik*.


120 The attorney mailed cards announcing the opening of a new office which, under a Missouri disciplinary rule, is prohibited if the cards are mailed to strangers. *Id.* at 198.

121 455 U.S. at 196.

122 455 U.S. at 193-96. The first charge against the attorney (and the emphasis of the opinion) dealt with a rule formulated by the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri to "strike a midpoint between prohibition and unlimited advertising." *Id.* at 193 (quoting Report of Committee to Chief Justice of Supreme Court of Missouri (September 9, 1977)). The rule prohibited advertisements of attorneys from deviating from a specific listing of areas of practice which the committee approved for attorneys' advertisements. *Id.* at 193-94. Although attorneys were allowed to advertise, any deviation from a standard list of words they could use to describe their practice would constitute a rule's violation. *Id.* at 191-95.

123 455 U.S. at 206-07. While the Court noted that mailings are more difficult
In a footnote in *R.M.J.*, the Court set forth a four-part analysis which the Court had used in *Central Hudson Gas & Electric Corporation v. Public Service Commission* to determine the validity of a regulation of commercial speech. The four relevant questions were listed as: (1) is the commercial speech involved outside the scope of the First Amendment's protection? (i.e., is it misleading or does it concern an unlawful activity?); (2) do substantial governmental interests exist which justify retaining the regulation?; (3) does the regulation advance the governmental interest?; and (4) is there a less restrictive alternative?

In *R.M.J.*, the Court, applying the *Central Hudson* four-part analysis, held unconstitutional the ban on the mailing of professional announcement cards. In so holding, the Court noted that direct mail solicitation has supervisory problems that are not present in newspaper advertising cases. However, the Court suggested that by filing the mailings with an Advisory Committee to the State Supreme Court these supervision problems could be circumvented without resorting to absolute prohibition. Additionally, the Court rejected the argument that members of the public would be frightened by an attorney's

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124 455 U.S. at 203 n.15.
125 447 U.S. 557 (1980). In *Central Hudson*, the Court disapproved a New York Public Service Commission regulation which banned an electrical utility from advertising to promote the use of electricity. *Id.* at 572 (reversing the judgement of the New York Court of Appeals). The Court stated that in commercial speech cases, whether or not a regulation is violative of the First Amendment depends on how the regulation stands up against a four-part test. *See* text accompanying infra note 82a. After applying the test to the regulation banning advertising that promoted the use of electricity, the Court in *Central Hudson* held the statute unconstitutional. *447 U.S.* at 572.

126 447 U.S. at 566.
127 455 U.S. at 207.
128 *Id.* at 206. As the court stated: "mailings and handbills may be more difficult to supervise than newspapers." *Id.*
129 *Id.* *See also supra* note 123.
solicitation mailing because they were unaccustomed to receiving such letters from a law office. The Court suggested that attorneys can alleviate these fears by stamping "This is an Advertisement" on the outside of the envelope.

The Court both summarized the relation between commercial speech and advertising for professional services and presented a new interpretation of the Central Hudson test. The Court stated:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experiences prove that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. (Emphasis added.)

The emphasized material adds a new element to the first part of the Central Hudson four-part analysis. The first element in Central Hudson withholds First Amendment protection from misleading commercial speech. The Court in R.M.J., stated that the inquiry should not focus only on whether a particular advertisement is potentially misleading, but also on whether a certain method of advertising is inherently misleading. Thus, a potentially mis-

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130 455 U.S. at 206 n.20. The Advisory Committee for the State of Missouri argued that because members of the public were not accustomed to receiving letters from law offices, they would be frightened when mailings began arriving. Id.
131 Id.
132 Id. at 203.
133 See supra notes 125-26 and accompanying text (discussing the Central Hudson Test).
134 447 U.S. at 567. The first line of the Court's analysis in Central Hudson stated "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern a lawful activity and not be misleading." Id. at 566.
135 455 U.S. at 203. See also id. at 202 (where the Court states that "regulation is permitted if a particular method of advertising is found to be deceptive").
leading advertisement may be afforded First Amendment protection under the first element of the *Central Hudson* test if the same information can be presented in a manner that is not misleading—that is, if the method of advertising is not inherently misleading. This result is far removed from the days before *Virginia Pharmacy* when it was assumed that commercial speech was not entitled to First Amendment Protection.

*In re R.M.J.* affirms an attorney's right to advertise through general mailings. However, as the final word of the Supreme Court regarding mail solicitation, the decision in *R.M.J.* leaves many open questions—including the propriety of using a "target" mailing directed toward a closely defined set of potential clients. Because the Supreme Court did not address the issue of target mailings, state courts maintain much discretion in deciding this open question.

**B. State Cases Outside of New York**

No state other than New York has ruled on the propriety of the use of targeted mailings by attorneys to solicit mass-accident victims. Since *R.M.J.*, however, three state cases have addressed the validity of other means of direct mail solicitation. The first court to do so was the

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156 455 U.S. at 203. Although the attorney in *R.M.J.* deviated from an approved set of precisely worded areas of practice thereby opening the potential for deception, the Court found that because the information was presented in a non-misleading manner it deserved First Amendment protection. *Id.* at 204-06.

157 See supra notes 43-65 and accompanying text.

158 See generally Note, Direct Mail Solicitation by Attorneys: Bates to *R.M.J.*, 33 Syracuse L. Rev. 1041 (1982). This Note outlines many of the questions left open by *R.M.J.*:

[T]he *R.M.J.* decision also raises some disturbing questions of its own: What is a "general mailing?" Does it include targeted mailings? Does it depend on how many letters are sent? Or to whom? Or what the letters say? And what is required of the state to demonstrate that direct mailing is misleading and therefore proscribable? *Id.* at 1065.

159 See infra note 205.

140 See supra notes 119-38 and accompanying text for a discussion of *R.M.J.*.
Supreme Court of Kansas in *State v. Moses*. In *Moses*, an attorney mailed 150 letters to homeowners offering his services as a real estate consultant to assist in setting up sales of homes "By Owner." The court affirmed the Board of Discipline's recommendation that the attorney receive public censure. In so holding, the court implied that use of direct mailings rests closer to the in-person end of the solicitation spectrum prohibited by *Ohralik* than it does to the advertising end of the spectrum approved of in *Bates*. Although the court alluded to *R.M.J.*, they did not undertake the full analysis which that decision requires. *R.M.J.* clearly stated that a state must show substantial interest before a prohibition of direct-mail advertising is upheld.

However, in *Moses* the Board of Discipline failed to show any such state interest. This prompted one commentator to predict that the United States Supreme Court will have to speak again in order to clarify conflicting state interpretations resulting from *R.M.J.*

The Utah Supreme Court did not address the actions of a particular attorney but, instead, ruled on a state bar petition for approval of changes in the disciplinary rules governing advertising. The proposal stated that solicitation by "in-person, direct mail, and similar direct forms of contact with a prospective client" would be prohib-

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142 642 P.2d at 1005-06.
143 *Id.* at 1007.
144 See supra notes 89-94 and accompanying text for a discussion of *Ohralik*.
145 See supra notes 66-85 and accompanying text for a discussion of *Bates*.
146 455 U.S. at 203. The Court in *R.M.J.* used the *Central Hudson* test which requires a substantial state interest to be shown before an absolute prohibition of commercial speech is held constitutional. See supra notes 125-26 and accompanying text.
147 642 P.2d at 1006-07.
148 See Andrews, *The Selling of a Precedent*, 10 STUDENT LAW. 12 (Mar. 1982), where the author predicts that development of advertising regulations among the states will "undoubtedly continue in a crazy quilt form." *Id.* at 49.
149 *In re Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising*, 647 P.2d 991 (Utah 1982).
In light of *R.M.J.*, the court struck the words "direct mail" from the proposal. The court stated that the state interests involved were not substantial enough to justify the prohibition of mailing of professional cards or announcements. As a result, the court amended the proposed rule, thereby bringing the rule within the constitutional limits established by *R.M.J.*.

The Ohio Supreme Court also had the opportunity to address the direct mail solicitation question. In *Dayton Bar Association v. Herzog*, the court disbarred an attorney who mailed more than 500 letters to defendants in municipal court cases. The letters stated that a new federal law might allow a judgment debtor to forestall collections and invited the reader to call the attorney for an appointment. The court labelled the attorney's actions "patent solicitation" unprotected by *Bates* and distinguished *R.M.J.* on the grounds that it involved a different disciplinary rule. The court noted a state interest in protecting the public from mail solicitation by professionals, however, the court failed to undergo the detailed analysis of state interests mandated by *R.M.J.*.

Although these state cases show a general inconsistency in the application of *R.M.J.*, no state except New York has had an opportunity to develop a line of cases dealing with

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150 Id. at 995.
151 Id. at 996.
152 Id. at 995-96.
153 Id.
154 70 Ohio St.2d 261, 436 N.E.2d 1037 cert. denied, 459 U.S. 1016 (1982).
155 436 N.E.2d at 1038 n.*.
156 Id.
157 Id.
158 Id. *R.M.J.* involved Model Disciplinary Rules DR 2-101, limiting the content of advertisements, and 2-102, limiting the class of people who may receive the solicitations. See *supra* note 7. *Herzog*, on the other hand involved DR 2-103 which states that an attorney may not recommend his services to a layman who has not solicited his advice. See *Orhalik v. Ohio State Bar Ass'n* 436 U.S. 447, 453 n.9 (1978).
159 436 N.E.2d at 1038 n.*.
160 See *supra* notes 119-38 and accompanying text for a discussion of *R.M.J.*
direct mail solicitation. The state cases involving direct mail solicitation since the Supreme Court's ruling in *R.M.J.* were all decided in 1982. Since that year, no other state court of highest jurisdiction has ruled on the permissibility of direct mail solicitation. *In re von Wiegen* is the first case to address the use of mailings to targeted victims since the *R.M.J.* analysis was established. To better understand the impact of *von Wiegen*, relevant New York cases must be reviewed.

C. New York Cases

In 1980, after *Bates*, *Ohralik*, and *Primus*, but before *R.M.J.*, the first opportunity for the New York Court of Appeals to deal with a direct mail solicitation case arose in *Koffler v. Joint Bar Association*. In *Koffler*, the New York court struck down a disciplinary rule which completely prohibited direct mail solicitation by attorneys. Two attorneys sent out a letter to approximately 7,500 property owners and to a number of real estate brokers offering their legal services for any legal matter connected with the purchase and sale of property. The Joint Bar Association Grievance Committee of the Tenth Judicial District of New York charged the attorneys with violation of DR 2-103(A). The court first refuted the Bar Association's argument that a fundamental difference existed between advertising and soliciting. Earlier, the Appellate Division ruled that *Bates* extended the right to advertise but that the attorneys in question were soliciting, which the law still prohibited. The Court of Appeals rejected this ar-
argument citing the United States Supreme Court’s decision in *Bigelow v. Virginia* \(^{168}\) which, in part, said:

Regardless of the particular label asserted by the state — whether it calls speech “commercial” or “commercial advertising” or “solicitation” — a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.\(^{169}\)

The New York court applied this general analysis of the similarity between the terms “advertising” and “solicitation” to direct mail solicitation by pointing out that although a mailing not only advertises legal services and also suggests the employment of the author to carry out those services, it does not follow that such a mailing crosses the boundary between advertising and solicitation.\(^{170}\)

Additionally, the court reiterated the argument addressing the strong relationship between the free flow of commercial information and reliable decision making in a free enterprise economy.\(^{171}\) After noting that the United States Supreme Court cases did not speak directly to the issue in *Koffler*,\(^{172}\) the court undertook the four-part *Central Hudson* test\(^{173}\) to determine the validity of the disciplinary rule prohibiting direct mail solicitation. The court recognized the state interests advanced by the bar association as “the potentials for deception, for invasion of privacy, for overcommercialization of the profession and for conflict of interest.”\(^{174}\) However, the court ruled that these interests were not particularly advanced by the regulation

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\(^{166}\) 421 U.S. 809 (1975). See *supra* note 45 for the case background.

\(^{169}\) 421 U.S. at 826.

\(^{170}\) 51 N.Y.2d at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76.

\(^{171}\) *Id.* at 146, 412 N.E.2d at 921, 432 N.Y.S.2d at 875-76.

\(^{172}\) *Id.* at 147, 412 N.E.2d at 931-32, 432 N.Y.S.2d at 876-77. The court noted that the decision in *Primus*, although involving a letter, was decided on the grounds of political and associational speech and not commercial speech. *Id.*

\(^{173}\) See *supra* notes 125-26 and accompanying text for a discussion of the *Central Hudson* test.

\(^{174}\) 51 N.Y.2d at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 877.
and that less restrictive alternatives were available.\textsuperscript{175} Specifically, the court ruled that the regulation did not advance the interest against invasion of privacy and overbearing persuasion since the recipient of an attorney’s letter may simply throw the letter away.\textsuperscript{176} In addition, the court followed the solution of a sister state\textsuperscript{177} and suggested that the filing of solicitation letters would be a less restrictive alternative to complete prohibition.\textsuperscript{178}

Finally, the court specifically ruled that the disciplinary rule in question violated the First Amendment regardless of whether the disciplinary rule was considered a time, place, and manner restriction or a content restriction.\textsuperscript{179} According to the court in Koffler, if a restriction of commercial speech goes to the content of the speech, for the restriction to be held valid it must pass the Central Hudson test.\textsuperscript{180} However, if the restriction goes to the time, place, or manner of the commercial speech, the restriction may be upheld if it is reasonable, serves a significant governmental interest, and leaves ample alternative channels

\begin{itemize}
  \item \textsuperscript{175} Id. at 150, 412 N.E.2d at 933, 432 N.Y.S.2d at 878.
  \item \textsuperscript{176} Id. at 149, 412 N.E.2d at 933, 432 N.Y.S.2d at 878. The Court stated: As the Supreme Court put it in Consolidated Edison Co. v. Public Serv. Comm. [citations omitted], a recipient of a lawyer’s letter “may escape exposure to objectionable material simply by transferring . . . [it] from envelope to waste basket.”
  \item \textsuperscript{177} Id.
  \item \textsuperscript{178} Id. at 150, 412 N.E.2d at 933, 432 N.Y.S.2d at 878. In a footnote the court stated “our discussion of a filing requirement is, of course, by way of example only and not by way of prescription.”
  \item \textsuperscript{179} Id. at 150-51, 412 N.E.2d at 934, 432 N.Y.S.2d at 878. The courts have developed a distinction between a content restriction of commercial speech and a time, place, and manner restriction of commercial speech.
  \item \textsuperscript{180} Id. See supra notes 125-26 for a description of the Central Hudson test which determines the validity of state regulations of commercial speech based on the content of the speech.
\end{itemize}
for communication. The court did not state whether the restriction in question was a "content" restriction or a "time, place, and manner" restriction, but instead stated that if the regulation was assumed to be a content restriction, the four-part Central Hudson test held the disciplinary rule unconstitutional. The court also held the disciplinary rule unconstitutional as a time, place, and manner restriction, since there was no "ample alternative channel for communication." Because the cost effectiveness of direct mailings was arguably much greater than that for newspaper, magazines, telephone directories or television, the court reasoned that there was no cost effective alternative to direct mailings. By holding the disciplinary rule in question unconstitutional, Koffler cleared the way for direct mail solicitation in New York.

In Greene v. Grievance Committee for the Ninth Judicial District, Alan Greene, a New York attorney, sent flyers, in reliance on Bates, to real estate brokers in New York, asking them to recommend his services to their clients. The Grievance Committee for the Ninth Judicial District of New York charged Mr. Greene with violation of DR 2-103(A) and § 479 of the Judiciary Law. Going against the trend of cases holding disciplinary rules unconstitutional, the New York Court of Appeals held this disciplinary rule constitutional and affirmed the Appellate

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1. See supra notes 66-85 and accompanying text for a discussion of Bates, the first United States Supreme Court case giving attorneys the right to advertise.

2. 54 N.Y.2d at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884. For the actual text of the flyer see id. at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884.

3. For the text of both the disciplinary rule and this section of the judiciary law see 54 N.Y.2d at 121, 429 N.E.2d at 392-93, 444 N.Y.S.2d at 885-86. The disciplinary rule which primarily requires an attorney not to solicit business is the same one construed in Koffler. See supra notes 162-85 and accompanying text.

4. As Bates, Primus, R.M.J. and Koffler indicate, within a very short period of time, the United States Supreme Court, as well as the New York Court of Appeals,
Division's finding that Greene acted unprofessionally.\textsuperscript{191}

Because the flyers in question were not mailed to the potential clients directly, but rather to the real estate brokers who were to refer the clients to the attorney,\textsuperscript{192} Greene contradicted the trend of decisions giving attorneys more freedom in their modes of advertising. The Appellate Division\textsuperscript{193} was guided by a footnote in Koffler which stated: "[T]hird person mailings will, if their ends are to be achieved, almost always involve in-person solicitation by the intermediary, and are, therefore, much closer to speech of the type Ohralik . . . has held can be proscribed . . . ."\textsuperscript{194} Consequently, the Appellate Division concluded that because the real estate brokers who received these flyers were asked to approach the clients face-to-face, this solicitation that began as a mailing was converted into an in-person solicitation similar to that prohibited in Ohralik.\textsuperscript{195}

The New York Court of Appeals affirmed the Appellate Division and found that provisions regulating third person mailings are not content restrictions, but rather time, place, and manner restrictions.\textsuperscript{196} To be valid, time, place, and manner restrictions must only be reasonable and serve a significant governmental interest.\textsuperscript{197} Using

\textsuperscript{191} 54 N.Y.2d at 136, 429 N.E.2d at 400, 444 N.Y.S.2d at 893.

\textsuperscript{192} A reading of the case will show that using third party mailings created a situation that was closer to Ohralik, thereby granting a greater justification for allowing the disciplinary rule to stand. See supra notes 88-96 and accompanying text for a discussion of Ohralik.


\textsuperscript{195} Greene, 78 A.D.2d at 433 N.Y.S.2d at 854.

\textsuperscript{196} 54 N.Y.2d at 125-26, 429 N.E.2d at 394, 444 N.Y.S.2d at 887. See infra note 210 and accompanying text for a discussion of the different standards applied to content restrictions and time, place, and manner restrictions.

the Central Hudson test, the court found many of the same state interests existed in third party mailing situations that were sufficient to prohibit in-person solicitation in Ohralik. The court also found a substantial state interest in preventing potential conflicts of interest that might arise when both real estate brokers and attorneys share pecuniary interests in the client. In addition, the court noted that the practice suggested in Koffler of filing mailings with a supervising agency would not adequately protect against the conflict of interest problems in third party mailing situations.

Greene contributed to the developing law regarding direct mail solicitation by further limiting the range of permissible possibilities for direct mail solicitation. Unlike Ohralik, a relatively easy case for the United States Supreme Court to decide because of the ambulance chasing activities involved, Greene squarely addressed a new use for direct mailings — third party mailings — and convincingly foreclosed its further exercise. With in-person solicitation ruled out by Ohralik and third party mailings ruled out by Greene, the highest court of the State of New York readied itself to tackle another possible use for direct mailings: the use of solicitous mailings directed toward narrow, targeted audiences with similar legal claims.

II. In re von Wiegen

In re von Wiegen was the first case to address a targeted mailing by an attorney soliciting the victims of a mass disaster. In response to the Hyatt Regency disaster,

198 See supra notes 125-26 and accompanying text for a discussion of the Central Hudson test.
199 54 N.Y.2d at 127-29, 429 N.E.2d at 394-95, 444 N.Y.S.2d at 887-88.
200 Id. at 128, 429 N.E.2d at 395, 444 N.Y.S.2d at 888.
201 Id. at 129, 429 N.E.2d at 396, 444 N.Y.S.2d at 889.
202 See supra notes 89-92 for a discussion of the attorney's behavior in Ohralik.
203 See 54 N.Y.2d at 128-29, 429 N.E.2d at 395, 444 N.Y.S.2d at 888 holding the statute which prohibits third party mailings constitutional.
204 See supra notes 1-11 and accompanying text (giving the factual background and specific allegations in the case).
Eric von Wiegen sent the disaster victims and their families notices soliciting their business. Consequently, for the first time, a court ruled on the constitutionality of direct mail solicitation to a narrow, targeted audience such as disaster victims.205

The court began its analysis by stating that it could approach the case either by relying on the Appellate Division’s analysis206 or by doing its own structured constitutional analysis under the four-part Central Hudson test.207 The court reviewed and rejected the Appellate Division’s analysis, and instead decided to apply the Central Hudson test.208

In reviewing the Appellate Division’s decision, the court decided that although the receivers of the notices in question were accident victims as opposed to potential real estate clients, the identity of the receivers failed to make the situation unique.209 The court reasoned that because the permissibility of solicitous mailings is a question of commercial speech rights and does not depend on whether a tort or real estate matter is involved, the determination should not turn on who is on the receiving end.210 Furthermore, the court stated that allowing the use of direct mail advertising (as was done in Koffler) for

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205 Prior cases had dodged the narrow issue of direct mail solicitation to a targeted audience. In In re Teichner, 75 Ill.2d 88, 387 N.E.2d 265 (1979), a local reverend arranged for an attorney to visit the town where many of the victims of an accident lived because the reverend believed local counsel failed to adequately negotiate settlement agreements. 387 N.E.2d at 267. Consequently, the court held the attorney’s activities were related to associational values, thereby making this case a political speech case, rather than a commercial speech case. Id. at 71-72. In re Appert, 315 N.W.2d 204 (Minn. 1981), involved solicitation of clients with personal injury claims related to the Dalkon Shield. Appert, however, did not involve an immediate disaster where a great number of people were injured at the same time, and the court did not address solicitation to a targeted list of victims. Id.


207 See supra notes 125-26 and accompanying text for a discussion of the Central Hudson test.

208 63 N.Y.2d at 170, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

209 Id.

210 Id. at 169-72, 470 N.E.2d at 841-43, 481 N.Y.S.2d at 43-44.
real estate agents but denying its use for accident victims would restrict commercial speech on the basis of its content. The court’s labeling of the rule as a content restriction is significant because a content regulation is much more difficult to constitutionally justify than a time, place or manner regulation. The State has a much better chance to justify the regulation of the time, place and manner of commercial speech. To be constitutional, time, place and manner regulations must simply be reasonable and rationally related to legitimate state interests. Content restrictions, on the other hand, will be sustained only if substantial state interests are involved, and the regulation may only go as far as is necessary to serve that interest. The Appellate Division categorized the rule in question as a time, place, and manner restriction since it related only to recipients of the solicitations rather than the content of the letter. In so ruling, the Appellate Division relied on Greene v. Grievance Committee which upheld restrictions against third party mailings as constitutional time, place, and manner restrictions.

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211 Id. The Court labeled the restriction a content restriction using the following analysis:

Here, the State seeks to regulate respondent’s letter, not because of the involvement of third parties, but because of the subject matter of the communication — the fact that respondent seeks to be retained to represent accident victims and their families. As such, the regulation is plainly content-based. (citations omitted)

Id. at 172, 470 N.E.2d at 841, 481 N.Y.S.2d at 45.

212 63 N.Y.2d at 171, 470 N.E.2d at 842, 481 N.Y.S.2d at 44. The court summarized the difference between the two tests as follows:

The State is permitted considerably more latitude in restricting the time, place, and manner of speech that it is when it attempts to restrict content. Time, place and manner restriction [sic] are valid if reasonable and rationally related to legitimate State interests. Content or subject matter may be regulated only if substantial State interests are involved and then the regulation may go no further than necessary to serve that interest.

Id.

213 Id.

214 Id.

215 474 N.Y.S.2d at 148.

216 Id. See supra notes 186-203 and accompanying text for a discussion of Greene.
The Court of Appeals rejected this argument by saying the restriction in this case related to the content of the letter since the letter stated that the attorney wanted to represent accident victims and their families. Consequently, the court subjected the restriction in question to the four-part analysis of content based prohibitions — the Central Hudson test.

In applying the first part of the Central Hudson test, the court determined whether the communication in question fell within the scope of the First Amendment's protection. As the court put it, "[t]here is no constitutional right to disseminate false or misleading information or information about unlawful activity." Relying on In re R.M.J., the court stated that the proper inquiry is not whether the particular letter is misleading but rather whether the method of advertising involved is misleading. The court disposed of the first part of the test by holding that the method of advertising, direct mail solicitation, is not inherently misleading. The court went on to state that if a certain method of communication can be used in a way that is not deceptive, a state may not altogether prohibit that method of communication merely because it is sometimes used to disseminate misleading information.

Under the second part of the Central Hudson test, the court addressed the issue of whether substantial governmental interest existed to justify retention of the regulation. The court identified four governmental interests:

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217 63 N.Y.2d at 172, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.
218 Id. at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45. See supra notes 125-26 and accompanying text for a discussion of the Central Hudson test.
219 63 N.Y.2d at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.
220 Id.
221 For an explanation of R.M.J., see supra notes 119-38 and accompanying text.
222 63 N.Y.2d at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.
223 Id. The court stated: "Thus, because information on the availability of legal services for accident victims may be communicated in a fair and understandable fashion, through direct mail solicitation absolute prohibition is unwarranted [citation omitted]." Id.
224 Id. at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.
225 Id. at 173, 470 N.E.2d at 843-44, 481 N.Y.S.2d at 46.
(1) overcommercialization of the profession and the possibility for ambulance chasing; (2) invasion of privacy and the potential for undue pressure; (3) stirring up litigation; and (4) the potential for deception. The court disallowed the first state interest, noting that Bates and Koffler recognized the informational purpose of attorney advertising and found that attorney advertising enjoys constitutional protection. The court negated the second state interest, the invasion of privacy issue, by stating that mail solicitation does not exert the same potential for undue pressure that in-person solicitation does. The court noted that "the simple answer to the claim that [direct mail solicitation] does [constitute a substantial invasion of privacy] is that the recipient of a lawyer's letter 'may escape exposure to objectionable material simply by transferring [it] from envelope to waste basket.'" The court rejected the third state interest, preventing unnecessary litigation, by simply arguing that in this particular instance, the victims and their families obviously needed immediate legal counsel. Consequently, the court reasoned that the informational function that the letter served outweighed the recognized state interest in preventing unnecessary litigation.

Turning to the final state interest, potential deception, the court recognized

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226 Id.
227 See supra notes 66-85 and accompanying text for a discussion of Bates.
228 For a discussion of Koffler, see supra notes 162-85 and accompanying text.
229 63 N.Y.2d at 173-74, 470 N.E.2d at 844, 481 N.Y.S.2d at 46. The court stated:
While lawyer advertising may appear unseemly to many members of the profession, particularly where, as here, it is directed at the unfortunate victims of a disaster or their families, it is constitutionally protected and serves the recognized purpose of informing those in need of the cost and availability of legal services.

Id. at 174, 470 N.E.2d at 844, 481 N.Y.S.2d at 46 (citations omitted).
230 Id. at 174, 470 N.E.2d at 844, 481 N.Y.S.2d at 46 (citations omitted).
231 Id. (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980)).
232 63 N.Y.2d at 174-75, 470 N.E.2d at 844, 481 N.Y.S.2d at 16. The court noted that "it is better to address such wrongs than to suffer in silence." Id. at 175 (citing Bates, 433 U.S. at 364, 376).
233 63 N.Y.2d at 174-75, 470 N.E.2d at 844, 481 N.Y.S.2d at 46.
that many people view mail solicitation as having greater potential for deception because it invites less public scrutiny than newsprint or electronic media advertisements. However, the court concluded that this potential for deception presents no greater danger in mail solicitation than when solicitation occurs in person. Consequently, the court found this state interest inadequate to justify the particular rule against mail solicitation. In addition, the court noted that the filing requirement first suggested in Koffler would help to alleviate the potential for deception.

The court dealt with the third and fourth parts of the Central Hudson test concurrently. The court did not squarely address the third part of the test: whether the restriction advances governmental interests. Instead, the court merely argued that under the fourth part, concerning the existence of a less drastic alternative to the restriction in question, a complete prohibition could not be justified since a filing requirement would be a less drastic alternative.

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234 Id. at 175, 470 N.E.2d at 844, 481 N.Y.S.2d at 46. The court in noting the unique character of mail solicitations, stated:

[T]he potential for deception present in Matter of Koffler is also a genuine concern here because these mailings are not subject to the public scrutiny that a newspaper or television advertisement would receive. Moreover, many people may perceive a potentially greater incentive for deception in personal injury litigation than in other types of legal business because greater sums of money may be involved, the nature of the representation may be less routine, contingent fee arrangements may be employed, and because of past abuses in the area. These are serious concerns, but they are concerns which must be addressed whether the solicitation is in person or in writing and the potential for deception is not greater in mail solicitation.

Id. (citations omitted).

235 Id.

236 In Koffler, the court suggested that potential deception could be minimized by requiring attorneys using direct mail solicitation to simultaneously mail a copy of their solicitation to an overseeing agency of the state bar. See supra notes 177-78 and accompanying text for a discussion of the suggestion in Koffler.

237 63 N.Y.2d at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47.

238 Id.

239 Id. See also supra notes 177-78 and accompanying text for a discussion of the filing requirement.

240 63 N.Y.2d at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47.
The court concluded its analysis by finding that the state could not advance any substantial interest sufficient to override the public's need for information about cost and availability of legal services. Consequently, the court held unconstitutional the disciplinary rule which banned direct mail solicitation to accident victims. For the first time in the history of the American legal system, an attorney's direct mail solicitation of a highly visible targeted audience received judicial approval.

III. PRACTICAL IMPLICATIONS OF IN RE VON WIEGEN

This groundbreaking decision, which one expert believes will guide future decisions by the Supreme Court, has wide-ranging practical implications. Because decisions from the New York Court of Appeals command respect from other jurisdictions, von Wiegen will have impact around the country. Primarily, von Wiegen has two practical implications: (1) it offers guidance for other courts on how to analyze direct mail solicitation regulations, and (2) it provides a groundwork for the first state bar association that must accommodate the use of direct mailings to targeted groups such as disaster victims. How New York deals with these implications may determine the validity of similar solicitations by attorneys in other states.

The first practical implication of the von Wiegen decision is its potential influence on other state court decisions. The von Wiegen court's analysis of the bar association regulations prohibiting direct mailing will provide guidance

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241 \textit{Id.}

242 \textit{Id.} at 170, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

243 \textit{Lawroy, Solicitation by Mail}, 11:3 A.B.A. Litigation Sec. 51, 63 (Spring, 1985).

244 See \textit{infra} notes 256-59 and accompanying text for a discussion of the analysis the court used.

245 See \textit{infra} notes 260-62 and accompanying text for a discussion of the practical implications targeted mailing will bring.
for other state courts faced with ruling on the constitutionality of similar regulations.\textsuperscript{246} Since \textit{von Wiegen} stands alone as the only precedent on the subject, other state courts will refer to it for guidance.

Two distinct tests were available for the \textit{von Wiegen} court to analyze the regulation in question.\textsuperscript{247} Depending on which test was selected, the resulting burden on the state would be quite different. The court chose the \textit{Central Hudson} test\textsuperscript{248} typically used to analyze the constitutionality of rules regulating the \textit{content} of commercial speech.\textsuperscript{249} Alternatively, the court could have considered the restriction to be one regulating the \textit{time, place, and manner} of commercial speech. If the court had taken this approach, the state would have had an easier time justifying the restriction since “the state is permitted considerably more latitude in restricting the time, place, and manner of [commercial] speech than it is when it attempts to restrict content.”\textsuperscript{250}

The court seemed to make a logical jump in reasoning when it determined that the disciplinary rule in question was content-based rather than a time, place, and manner restriction. The Appellate Division cited \textit{Greene v. Grievance Committee} as its authority for holding the rule to be a time, place, and manner regulation of commercial speech.\textsuperscript{251} The Court of Appeals rejected the Appellate Division’s holding on the ground that the rule in \textit{Greene} operated only to prohibit the attorney from advertising in a particular manner — specifically, use of mailings which

\textsuperscript{246} In the recently decided case of Adams v. Supreme Court of Illinois, No. 84 C 3548, slip. op. (N.D. Ill. 1985), the court noted its approval of the analysis used in \textit{von Wiegen}. \textit{Id.}, however, the court failed to state whether the disciplinary rule in question (DR 2-103) was a \textit{content} restriction or a \textit{time, place, and manner} restriction. \textit{Id.}

\textsuperscript{247} 63 N.Y.2d at 168-69, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

\textsuperscript{248} See supra notes 125-26 and accompanying text for a discussion of the \textit{Central Hudson} test.

\textsuperscript{249} 63 N.Y.2d at 171, 470 N.E.2d at 843, 481 N.Y.S.2d at 44.

\textsuperscript{250} \textit{Id.} at 170, 470 N.E.2d at 842, 481 N.Y.S.2d at 43 (1984).

asked a third party to solicit the potential client in-person. The court then distinguished Greene, finding that the regulation in von Wiegen sought to regulate the content of the letter because the attorney was specifically soliciting accident victims and their families.

This finding by the Court of Appeals seems questionable. The court concludes that the state attempt to prevent solicitation of accident victims goes to the subject matter of the communication. Consequently, the regulation receives a “content-based” label and becomes subject to the tougher Central Hudson test.

Although the court cites some authority for the assumption that a regulation against the solicitation of accident victims is content-based, the cases fail to bolster this assumption. Given this lack of authority, the court just as easily could have concluded that the rule does not restrict the content of the advertisements but rather the manner of using accident victims lists to target solicitous mailings. By assuming that a regulation against targeted mailings is content-based, the court sets a significant precedent.

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252 63 N.Y.2d at 172, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.
253 Id.
254 Id.
255 Id.
256 Id. The court cites the following: Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (federal statute prohibiting unsolicited advertisements for contraceptives held unconstitutional); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (state utility commission order prohibiting inclusion of promotional material in monthly utility bills held unconstitutional); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidating a city ordinance prohibiting drive-in movie theaters from showing pornographic films because the ordinance went beyond permissible restraints on obscenity); Cox v. Louisiana, 379 U.S. 536 (1965) (reversing convictions of civil rights demonstrators under a peace statute). However, none of these cases give any support to the theory that a regulation against solicitation by targeted mailings constitutes a content restriction. In fact, Erznoznik stands for the proposition that “time, place and manner regulations [must be] applicable to all speech irrespective of content.” 422 U.S. at 209. Consequently, just as Greene operated to prohibit all mailings which solicit through third parties, see supra notes 186-203, the State's regulation in von Wiegen arguably operates to prohibit all mailings which use a targeted victims list — even if the State has no objection to the content of the letter in question. Thus, it applies to all solicitations of this manner “irrespective of content.” Erznoznik, 422 U.S. at 209.
which other states may follow. If other states follow New York's lead, the restrictions against direct mailings in those jurisdictions will face a much tougher constitutional test. Consequently, more of those jurisdictions' restrictions likely will fail, thereby allowing a nationwide increase in direct mail solicitation.

The second practical implication of the von Wiegen decision is that New York will become the first state which must design and implement a system for adequately supervising attorney mail solicitations to targeted groups. Obviously, a number of questions will arise as a result of the high court's ruling. For example, the adequacy of the von Wiegen court's suggestion that all mailings be filed with the bar association will be put to the practical test. The public's unsavory reactions to overbearing solicitations (which a filing requirement seeks to prevent) may prove unavoidable if members of the public receiving solicitations are opening their letters and reading them at the same time the policing powers at the bar association are opening and reading theirs. Simply requiring the letter to be filed with the state bar will not prevent the letter from reaching the hands of the public. From this standpoint the filing requirement would not protect the public from direct mail solicitations which later may be found improper. The legal profession consequently may be held in lower esteem by the public — the precise reaction the requirement is designed to avoid.

Another important question will be whether a minimum number of potential clients will be required before these mailings may be used. Since nothing in the decision implies that the number of people on the receiving end af-

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257 See supra note 246.
258 Id.
259 For a discussion of the justification used by the New York Court of Appeals' for their choice of the more strenuous Central Hudson test, see supra notes 211-18 and accompanying text.
260 See 63 N.Y.2d at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47.
261 See supra notes 177-78 and accompanying text for a discussion of the filing requirement.
fects the propriety of the solicitation, a day may come when a single obituary or accident report in a newspaper provokes a barrage of mail solicitation from attorneys exercising their First Amendment right to commercial speech. Although some may argue this is the price which must be paid for free speech, the real solution lies in upholding regulations which ban targeted mailings to accident victims on the ground that such mailings are closer to the type of solicitation forbidden in *Ohralik* then they are to advertising.\(^2\) The key distinction between advertising and solicitation is that, in the case of solicitation, the recipient of the solicitations has recently been victimized. The victims and their families often have become emotionally distraught and are particularly susceptible to confusion about their legal rights. A targeted mailing to accident victims contributes to that confusion in a manner similar to the way in-person solicitation takes advantage of accident victims. Therefore, direct mail solicitations, unlike general mailings, are designed to capitalize on recipients in a particular situation. From this perspective, direct mailings seem more akin to solicitation than to advertising.

Finally, in the context of aviation law, the New York Court of Appeals' decision creates the possibility of direct mail solicitation of air crash victims. An airliner crash obviously creates a rash of lawsuits much like the Hyatt Regency disaster. New York attorneys may now solicit potential clients from these disasters by simply mailing a flyer or letter to the names on a victims list. With this new avenue of solicitation open to attorneys, the post-accident solicitation of victims' families may take a new twist. For example, after the August, 1985, crash of Delta Flight 191 at Dallas/Ft. Worth Airport,\(^3\) many of the victims' fami-

\(^2\) See Florida Bar v. Schreiber, 420 So.2d 599, 600 (Fla. 1982) (McDonald, J., dissenting) (stating that a regulation banning direct solicitation should be upheld because use of direct mail is an *Ohralik*-type of solicitation).

lies expressed disapproval toward attorneys who set up consulting offices at hotels near the airport. The Texas Bar Association initiated an investigation, and the Governor of Texas was compelled to issue a warning to overanxious attorneys. While advocates of direct mail solicitation may argue that approval of mail solicitation will result in fewer numbers of on-the-spot solicitors, opponents may counter with the argument that mail solicitation will merely provide another source of aggravation to bereaved families. The final result probably will depend on how quickly and efficiently those who abuse the new privilege are punished. Courts have recognized that states have a substantial interest in ensuring that their licensed professionals are held in high public esteem. Successful future application of that interest to justify a regulation banning targeted mailings may depend on how responsibly New York and states which follow the von Wiegen decision exercise the new targeted mailing privilege.

The decision in von Wiegen will have tremendous impact on the developing law of direct mail solicitation. Whether the long term effect of the decision will be beneficial depends on how efficiently the State of New York enforces the newly granted privilege given to its attorneys. While recognition of attorneys' direct mail solicitation rights increases the access to information about the cost and availability of legal services, the improved access to the legal system is accompanied by potential for greater abuse of the advertising privilege.

IV. Conclusion

The New York Court of Appeals decision allowing an attorney to use targeted direct mail solicitations to victims of a mass disaster fails to justify its result in several respects. In the first place, the court sidestepped the central question in determining the constitutionality of regulations affecting commercial speech: proper classification of the regulation as either content-based or a time, place, and manner regulation of commercial speech. The court self-servingly placed a content-based label on the regulation without justifying its conclusion and without explaining why it contradicted the Appellate Division’s decision to the contrary. Secondly, the court’s conclusion that no harm results from mail solicitations where the person receiving the solicitation may simply throw the letter away fails to recognize that the victim-recipient has been exposed to the harm by simply reading the letter. Given the sinking esteem of attorneys in the eye of the public, each letter inflicts substantial harm to the profession when the accident victim who receives it must read the letter before deciding to throw it away. Although no great harm may result to the recipient, each letter which reaches an accident victim and is thrown away in disgust contributes to quiet but steady erosion of the state interest in maintaining public confidence in licensed professionals. Finally, the court has put pressure on other states to follow the result in von Wiegen. As a result of this decision, New York attorneys may solicit business from unfortunate mass disaster victims through targeted direct mailings. Although such activity may diminish the esteem of the profession, as a practical matter it probably will result in more mass disaster cases going to New York attorneys because of their advantageous solicitation rules. Other states may be forced to reluctantly follow suit so that New York attorneys may not take undue advantage of the new solicitation technique. In the end, each mass disaster may bring an onslaught of targeted mailings by unscrupulous attorneys
who seek to gain through the misfortune of others under the guise of free speech and the First Amendment.

James Cramer

I. INTRODUCTION

Harold Thurston, Christopher J. Clark, and Clifton A. Parkhill are former captains for Trans World Airlines, Inc. (TWA). Each was involuntarily retired at age sixty pursuant to a Federal Aviation Administration (FAA) regulation prohibiting anyone from serving as a pilot on a commercial carrier past age sixty. Captains and first officers are “pilots” subject to the FAA regulation; flight engineers, however, are not.

In 1978, TWA adopted a new retirement policy in response to recent Congressional amendments to the Age Discrimination in Employment Act (ADEA). TWA’s new policy allowed cockpit employees to continue working as flight engineers upon reaching age sixty. The policy required a captain, prior to his sixtieth birthday, to submit a “standing bid” for a flight engineer position. If a vacancy occurred, the most senior captain with a standing bid was assigned the position. If no vacancy occurred prior

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2 14 C.F.R. § 121.383(c) (1984). “No certified holder may use the service of any person as a pilot on an airplane . . . if that person has reached his sixtieth birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his sixtieth birthday. Id. Both first officers and flight engineers are qualified as pilots. Id.
4 Thurston, 105 S. Ct. at 618.
5 Id. at 619.
6 Id.
to the captain's sixtieth birthday, he was retired.\textsuperscript{7} Captains displaced for any reason, other than age, did not have to participate in the bidding procedure.\textsuperscript{8} Instead, these captains were allowed to "bump," or automatically displace, a less senior flight engineer.\textsuperscript{9}

Thurston, Clark, and Parkhill were denied the opportunity to "bump" a less senior flight engineer under the TWA system.\textsuperscript{10} Thurston was involuntarily retired before TWA adopted its new policy, Clark was advised that bidding would not affect his chances of obtaining a transfer so he did not bid, and Parkhill was retired, despite filing a bid, because no vacancies occurred prior to his sixtieth birthday.\textsuperscript{11} They filed this action against TWA and the Air Line Pilots Association (ALPA) in the United States District Court for the Southern District of New York, arguing that TWA's transfer policy violated section 623(a) of the ADEA. They alleged that because the airline allowed captains displaced because of reasons other than age to "bump" less senior flight engineers, the airline must afford captains displaced upon reaching age sixty the same "privilege of employment."\textsuperscript{12} The district court granted a motion for summary judgment filed by TWA and the ALPA, ruling that plaintiffs had failed to establish a prima facie case of age discrimination.\textsuperscript{13}

\textsuperscript{7} Id.\textsuperscript{8} Id. For example, captains unable to maintain the required first-class medical certificate and captains whose positions are eliminated due to reduced manpower are allowed to "bump," or displace, less senior flight engineers. \textsuperscript{9} Id.\textsuperscript{10} Id. The displaced captain does have to obtain the second-class medical certificate required for flight engineer positions. See 14 C.F.R. § 67.15 (1984). TWA's collective bargaining agreement also provides that if the disabled pilot lacks sufficient seniority he is allowed to go on unpaid medical leave for up to five years, while retaining and accruing seniority. \textsuperscript{11} Id. at n. 9.\textsuperscript{12} Thurston, 105 S. Ct. at 619-20.\textsuperscript{13} Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 547 F. Supp. 1221, 1225 (S.D.N.Y. 1982), aff'd in part, rev'd in part sub nom. Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985). Id. at 1225. The Equal Employment Opportunity Commission (EEOC) intervened on behalf of ten other age-displaced captains in the proceedings. These captains had also been discharged due to their inability to "bump" less senior flight engineers. Id.\textsuperscript{13} Air Line Pilots Ass'n, Int'l, 547 F. Supp. at 1221.
Plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which reversed the district court's decision, holding that the plaintiffs had presented direct evidence of discrimination by TWA on the basis of age.\textsuperscript{14} The court also ruled that the affirmative defenses available under the ADEA did not justify TWA's discriminatory policy.\textsuperscript{15} The court held TWA liable for double damages due to its "willful" violation\textsuperscript{16} of the ADEA.\textsuperscript{17} The United States Supreme Court granted certiorari to determine whether the ADEA requires airlines to extend the same privileges of employment to pilots displaced because of age as it does to pilots displaced for other reasons.\textsuperscript{18} Held, affirmed in part, reversed in part: Employers may not extend to their employees employment privileges which are denied to any employees on the basis of age. Trans World Airlines, Inc. v. Thurston, 105 S.Ct. 613 (1985).

II. Legal Background

A. Legislative History

Congress passed the ADEA in 1967 to promote the em-

\textsuperscript{14} Airline Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 949-51 (2d Cir. 1983). Undisputed evidence demonstrated that TWA permitted captains who were displaced for reasons other than age to "bump" less senior flight engineers. Therefore pursuant to the ADEA, TWA was also required to allow age-displaced captains to "bump" less senior flight engineers. Id. at 955.

\textsuperscript{15} Id. at 955-54. Employers may assert as affirmative defenses the following: age is a bona fide occupational qualification; the differentiation in employees is based on reasonable factors other than age; the employer's conduct is part of the terms of a bona fide seniority system or employee benefit plan, or the individual was discharged or disciplined for good cause. ADEA, 29 U.S.C. § 623(f) (1982).

\textsuperscript{16} Air Line Pilots Ass'n, Int'l, 713 F.2d at 956. The ADEA is to be enforced in accordance with the remedies provided in the Fair Labor Standards Act (FLSA). ADEA, 29 U.S.C. § 626(b) (1982). Liquidated, or double damages are payable "only in cases of willful violations" of the ADEA. Id. Cf. FLSA, 29 U.S.C. § 16(b) (1982). The FLSA makes the award of liquidated damages mandatory for FLSA violations. The Court of Appeals for the Second Circuit ruled that "willfulness" is shown when an employer "either knew or showed reckless disregard for the matter of whether its conduct is prohibited by the ADEA." Airline Pilots Ass'n, Int'l, 713 F.2d at 956. TWA's clear awareness of the 1978 amendments was sufficient to constitute willful conduct and warrant the imposition of double damages. Id. at 957.

\textsuperscript{17} Airline Pilots Ass'n, Int'l, 723 F.2d at 956-57.

\textsuperscript{18} Thurston, 105 S. Ct. at 618.
ployment of older persons based on their ability rather than their age and to help employers and workers meet problems caused by the impact of age on employment.\textsuperscript{19} Congress sought to achieve these goals by prohibiting employment decisions which are based on the age of an individual.\textsuperscript{20} Hiring or termination decisions and decisions regarding terms, conditions, privileges, or compensation are encompassed by the ADEA.\textsuperscript{21}

Congress recognized that a mechanical application of age discrimination legislation might result in the early retirement of well-qualified older workers.\textsuperscript{22} To avoid that result, Congress provided that the ADEA be administered so as not to worsen a situation by retiring well-qualified workers, or to prevent an employer from achieving a reasonable age balance.\textsuperscript{23} Congress expressed its intention that the ADEA be applied on a case-by-case basis in such situations. They felt that the vagaries of employment obligations required that the ADEA not be strictly applied.\textsuperscript{24} For instance, it had been recognized that in certain industries or businesses, such as aviation, fire prevention, or law enforcement, a concern for public safety exists which might make it less difficult for an employer to prove that a

\textsuperscript{19} ADEA, 29 U.S.C. § 621(b) (1982). Congress set forth in the ADEA a statement of findings which indicates its primary concerns of age discrimination. These include older workers' abilities to retain or regain employment, the "deterioration of skill, morale, and employer acceptability" which results from long term unemployment (a common condition for older workers), and the effects on commerce of arbitrary age discrimination. ADEA, 29 U.S.C. § 621(a) (1982).

\textsuperscript{20} ADEA, 29 U.S.C. § 623(a) (1982). Section 623(a) prohibits an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." Id.

\textsuperscript{21} Id.

\textsuperscript{22} H.R. REP. No. 805, 90th Cong., 1st Sess. 2, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2220. The House Report stated "[i]t is enough that the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad guidelines for its implementation." Id.

\textsuperscript{23} Id. The Report cited as an example the railroad industry, whose work force contains a high number of older workers as a result of declines in employment and the exercise of seniority rights. Id.

\textsuperscript{24} Id. The case-by-case method was designated to serve as the underlying rule in the administration of the ADEA. Id.
mandatory retirement age is necessary.\footnote{See, e.g., Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 755 (7th Cir. 1982) (public safety is a factor which becomes an important legal concern). The Orzel court noted that a safety related situation does not relieve an employer from justifying the particular age chosen. \textit{Id.} See generally, 14 C.F.R. § 121-383(c) (1984) (FAA regulation requiring captains to retire at age sixty); 5 U.S.C. § 8335(b) (1982) (regulation requiring federal firefighters or law enforcement officers to retire at age fifty-five).} Section 623(f)(1) of the ADEA makes lawful an otherwise unlawful act if age is shown to be a bona fide occupational qualification (BFOQ) necessary to the operation of the business.\footnote{ADEA, 29 U.S.C. § 623(f)(1) (1982). Section 623(f)(1) condones otherwise unlawful acts under the ADEA if those acts are based on reasonable factors other than age. \textit{Id.}} Section 623 (f)(1) demonstrates the intent of Congress that the ADEA not prohibit employment decisions based on factors that may accompany age.\footnote{See Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1978) (the Court of Appeals for the First Circuit includes declining health, diminished vigor, and incompetence among employment factors related to advancing age).} Nor was the ADEA meant to require employers to hire workers who do not otherwise meet the qualifications of employment.\footnote{See, \textit{H.R. REP.} No. 805, 90th Cong. 1st Sess. 7, reprinted in 1967 \textit{U.S. CODE CONG. & AD NEWS} 2219-20. \textit{See also Reed, Age Discrimination of Airline Pilots: Effects of the Bona Fide Occupational Qualification 47 J. AIR L. & COM. 383 (1983).}} However, one commentator has noted that the use of age as a measure of personal characteristics ignores individual differences.\footnote{Thomas, \textit{Mandatory Retirement and Impact Discrimination Under the Age Discrimination in Employment Act: You’ll Get Yours When You’re 70, 17 Akron L. Rev.} 65, 67 (1983).} Use of age as a general measure of individual capabilities has confused Congress in its ongoing attempt to eliminate age discrimination in the workplace.\footnote{See id. at 74. Thomas notes that Congress has yet to define a point at which it would want to prohibit all stereotypes. For instance, § 623(f)(2) of the 1978 ADEA amendments would prohibit discharge or refusal to hire based on age, but would allow differential retirement plans based on age. \textit{Id.} at 73 n. 80.}

The ADEA has been amended three times since its passage in 1967.\footnote{See ADEA, 29 U.S.C. § 630(b)(1982) (amending 29 U.S.C. § 630(b)(1970)). This section was amended in 1974 to reduce from twenty-five to twenty the minimum number of employees needed to qualify an individual as an employer under the ADEA. The amendment also extended the scope of the ADEA to include federal and state governments in the definition of employer. \textit{Id.} Congress ex-
seniority system or employee benefit plan may require or permit the involuntary retirement of any individual because of the individual's age.\textsuperscript{32} Previously, the ADEA had been held to permit the mandatory retirement of employees protected under the legislation if such retirement was included in the terms of an employee benefit plan.\textsuperscript{33} The 1978 amendments show that such involuntary retirement of employees covered by the ADEA will no longer be permitted.\textsuperscript{34} Congress, in discussing the 1978 amendments, specifically disagreed with those cases which held that retirement plans which were in effect prior to the date of enactment of the ADEA were exempt under the amended section solely because they antedate the ADEA or the 1978 amendments.\textsuperscript{35}

\begin{footnotesize}
\textsuperscript{33} See United Airlines Inc. v. McMann, 434 U.S. 192 (1977) (United's retirement plan requiring plaintiff's retirement at age sixty was upheld). See H. Conf. Rep. No. 950, 95th Cong. 2d Sess. 7, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 504, 528-29 [hereinafter cited as Conference Report]. The Conference Report states: [t]he conferees agree that the purpose of the amendment to Section 4(f)(2) is to make absolutely clear one of the original purposes of the provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.\textsuperscript{Id.} The Fourth Circuit Court of Appeals held in United Airlines Inc. v. McMann, 542 F.2d 217 (1976), that a pre-age sixty-five retirement policy falls within the meaning of "subterfuge" (to evade the ADEA) unless an employer can show that the early retirement provision has an economic or business purpose other than arbitrary age discrimination. McMann, 542 F.2d at 221. The Supreme Court [in a decision rejected by the conferees, see Conference Report supra] reversed the Fourth Circuit Court of Appeals, finding "nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith... or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans." McMann, 434 U.S. at 203.

\end{footnotesize}
The Equal Employment Opportunity Commission (EEOC) published guidelines which aided the courts in defining a bona fide benefit plan. The EEOC’s action reflected two of the changes the ADEA underwent in 1978. Through the amendments Congress not only toughened the requirements for a bona fide benefit plan, but President Carter also transferred the responsibility and authority for enforcing the legislation from the Department of Labor to the EEOC. This was done pursuant to the President’s plan to consolidate the government’s equal employment effort. At least one commentator has noted that the transfer caused some confusion as to whether the Department of Labor guidelines or the EEOC guidelines on benefit plans are the principal authority.

The ADEA’s language closely parallels that of Title VII. When Congress debated Title VII, it was suggested that age be included as one of the proscribed criteria. The suggestion was rejected in favor of a directive to the Secretary of Labor to study age discrimination and report his findings to Congress. The Secretary’s resulting report formed a basis for the ADEA. The ADEA shares

36 46 Fed. Reg. 47,724 (1981). The EEOC’s interpretations require that the plan exist, pay actual benefits, and that its terms be accurately described in writing to employees. 29 C.F.R. § 860.120(b) (1985). See also, Age Discrimination, supra note 35, at 143. See generally Thomas supra note 29.


38 See King, supra note 34, at 20.

39 See Lorillard v. Pons, 434 U.S. 575, 584 (1978) (prohibitions of the ADEA were derived from the same words as Title VII); Laugesen v. Anaconda, 510 F.2d 307, 311 (6th Cir. 1975) (similarity between Title VII and the ADEA hardly accidental); See generally Player, Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate? 14 U. Tol. L. Rev. 1261 (1983) (examines applicability of impact analysis used in Title VII litigation to ADEA litigation).

40 See Player, supra note 39, at 1263.

41 Id.

the same substantive prohibitions, and the same major defenses, as Title VII. Title VII forbids discrimination based on race, color, religion, sex, or national origin. The ADEA forbids discrimination based on age. Therefore, when ADEA litigation began, Title VII cases were used as guidelines.


(a) Employers. It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; . . .

with ADEA, 29 U.S.C. § 623 (1982) which provides:

(a) Employer practices. It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age . . .

44 Compare Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1964), which provides:

(e) Notwithstanding any other provision of this title . . . (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise. . .

with ADEA, 29 U.S.C. § 623(f) (1982), which provides:

It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

45 See Player, supra note 39, at 1264. Player also notes the differences between Title VII and the ADEA: the ADEA provides trial by jury, Title VII does not; the ADEA allows distinctions based on bona fide benefit plans and on reasonable factors other than age, Title VII does not. Id.


48 See Levien, The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments 13 Duq. L. Rev. 227 (1974). The ADEA was rarely enforced in its early years. As of December, 1971, there appeared to be only two reported cases under the ADEA. Levien credits increased public awareness and a more active government enforcement policy with the eventual increase in ADEA litigation. Id. at 227.

49 See id. at 249; Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (ADEA requires an employee to commence a proceeding with the appropriate state agency in order to screen cases for the federal courts just as Title VII does); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 411 (9th Cir. 1981) (substantive rights arising under ADEA are construed similarly to Title VII substantive rights);
B. Procedural Development of ADEA Case Law

The ADEA provides the procedure by which an aggrieved party may bring suit.\(^{50}\) Congress did not, however, set forth the methods by which the courts should proceed in deciding cases brought under the ADEA.\(^{51}\) In \textit{Loeb v. Textron} the court borrowed a burden of production test from Title VII litigation.\(^{52}\) The plaintiff, Frank Loeb, was involuntarily terminated at the age of fifty-four for alleged poor job performance.\(^{53}\) The jury returned a verdict for Loeb pursuant to instructions using a Title VII test regarding burdens of production.\(^{54}\) The trial court instructed the jury that a plaintiff may establish a prima facie case of discrimination by showing that 1) he was qualified for a job from which he was fired or for which he was denied employment, and 2) that the employer sought a replacement with qualifications similar to the plaintiff's.\(^{55}\) On appeal, Textron challenged the verdict largely

\(^{50}\) Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied sub nom, Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975) (applied burden of proof standard for determining bona fide occupation qualifications in Title VII litigation to ADEA litigation); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (burden of production test used in Title VII litigation may be used in ADEA cases although not automatically); Wilson v. Sealtest Foods Div. of Kraftco Corp., 501 F.2d 84 (5th Cir. 1974) (applied burden of production test developed in and used for Title VII cases to ADEA cases). \textit{See also Reed, supra} note 28.

\(^{51}\) ADEA, 29 U.S.C. § 626(c) (1982). The ADEA requires that an individual give the Secretary of Labor sixty days notice of an intent to file an ADEA action to avoid stale claims. \textit{Id.} at § 626(d), (e). This notification must ordinarily be filed within one hundred eighty days of the alleged unlawful practice. \textit{Id.} The Secretary of Labor then notifies all prospective defendants and the parties attempt to solve the problem through reconciliation. \textit{Id.} There is a two-year statute of limitations on such actions. However, if the violation is willful the limitation period is three years. \textit{Id.} \textit{See Levien, supra} note 48, at 231.

\(^{52}\) \textit{Loeb v. Textron, 600 F.2d 1003, 1010 (1st Cir. 1978).}

\(^{53}\) \textit{Id. at 1007. Loeb served as Textron's International Sales Manager prior to his involuntary retirement. Id.}

\(^{54}\) \textit{See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See infra note 66 and accompanying text for discussion of Title VII test developed in McDonnell Douglas.}

\(^{55}\) \textit{Loeb, 600 F.2d at 1008. The trial court in Loeb based its instruction on McDonnell Douglas guidelines. See also Teamsters v. United States, 431 U.S. 324, 358}
on the ground that the Title VII burden of production test should not be used for ADEA litigation. The First Circuit Court of Appeals rejected Textron's challenge. The court cited the suggestion of the United States Supreme Court that the test used by the trial court "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

The court also found that the Title VII test "addresses two problems that exist in most employment discrimination cases." Those problems involve the unavailability of direct evidence of discrimination, and the lack of accessibility to documents regarding the employee's dismissal. The Title VII burden of production test itself was formulated in McDonnell Douglas Corp. v. Green, a non-jury case in which a black civil activist employee was fired. Although the employee qualified for a newly opened position, McDonnell Douglas failed to rehire him for the position. The United States Supreme Court affirmed the employee's right to make a prima facie showing of discrimination by establishing that his rejection did not result from either lack of qualifications or absence of a job opening, the two most common reasons for such a rejection. The holding in McDonnell Douglas permitted the

(1976) (prima facie proof required in McDonnell Douglas test not necessarily applicable in all respects to different factual situations).

56 Loeb, 600 F.2d at 1009. Textron also argued that if the Title VII test applied, Loeb failed to meet the requirements of the test. Id. at 1010. Textron further argued that the award of liquidated damages by the trial court was unauthorized because a specific finding of bad faith was not made. Id. at 1010. See also infra note 150 and accompanying text.

57 Loeb, 600 F.2d at 1010.
58 Id. at 1014. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (when all legitimate reasons for discrimination are rejected as reasons for the employer's actions, more likely than not employer based his decision on an impermissible factor).
59 Loeb, 600 F.2d at 1014.
61 Id. at 796.
62 Id.
63 Id. See infra note 66 and accompanying text for discussion of prima facie showing of discrimination.
plaintiff to litigate his claim even though direct evidence was unavailable. Through this procedure, the employee was also given an explanation from the employer for the action taken.

The role of the prima facie case in the burden of production test is to raise an inference of discrimination because the employer's acts, unless otherwise explained, are presumed to be based on impermissible factors. Once the employee established his prima facie case, the court allocated a burden of production on the employer. The employer must "articulate some legitimate, nondiscrimi-

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64 Loeb, 600 F.2d at 1014.
65 Id.
66 See generally Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980) (creates presumption that employer unlawfully discriminates against employee); Furnco Construction Corp. v. Waters, 438 U.S. at 567 (more often than not people do not act in an arbitrary manner, especially in making business decisions); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1976) (employer's decision to reject an applicant who belongs to a minority does not prove decision was based on the employee's minority status); Loeb, 600 F.2d at 1013.

The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). McDonnell Douglas should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense.

Burdine, 450 U.S. at n. 7. One method by which the United States Supreme Court determined that an employee may establish a prima facie case is for the employee to show the following: (1) that he belongs to a minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that the position remained open after his rejection and the employer still sought applicants with the employee's qualifications. McDonnell Douglas, 411 U.S. at 802. The First Circuit Court of Appeals stated in Loeb v. Textron, Inc. that the McDonnell Douglas test is designed to assure that "plaintiff [has] his day in court despite the unavailability of direct evidence." Therefore, where direct evidence of discrimination is available, the McDonnell Douglas test is not needed. Loeb, 600 F.2d at 1014. See McDonnell Douglas, 411 U.S. at 802. A complainant may also proceed by offering evidence which directly indicates a policy or intention of using age as a factor in the process of selecting those employees who would be hired or fired, or the use of age as a factor in other employment decisions. Laugesen v. Anaconda Co., 510 F.2d 307, 310. For example, an admission by the defendant, or a state of facts so clear that no reasonable person could disagree, could constitute direct evidence of discrimination. Id. at 310.
natory reason for the employee's rejection." If the employer is able to validly assert an exception provided in the ADEA, the burden of proof shifts to the employee. The employee then must demonstrate that the reason given by the defendant was a pretext or subterfuge to evade the ADEA. If the employer fails to produce a nondiscriminatory reason for the employee's rejection, then the employee prevails.

The McDonnell Douglas test is most helpful if no direct evidence of discrimination is available. However, if such direct evidence is available, the McDonnell Douglas test is not needed. In Laugesen v. Anaconda Co., the Sixth Circuit Court of Appeals applied a modified version of the McDonnell Douglas test. The defendant Anaconda

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67 McDonnell Douglas, 411 U.S. at 802. It is possible that age, sex, race, or religion could be a bona fide occupational qualification for the job which would except the discrimination pursuant to the ADEA. See ADEA, 29 U.S.C. § 623(f) (1982).

68 The ADEA provides that acts otherwise prohibited by the ADEA are lawful where (1) age is a bona fide occupational qualification or where the differentiation is based on reasonable factors other than age; (2) such acts are done pursuant to a bona fide seniority system or any bona fide employment benefit plan which is not a subterfuge to evade the purpose of this chapter; and (3) where the acts are a discharge or disciplinary acts done for good cause. ADEA 29 U.S.C. § 624(f) (1982).

70 See Burdine, 450 U.S. at 254 (employee need not, but if able to may, show that the discriminatory act was motivated by prohibited reasons) and Loeb, 600 F.2d at 1014 (McDonnell Douglas prima facie case assures plaintiff his day in court despite the lack of direct evidence).

71 See Loeb, 600 F.2d at 1018. The court stated that the judge should not force any case into the McDonnell Douglas format. The First Circuit Court of Appeals reasoned that in cases in which a plaintiff's evidence of discrimination relies heavily upon direct evidence of discriminatory motive, the McDonnell Douglas formula would not be required for a jury instruction. Id. The formula is also unnecessary where there is direct or circumstantial evidence that supports an inference of discrimination. Id.

72 Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). In Laugesen the court stated "we believe it would be inappropriate simply to borrow and apply [McDonnell Douglas] guidelines automatically." 510 F.2d at 312. Noting differences in the criteria of the ADEA (age) and Title VII (race, religion, sex, color, national origin) the Sixth Circuit Court of Appeals stated:

"the more strict approach which is evident in the treatment of a Title VII race discrimination case in McDonnell Douglas v. Green may not be desirable here. The progression of age is a universal human pro-
permanently discharged the fifty-six year old plaintiff from employment as a result of a reorganizing effort. At trial, Laugesen did not offer evidence directly indicating a policy or intention of using age as a factor in Anaconda's employment decisions. The jury rendered a verdict in favor of Anaconda, which raised questions concerning the extent McDonnell Douglas guidelines may be applied to ADEA situations. The appellate court reversed and remanded. The court approved the use of McDonnell Douglas guidelines but ruled that the jury instructions failed to make clear that Laugesen could recover even if age was one of many factors which determined whether he would remain with Anaconda or be fired.

The McDonnell Douglas guidelines made a smooth transi-

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Id. at 312 n.4.

Laugesen, 510 F.2d at 310-11.

Id. The basis of the plaintiff's termination in Laugesen, a separation notice, contained evaluations by the employee's manager. Under a section provided for the manager's general comments, the manager had noted "too many years in job." Id.

Laugesen, 510 F.2d at 310. Anaconda sought to justify the alleged discrimination as a bona fide occupational qualification (BFOQ) necessary to the normal operation of the business. Id. The BFOQ defense is provided by § 623(f)(1) of the ADEA. 29 U.S.C. § 623 (f)(1) (1982).

Laugesen, 510 F.2d at 317. The court reversed and remanded because "it was essential for the jury to understand . . . that there could be more than one factor in the decision to discharge and that he was nevertheless entitled to recover if one such factor was his age and in fact it made a difference in determining whether he was to be retained or discharged." Id. The Sixth Circuit Court of Appeals ruled that the instructions governing a plaintiff's right to recover state that it is unlawful to discharge an individual "merely because of his age," and the plaintiff has the burden of showing by a preponderance of the evidence that he was discharged because of his age. Id. The instructions do not require that age be the sole or exclusive cause of discharge. Cf. King v. Laborers Int'l Union, 443 F.2d 273 (6th Cir. 1973) (Title VII cases in which the court stated that where discrimination on basis of age, race, color, religion, sex or national origin was a causal factor for refusal to hire or for discharge, the aggrieved party is statutorily entitled to recover). See also ADEA Interpretations 29 C.F.R. § 860.103(c)(1985) (Secretary of Labor stated in interpreting ADEA regulations that age must be one factor, but need not be the determining factor, in decision to discharge).
tion from Title VII cases to ADEA cases. The United States Supreme Court termed the guidelines an "orderly way to evaluate evidence of discrimination." The First Circuit Court of Appeals said "we see no inherent reason why it is any less a 'sensible, orderly way to evaluate the evidence' in an age discrimination case than in any other. McDonnell Douglas meets a problem of proof that may be present in any case where motivation is an issue but does not alter the traditional burdens of proof." Because of the similarities between the ADEA and Title VII, both in their aims to eliminate discrimination from the workplace and in their substantive provisions, it naturally followed that the methods and burdens of proof used under one may be used by the other. As a result, courts hearing ADEA cases consistently apply the McDonnell Douglas guidelines where direct evidence of discrimination is not available.

C. The Bona Fide Occupational Qualification (BFOQ)

1. Age as a BFOQ

The ADEA provides affirmative defenses for its general

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77 See also Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978) (guidelines set forth in McDonnell Douglas generally applicable to ADEA cases); Kentrogi v. Frontier Airlines, 585 F.2d 967, 969 (10th Cir. 1978) (McDonnell Douglas rules apply to age discrimination cases); Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 592 (5th Cir. 1978) (requiring a defendant to prove differentiating factors other than age were evenly applied to similarly situated employees is inconsistent with Title VII case law); Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977) (evidentiary presumptions and burdens of proof used in Title VII cases will clarify standards for ADEA actions), cert. denied, 436 U.S. 913 (1978); Loeb, 600 F.2d at 1010 (operative principles of McDonnell Douglas applicable in age discrimination cases).

78 Furnco Construction Corp. v. Waters, 438 U.S. at 577. See also supra note 49 and accompanying text.

79 Loeb, 600 F.2d at 1015. See also Lorillard, 434 U.S. at 584. The Supreme Court stated, "[t]here are important similarities between the two statutes [the ADEA and Title VII] . . . in their aims . . . and in their substantive procedures." Id.

80 See Loeb, 600 F.2d at 1015 (court ruled nothing in the ADEA or Title VII precluded the use by either of the same guidelines).

81 See supra notes 66 and 77 and accompanying text for discussion of proof needed for prima facie case.
prohibitions of age discrimination to employers involved in age discrimination litigation.\( ^{82} \) Section 623(f)(1) of the ADEA provides that "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age," the ADEA prohibitions do not apply.\( ^{83} \) The BFOQ exception to the ADEA is narrowly construed, and the burden of proof required to establish a BFOQ defense is on the employer.\( ^{84} \)

As with the procedural development of the ADEA, the interpretation of the BFOQ in ADEA cases borrowed some guidelines from Title VII cases.\( ^{85} \) In \textit{Weeks v. Southern Bell Tel. & Tel. Co.}\( ^{86} \) the plaintiff, a female employee of the defendant, applied for a switchman position but was informed by Southern Bell that it would not assign women to that position.\( ^{87} \) Mrs. Weeks filed a sex discrimination suit under Title VII.\( ^{88} \) Mrs. Weeks alleged that she


\( ^{84} \) 29 C.F.R. § 860.102(b) (1985) \textit{See also} Levien, \textit{supra} note 48, at 238 (discussion of first use of BFOQ defense in ADEA litigation).

\( ^{85} \) \textit{See} Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(e)(1). Title VII of the Civil Rights Act provides that it shall not be unlawful for an employer to hire and employ persons on the basis of race, color, religion, sex, or national origin where race, color, religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.

\( ^{86} \) \textit{Weeks v. Southern Bell Tel. & Tel. Co.}, 408 F.2d 228 (5th Cir. 1969). Mrs. Weeks, the plaintiff, had been employed by defendant for nineteen years when she applied for a switchman position. \textit{Id.} at 230.

\( ^{87} \) \textit{Id.}

\( ^{88} \) \textit{Id.} \textit{The Civil Rights Act of 1964 states in pertinent part:}

\( ^{a} \) Employer practices.

\( ^{a} \) It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or (2) to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's sex . . . .
was denied a position for which she was qualified solely because she was a woman.\textsuperscript{89} Southern Bell's affirmative defense to Mrs. Week's prima facie case was that the switchman position fit within the Title VII BFOQ exception because the job required the lifting equipment and "strenuous activity."\textsuperscript{90} The Court of Appeals for the Fifth Circuit-recognized the danger of allowing a broad, stereotypical interpretation of the BFOQ exception.\textsuperscript{91} The court held that in order for Southern Bell to rely on the BFOQ exception the "employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."\textsuperscript{92} The court rejected Southern Bell's stereotypical contentions that the "strenuous activity" accompanying the switchman position justified a BFOQ exception and denied its affirmative defense.\textsuperscript{93}

In \textit{Smallwood v. United Air Lines},\textsuperscript{94} the Court of Appeals for the Fourth Circuit allocated a similar burden of proof to the defendant employer.\textsuperscript{95} Smallwood, a forty-eight year old captain and first officer with ten years of experi-

\textsuperscript{89} Southern Bell, in effect, admitted a prima facie violation of the Civil Rights Act by hiring a man with less seniority than Mrs. Weeks for the switchman position. \textit{Id.} at 231. Southern Bell's usual practice is to award the job to the most senior applicant. \textit{Id.}

\textsuperscript{90} \textit{Id.} at 234. See \textit{supra} note 44 and accompanying text for a discussion of Title VII and ADEA BFOQ defenses.

\textsuperscript{91} See \textit{Weeks}, 408 F.2d at 235. The court found that a stereotypical construction of a BFOQ was inconsistent with the purpose of the ADEA to provide a foundation in law for the principle of nondiscrimination. \textit{Id.}

\textsuperscript{92} \textit{Weeks}, 408 F.2d at 235-36.

\textsuperscript{93} \textit{Id.} See also Reed, \textit{supra} note 28, at 387 (subsequent test requiring employer to show he had a factual basis for believing that all or substantially all of those discriminated against would be unable to safely and efficiently perform the job).

\textsuperscript{94} \textit{Smallwood v. United Air Lines}, 661 F.2d 303 (4th Cir. 1981), \textit{cert. denied}, 456 U.S. 1007 (1982). See Reed, \textit{supra} note 28, at 395-402. Reed notes that the "all or substantially all" test as formulated in \textit{Weeks} is not the only test that has been used in ADEA airline pilot cases. \textit{Id.} Another test formulated in \textit{Diaz v. Pan American World Airways}, 442 F.2d 385 (5th Cir. 1971), would require proof that the employment of older workers would undermine the essence of the business operation. \textit{Id.} at 400.

\textsuperscript{95} \textit{Smallwood}, 661 F.2d at 307.
ence, applied to United for a flight engineer position. United informed Smallwood that it only processed applications for applicants twenty-one to thirty-five years of age. Smallwood subsequently filed an ADEA claim against United. The trial court ruled for United, adopting its contention that the age limitation was a BFOQ because hiring older pilots would impede the safe, effective, and coordinated functioning of the three cockpit officers. The Court of Appeals for the Fourth Circuit reversed, holding that United failed to show a relationship between the age at which pilots are hired and airline safety. Adopting tests from Title VII BFOQ exception cases, the court set forth the requirements for an ADEA defendant to meet in order to justify a BFOQ defense. A defendant must show that the job qualifications he invokes to justify his discrimination are reasonably necessary to the essence of his business and that a factual basis exists for believing that all or substantially all persons over a certain age could not perform the duties of the job safely and efficiently. Alternatively, an ADEA defendant may show that it is impossible or impractical to ascertain the difference between older employees who can and

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96 Id. at 305-06. United, the defendant, responded to the plaintiff’s application for a flight officer position by sending a form letter to the plaintiff which listed basic qualifications. Next to the “Age 21 through 29” qualification a pencil mark appeared. Id. at 306.

97 Id. Smallwood wrote United that in view of the national policy against age discrimination, his application should be reconsidered. Id. Conciliation hearings between United and Smallwood were unsuccessful. Id.

98 Id.

99 Id.

100 Id. at 309. The court found that the alleged harm to the “crew concept,” the safe, coordinated functioning of cockpit officers, was a function of prior experience, not the age of the pilot at the time he is hired. Id. at 308.

101 Id. at 307. See Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir. 1970) (Title VII case of male being denied position as flight cabin attendant), cert. denied, 404 U.S. 950 (1971). The district court found for the defendant, ruling that females were superior in the non-mechanical aspects of the job. Id. at 387. The court of appeals reversed, finding that discrimination based on sex is valid only when the essence of the business operation is undermined by not hiring members of one sex exclusively. Id. at 388.

102 Smallwood, 661 F.2d at 307.
cannot perform the job safely.\textsuperscript{103}

One commentator noted that in hearing and deciding airline pilot age discrimination cases involving BFOQ exceptions, triers of fact face a paradox.\textsuperscript{104} While the Secretary of Transportation requires a high degree of safety in the transport of passengers, the ADEA prohibits age discrimination in the hiring of those most responsible for passenger safety.\textsuperscript{105} It has been suggested that the high risks involved in airline transportation and the concern for passenger safety should serve to lighten the burden on the airlines in establishing a BFOQ exception.\textsuperscript{106}

2. Seniority Systems and Retirement Plans: The 1978 ADEA Amendment

The ADEA, prior to the 1978 amendments, prohibited mandatory retirement of protected workers prior to age sixty-five, unless pursuant to a "bona fide seniority system . . . or benefit plan."\textsuperscript{107} One commentator asserts that United Airlines v. McMann\textsuperscript{108} set the amendment process in motion.\textsuperscript{109} United hired McMann in 1944 and in 1973, just after McMann’s sixtieth birthday, retired him pursuant to the mandatory requirements of United’s Employee

\textsuperscript{103} Criswell v. Western Airlines, Inc., 709 F.2d 544, 551 (9th Cir. 1983). The "all or substantially all" test was adopted by the Ninth Circuit in Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980). See also Criswell, 709 F.2d at 550-51. In the plaintiff’s attempt to downbid from captain to flight engineer, the court ruled that since the BFOQ defense was raised only for the position of flight engineer, it was unnecessary to include in the jury’s instructions the rationale of the FAA’s Age 60 Rule because that rule has never been applied to flight engineers. Id. at 551.

\textsuperscript{104} See Reed, supra note 28, at 404-05.

\textsuperscript{105} Id. at 404.

\textsuperscript{106} Id. at 405.


\textsuperscript{108} United Air Lines v. McMann, 434 U.S. 192 (1977). The United States Supreme Court decision in McMann was preceded by indecision of the Secretary of Labor on the issue and by divergent lower court opinions which created the need for the amendment. Thomas, supra note 29, at 69.

\textsuperscript{109} Thomas, supra note 29, at 69. Thomas states that the Congressional intent of the amendment to the benefit plan exception was to correct the Supreme Court’s McMann interpretation. Id. at 81.
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Plan. The district court held that any action required by a plan that predated the effective date of the ADEA could not be a subterfuge to evade the ADEA. The Court of Appeals for the Fourth Circuit reversed and required United to show the mandatory retirement provision of the plan had some economic or business purpose and was not adopted or maintained as subterfuge. United appealed to the United States Supreme Court. The Supreme Court, in reviewing the case, defined subterfuge as a "scheme, plan, stratagem, or artifice of evasion." The Court reasoned that no plan adopted prior to the effective date of the ADEA could be a subterfuge, and therefore, employers did not need to show that mandatory retirement was due to a business necessity.

In response to the McMann decision, Congress amended the ADEA for the purpose of expressing approval of the reasoning of the Fourth Circuit Court of Appeals. In hearings before the United States House of Representatives, a proponent of the 1978 amendment tes-

110 United Air Lines v. McMann, 434 U.S. at 193-94. McMann held various positions with United during his employment there. Id. at 193.
111 United Air Lines v. McMann, 542 F.2d 217 (4th Cir. 1976), rev'd, 434 U.S. 192 (1977). McMann received a Department of Labor opinion which indicated United's plan was bona fide and did not appear to be a subterfuge to evade the ADEA, yet he still filed suit. McMann, 542 F.2d at 219-20.
112 Id. at 218. The district court agreed with United's reliance on Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974). In Brennan the court concluded that pre-sixty-five retirement as required by a plan which pre-dated the ADEA was valid, since such a plan could not be subterfuge. Id. But see Zinger v. Blanchett, 549 F.2d 901 (3d Cir. 1977) (court concluded that involuntary retirement pursuant to bona fide plan would not be subterfuge, but pre-ADEA plans were not automatically exempted simply because they preceded the legislation).
113 McMann, 542 F.2d at 221.
115 McMann, 434 U.S. at 203. The Court stated "[i]n the context of this statute [ADEA], 'subterfuge' must be given its ordinary meaning and we must assume Congress intended it in that sense." Id.
116 Id. Justice Marshall, in his dissent, argued that if the majority's interpretation was correct, it could result in employers requiring employees to retire before age sixty-five, while under another ADEA provision the employer would have to rehire the same employee if that employee re-applied. Id. at 217.
tified that mandatory retirement ages are arbitrary, a substitute for good personnel policies, and merely an administrative convenience. A medical authority suggested that declines in physical and mental health often accompany the enforced idleness caused by involuntary retirement. One opponent of the amendment argued that passage could cause confusion to those older workers wanting to retire, and that to change the system would disrupt many effective retirement plans. He claimed, in essence, that the solution is more income for older workers, not a longer working life. After hearing the testimony of various witnesses, Congress enacted the 1978 ADEA amendment. The amendment requires that employers treat protected workers as any other employee in any mandatory retirement action. Employers with collective bargaining agreements were given until January 1980, or until the agreements expired, to comply with the amendment.


119 Id. at 5.

120 Id.

121 Age Discrimination in Employment Amendments of 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 173, 177 (1977) (testimony of Dr. Albert Gunn, J.D., M.D., Assistant Director for Hospitals, The University of Texas System Cancer Center, M.D. Anderson Hospital, Hospital and Tumor Institute, Houston, Texas). Dr. Gunn suggests "loss of status, lack of meaningful activity, fear of becoming dependent, and . . . isolation" may contribute to the decline in health of persons who are mandatorily retired. Id.

122 Hearings, supra note 120, Pt. 1 at 64 (testimony of H. J. Lartigue of the Exxon Co., U.S.A.). In support of Exxon's mandatory retirement policy, Mr. Lartigue noted that the policy provided equitable treatment for all employees under the policy, that the policy had an unusually broad scope, and that Exxon employees continued to demonstrate a willingness to retire before age sixty-five. Id. at 67.

123 Id. at 68.

124 Hearings, supra note 118, at 67. See Thomas, supra note 29, at 82.

125 See supra notes 32-34.

126 See Thomas, supra note 29, at 82.

D. The ADEA and the Aviation Industry

The 1978 ADEA Amendments directly conflicted with the then existing FAA regulation that prohibited anyone over age sixty from serving as a pilot of a commercial carrier.

In 1978, authority and responsibility for enforcing the ADEA was transferred from the Department of Labor to the EEOC.

In setting forth its official interpretations of the ADEA, the EEOC declined to include specific examples of BFOQ's, the FAA Age 60 Rule in particular, because it wished to avoid the appearance of expressly approving them. Instead, the EEOC clarified its position on the requirements for establishing a BFOQ following the standards enunciated by the Fourth Circuit Court of Appeals and including the business necessity standard, linking the ADEA and Title VII yet again.

The conflict between the 1978 ADEA Amendments and

\[\text{footnote text}\]
the FAA Age 60 Rule for commercial airline pilots has often been addressed.\textsuperscript{133} The FAA rule was upheld under an abuse of discretion standard in *Starr v. Federal Aviation Administration*.\textsuperscript{134} A pilot who filed a petition for exemption from the FAA Age 60 Rule believed his physical condition warranted the exemption.\textsuperscript{135} The FAA contended that the rule should allow no exemption, regardless of the pilot's condition.\textsuperscript{136} The Court of Appeals for the Seventh Circuit agreed with the FAA's argument that just because the rule can be challenged does not mean exemptions must be granted.\textsuperscript{137} Reasoning that the FAA has the discretion to establish a no-exemption policy until satisfactory medical standards are available to adequately demonstrate the absence of health related risk factors, the court held that the FAA's denial of an exemption to Captain Starr was not an abuse of that discretion.\textsuperscript{138}

Two other circuits have heard challenges of the Age 60 Rule on substantive and procedural grounds. Both circuits upheld the method of enactment and the FAA's decision to adopt the rule.\textsuperscript{139} However, courts have been unwilling to uphold bona fide occupational qualifications solely on the basis that an appropriate federal agency de-

\textsuperscript{133} In TWA v. Thurston, for example, the Supreme Court noted that "[i]n this litigation, the respondents have not challenged TWA's claim that the FAA regulation establishes a BFOQ for the position of captain. The EEOC guidelines, however, do not list the FAA's age 60 rule as an example." *Thurston*, 105 S.Ct. at 622 n. 17.

\textsuperscript{134} *Starr v. F.A.A.*, 589 F.2d 307 (7th Cir. 1978).

\textsuperscript{135} *Id.* at 309. The Federal Aviation Act provides "[t]he Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest." 49 U.S.C. § 1421(c) (1982). Doctors who had previously evaluated Captain Starr testified that he was in excellent health before and at the time of his filing for exemption. No doctor found evidence of risk factors which would indicate a potential stroke. *Starr*, 589 F.2d at 309.

\textsuperscript{136} *Starr*, 589 F.2d at 310.

\textsuperscript{137} *Id.* at 312. The court recognized two benefits to the no-exemption policy: (1) potential petitioners are notified of the administrative hurdle before investing time and money; and (2) standards are established to prevent ad hoc judgments based on trivial differences. *Id.*

\textsuperscript{138} *Id.* at 314.

terminated that age is a BFOQ for the particular job. Instead, the employer is required to meet the "reasonably necessary" criteria set forth for establishing a valid BFOQ defense in ADEA litigation.

E. Willfulness

1. Legislative History

The ADEA provides that the rights created by the legislation are to be enforced in accordance with the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA). The original bill imposed criminal liability for willful violations in accordance with the FLSA. In debating the bill, however, Senator Jacob Javits of New York suggested that "difficult problems of proof . . .

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140 See Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 750 (7th Cir. 1983) (presence of statutorily mandated retirement age for federal firefighters does not automatically establish valid BFOQ defense); EEOC v. City of St. Paul, 671 F.2d 1162, 1166 (8th Cir. 1982) (general rule in circuit is that employer had burden of proving that the BFOQ exception applies despite existence of legislative determination); Tuohy v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir. 1982) (court expressly rejected lower court's conclusion that FAA Age 60 Rule preempted further inquiry into validity of BFOQ defense).

141 See Orzel, 697 F.2d at 750. The court stated "we hold that to avoid liability . . . the City must still demonstrate, by objective and credible evidence, that its compulsory retirement rule qualifies as a bona fide occupational qualification reasonably necessary to the normal operation of the particular business in question," Id. (quoting 29 U.S.C. § 623(f)(1)(1976)); EEOC v. City of St. Paul, 671 F.2d at 1166 (burden requires employer to show factual basis for believing that substantially all older employees are unable to perform their duties safely and efficiently, or that older employees have traits precluding safe and efficient job performance unascertainable by means other than by knowledge of employee's age); Tuohy v. Ford Motor Co., 675 F.2d 842, 845. The court found that "the presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low. However, this is quite different from dispensing with the requirement of necessity and holding that a BFOQ has been established as a matter of law because adoption by another body of a rule based on age was reasonable." Id.


would arise under a criminal provision” because subsequent employer invocation of the Fifth Amendment could hinder investigation, conciliation, and enforcement. To avoid such problems, Senator Javits suggested that double damage liability should replace the FLSA’s criminal provision. The original ADEA of 1967 included this amendment.

2. Willfulness Under the ADEA

Because the remedies and procedures of the FLSA are incorporated in the ADEA, several circuits automatically adopted the definition of “willful violation” used under the FLSA. That definition finds an employer’s conduct to be willful only if he violated the FLSA in bad faith. In Lorillard v. Pons, the United States Supreme Court had the opportunity to correlate the ADEA and the FLSA provisions. The ADEA House manager, Senator Javits, stated that the ADEA “incorporates by reference, to the greatest extent possible, the provisions of the [FLSA].”

145 Id. Senator Javit’s proposed amendment was adopted with slight modification. See ADEA, 29 U.S. C. § 626(b) (1982).
147 See Nabob Oil Co. v. United States, 190 F.2d 478, 480 (10th Cir.) cert. denied, 342 U.S. 876 (1951) (court found it sufficient to constitute willfulness if the act was deliberate, voluntary, and intentional as distinguished from one committed through inadvertence, accident or by ordinary negligence). Generally, a FLSA violation is willful if the employer wholly disregards the law without making a reasonable effort to find out whether his actions constitute a violation of the law. Id.

148 See Portal-to-Portal Pay Act § 11, 29 U.S.C. § 260 (1982) [hereinafter cited as PPA]. Section 11 of the PPA states that “if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act,” liquidated damages may not be awarded. Cf. Nabob, 190 F.2d at 480. The court recognized that “offenses ordinarily involve moral turpitude but . . . such an evil purpose or criminal intent need not exist.” See also Loeb, 600 F.2d 1003, 1020 (specific finding of the employer’s bad faith is not needed before liquidated damages may be awarded).
150 Id. at 580-82.
The Court noted the Senator's statement and recognized that the ADEA does provide for liquidated damages where willful violations occur. However, the Court also noted that the ADEA does not refer to section eleven of the Portal-to-Portal Pay Act, which is incorporated in the FLSA. That section requires that a violation must be found to have been committed in bad faith before it is considered willful.

In ADEA cases the definition of willful has usually paralleled that of FLSA cases that preceded the Portal-to-Portal Pay Act. Some courts in hearing FLSA cases have recently attempted to broaden the scope of an ADEA "willful violation." These courts advocate the imposition of liquidated damages where an act or omission is such that the "employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions."

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153 Lorillard, 434 U.S. at 581 n.8. See Fair Labor Standards Act § 11, 29 U.S.C. § 260 (1970 & Supp. 1985). Contra Hays v. Republic Steel Corp., 531 F.2d 1307, 1311 (5th Cir. 1976) (although liquidated damages are payable only if ADEA violation is willful, it should not be construed to mean such damages are always payable if a violation is willful).
155 See Hays, 531 F.2d at 1311. See also Orzel v. City of Wauwatosa Fire Dept., 697 F.2d at 759 (employer knew or reasonably should have known of ADEA requirements, and knew or reasonably should have known its act was inconsistent with requirements). See supra notes 140-41 for a discussion of Orzel.
156 See EEOC v. Central Kansas Medical Center, 705 F.2d 1270, 1274 (10th Cir. 1983) (hospital paid male janitors more than its female janitors although males and females performed similar tasks). See also Marshal v. Union Pac. Motor Freight Co., 650 F.2d 1085, 1092 (9th Cir. 1981) (basic duties of dispatchers do not directly affect safety of operation of motor vehicles, therefore, employer is obliged to pay overtime compensation to them and failure to do so is willful where employer was or should have been cognizant of an appreciable possibility that employees were covered under statute); Mistretta v. Sandia Corp., 639 F.2d 588, 595 (10th Cir. 1980) (reduction in work force resulted in termination of protected ADEA individuals: knowledge of violation was "in the picture", therefore, violation was willful); Laffey v. Northwest Airlines, 567 F.2d 429, 461-63 (D.C. Cir. 1976) (policy denying female stewardesses equal pay as male flight attendants was willful violation because employer knew of Equal Pay Act and its contents and understood prohibitions of different salary levels), cert. denied, 434 U.S. 1086 (1978); Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974) (employer's wage and bookkeeping practices were willful violation because employer knew of existence of FLSA and heard talk that amendments covered his employees); Coleman v.
III. TWA v. Thurston

The United States Supreme Court in *TWA v. Thurston* encountered TWA's transfer policy, the FAA Age 60 Rule, and the 1978 ADEA Amendments simultaneously. The Court first recognized that TWA's transfer policy was discriminatory on its face, as it allowed captains displaced for reasons other than age to "bump" less senior flight engineers but did not allow those captains who were excluded solely due to age to do the same. Because the plaintiffs were able to show direct proof of discrimination, a prima facie case of age discrimination, the court found no need to consider the shifting production burdens of the *McDonnell Douglas* test. The Supreme Court ruled that although TWA is not required to grant disqualified captains privileges of employment, once it grants those privileges to some disqualified captains, it cannot deny them to captains disqualified because of age.

Hoping to refute the plaintiffs' prima facie case, TWA raised two affirmative defenses: (1) the discharge of plaintiffs was lawful because age is a BFOQ for the position of captain; and (2) its retirement policy was part of a bona fide seniority system and therefore excluded from ADEA coverage. The Court recognized that TWA had two age related policies: (1) captains, after reaching the age of sixty, were no longer allowed to serve in that capacity; and

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1. See supra notes 3-9 and accompanying text for discussion of TWA's transfer policy.
2. See supra note 2.
5. *Id.* at 622.
6. *Id.* See also supra notes 66-69 and accompanying text for an explanation of the *McDonnell Douglas* test.
7. *Thurston*, 105 S.Ct. at 621. *Cf.* *Hishon v. King & Spaulding*, 467 U.S. 69, 74 (1984) (benefit which is part of employment relationship not to be given in discriminatory fashion even if employer is free not to allow privilege at all).
(2) captains displaced for reasons other than age enjoyed transfer privileges that age-displaced captains did not.\textsuperscript{165} Plaintiffs did not contest the FAA Age 60 Rule that TWA incorporated into its employment policy.\textsuperscript{166} Instead, the plaintiffs urged the Court to consider only the job of flight engineer as the job to which plaintiffs were allegedly discriminatorily refused to transfer.\textsuperscript{167} Age under sixty is not a BFOQ for the position of flight engineer,\textsuperscript{168} although TWA asserted that the legislative history of the ADEA amendments supported its BFOQ affirmative defense.\textsuperscript{169} The Court, reviewing the legislative history, found only that 

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'[it] does not prohibit TWA from retiring all disqualified captains, including those who are incapacitated because of age.'\textsuperscript{170} The Court discovered no evidence of a congressional intent to allow an employer to discriminate against an older worker seeking to transfer to another position on the ground that age was a BFOQ for his former position.\textsuperscript{171} Addressing TWA's second affirmative defense that its transfer policy was lawful because it was part of a bona fide seniority system,\textsuperscript{172} the Supreme Court ruled that any seniority system which allowed discrimination on the basis of age was not "bona fide" under the statute.\textsuperscript{173} The

\textsuperscript{165} Id.
\textsuperscript{166} Id. at 622 n. 17.
\textsuperscript{167} Id. at 622. See generally Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d at 228 (5th Cir. 1969) (telegraph company failed to meet burden of proof for BFOQ for switchman's job).
\textsuperscript{168} Thurston, 105 S.Ct. at 623 and 623 n. 18.
\textsuperscript{169} Id. at 622-23. The Court applied the ruling in Weeks v. Southern Bell Tel. & Tel. Co. that the phrase, "particular business" in section 623(f)(1) of the ADEA refers to the job from which the protected individual is excluded. TWA cited a Senate proposal to amend that section in order to allow an employer to establish a mandatory retirement age where age is a BFOQ. S. REP. No. 493, 95th Cong., 1st Sess. 11, 24, reprinted in U.S. CODE CONG. & AD NEWS 5041. The proposal was withdrawn in the Conference Committee, however, because it was agreed that it did not change the existing law in any way. H.R. CONF. REP. No. 950 95th Cong., 1st Sess. 7, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 529.
\textsuperscript{170} Thurston, 105 S.Ct. at 623.
\textsuperscript{171} Id.
\textsuperscript{172} Id. See also ADEA, 29 U.S.C. § 623(f)(2) (1982).
\textsuperscript{173} Thurston, 105 S.Ct. at 623.
ADEA provides that for a seniority system to be bona fide, it may not "require or permit" involuntary retirement of protected individuals on the basis of age. The Court found that, while the FAA Age 60 Rule, as opposed to TWA's transfer policy, may have caused plaintiffs' retirement, the transfer policy certainly permitted it.

The ADEA states that "[i]t shall be unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." By allowing captains displaced by reasons other than age the privilege of "bumping" less senior flight engineers without participating in the bidding procedures to which age-displaced captains are required to submit, the United States Supreme Court found that TWA's transfer policy violated the ADEA. In so finding, the Court upheld the purpose of the ADEA to promote the employment of older persons based on their ability rather than their age and to prohibit arbitrary discrimination in employment.

Having concluded that TWA's transfer policy violated the ADEA, the Supreme Court turned to the issue of damages. The plaintiffs attempted to persuade the Court to adopt the definition of "willful" that would impose liquidated damages on TWA for knowing that the ADEA was "in the picture." The Court retained its "employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" definition of "willful", reasoning that TWA's asserted interpretation "would result in an award of double damages in almost every case." Because TWA acted reasonably

175 Thurston, 105 S.Ct. at 623.
177 Thurston, 105 S.Ct. at 623.
179 Thurston, 105 S.Ct. at 625. See supra note 156 and accompanying text for examples of willful conduct situations and standards.
180 Thurston, 105 S.Ct. at 625.
181 Id. The Court reasoned that since employers are required to post ADEA
and in good faith, the Court found no evidence of "reckless disregard" on the part of TWA.\textsuperscript{182}

IV. CONCLUSION

In \textit{TWA v. Thurston}, the United States Supreme Court adopted the reasoning and procedures used by the lower courts in similar ADEA cases.\textsuperscript{183} The case reflects the growing public awareness of the problem of age discrimination. In the airline industry in particular, age becomes a crucial factor in light of the overwhelming interest in public safety.\textsuperscript{184} The airline industry and the FAA have recognized that the aging process affects some people sooner than others and in different ways.\textsuperscript{185} As a result, both organizations have tried to adjust the airline industry's employment practices accordingly by requiring captains to stop serving in that capacity at age sixty.\textsuperscript{186}

The concern expressed as to whether mandatory retirement policies are discriminatory is evidenced in the cases that have examined such policies for the purpose of determining whether discrimination is present.\textsuperscript{187} \textit{TWA v. Thurston} goes one step further in analyzing the employer's treatment of an age-displaced captain after his involuntary retirement from that position.\textsuperscript{188} Employers who analyzed their policies after the 1978 ADEA amendments were passed, and more particularly those who did not, will notices, it would be almost impossible for an employer to show he was unaware of the ADEA and its application. \textit{Id.}\textsuperscript{182}

\textit{Id.} at 626.

\textsuperscript{183} See supra notes 52, 71, 94, and 155 and accompanying text.

\textsuperscript{184} See supra notes 30-33 and accompanying text.

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} See 14 C.F.R. § 121-382.25(c) (1985). See supra note 2 and accompanying text. See also Thomas, supra note 29, at 82.

\textsuperscript{187} See, e.g., \textit{Thurston}, 105 S.Ct. 613 (1985); Johnson v. Mayor & City Council of Baltimore, 731 F.2d 209 (4th Cir. 1984); Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1982); EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982); Starr v. FAA, 589 F.2d 307 (7th Cir. 1978); Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960), cert. denied, 366 U.S. 962 (1961).

\textsuperscript{188} \textit{Thurston}, 105 S.Ct. at 623. See \textit{Criswell}, 709 F.2d 544 (Western tried to prevent age sixty pilots from downbidding to first officers or flight engineers, unsuccessfully claiming that age was a BFOQ for those positions).
now have to pay close attention to their transfer policies as well, maintaining a watchful eye for plans, systems, or policies which may be discriminatory. The Supreme Court’s decision in *TWA v. Thurston* will also affect other industries. Every employer, as that term is defined by the ADEA, who provides a retirement plan or seniority system in which participants are subject to mandatory retirement at an age within the protective limits of the ADEA, will have to closely scrutinize not only that plan and its effects on the retirees, but also any transfer policy to which the employer may subscribe. Every policy that may have a tendency to discriminate against retired employees on the basis of age is a target for a lawsuit under the ADEA.\textsuperscript{189} However, after the court’s decision in regard to liquidated damages and its preferred definition of willful found in *TWA v. Thurston*, it appears that employers who make an honest attempt to determine the validity of their employment policies under the ADEA need not worry about the imposition of double damages if a violation is found.\textsuperscript{190}

*Cynthia J. Harkins*


\textsuperscript{190} See supra notes 179-182 and accompanying text.

In 1976, President Ford ordered the Secretary of Health Education and Welfare (HEW) to coordinate the implementation of section 504 of the Rehabilitation Act of 1973, which states:

No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . . The head of each agency shall promulgate such regulations as may be necessary to carry out the amendments to this section.1

The Secretary of HEW issued guidelines to other federal agencies in 1978 directing them to begin rulemaking proceedings by issuing proposed rules implementing

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1 Exec. Order No. 11,914, 3 C.F.R. 1177 (1976)(revoked by Exec. Order No. 12,250, transferring section 504 responsibility from HEW to Department of Justice). See infra note 59 for a discussion of Executive Order No. 12,250 and the department currently responsible for section 504’s implementation.


3 Generally, an agency begins its rulemaking procedures by issuing a proposed rule for public comment. See infra note 64. The agency will promulgate its final rule in light of the public comments it receives. Id. This final rule becomes binding on all entities over which the rulemaking agency asserts jurisdiction. Id.
In response to HEW's directives, the Civil Aeronautics Board (CAB) issued its Proposed Rule in 1979. The CAB's Proposed Rule prohibited air "carriers" from providing "different services" to "qualified handicapped persons" and prohibited denial of services available to other passengers unless "reasonably necessary." The Proposed Rule also promulgated specific measures the airlines must take to accommodate the handicapped and compliance regulations for enforce-
ment of the specific requirements.\footnote{Id. at 32,407. To ensure compliance, carriers were to maintain a manual detailing the procedures and rules for employees to follow in accommodating handicapped passengers. \textit{Id}. An evaluation system was set up whereby each carrier would evaluate any complaints it had received and establish a periodical review of its efforts. \textit{Id}. In the event the CAB determined that a carrier had violated a requirement, the CAB could terminate the carrier's federal financial assistance after the carrier had an opportunity for a hearing. \textit{Id}.}

After heated arguments from both the airlines and the handicapped on the Proposed Rule,\footnote{Paralyzed Veterans of America, 752 F.2d at 701-02. The airlines contended that the attempt to require compliance with the regulations contravened the government policy of deregulation of the airline industry. \textit{Id}. at 701. Pacific Southwest Airlines argued that discrimination against the handicapped was nonexistent. \textit{Id}. The handicapped complained that the smaller operators using aircraft with less than thirty seats would be exempt. \textit{Id}. at 702.} the CAB issued its Final Rule in 1982,\footnote{Nondiscrimination on the Basis of Handicap, Final Rule, 47 Fed. Reg. 25,936 (1982)(codified at 14 C.F.R. pt. 382 (1985)).} limiting the regulation's application to those airlines receiving direct financial assistance from the federal government.\footnote{14 C.F.R. § 382.2, 47 Fed. Reg. at 25,940-41, 25,948. The CAB limited application of the Final Rule to smaller carriers because they are the only airlines receiving subsidies directly from the federal government. \textit{See infra notes 18, 74 and accompanying text}. The CAB also changed its position on other aspects of the Proposed Rule. In defining "qualified handicapped person", the CAB imposed the additional requirement that the transportation of the individual not violate Federal Aviation Administration (FAA) rules. 14 C.F.R. § 382.3, 47 Fed. Reg. at 25,939, 25,948; \textit{See also supra} note 9 and accompanying text. Generally, the CAB chose to grant great deference to the airlines to determine if the handicapped person is qualified to travel. 14 C.F.R. § 382.3(c), 47 Fed. Reg. at 25,939, 25,948. The CAB dropped the Braille emergency card requirement in favor of a rule which permits carriers to determine the means to convey this information to the blind. \textit{Id}. § 382.12, 47 Fed. Reg. at 25,941, 25,949. \textit{See supra} note 11.}

The CAB also clarified many of the regulations. For example, the CAB stated that an unqualified handicapped person may become qualified by traveling with another person. 14 C.F.R. § 382.3(c)(3), 47 Fed. Reg. at 25,939, 25,948. The regulation requiring that airline services be "reasonably accessible" was changed to "readily accessible" to match the language of HEW's guidelines. \textit{Id}. § 382.11, 47 Fed. Reg. at 25,940, 25,948-49. The CAB dropped the rule stating that a doctor's medical certificate of the handicapped person's ability to travel on an airplane was a prima facie showing that the handicapped person was qualified to travel. 47 Fed. Reg. at 25,941-42. The Final Rule omitted any reference to medical certificates because doctors usually do not have enough expertise in air safety to make those judgments. \textit{Id}. at 25,942. The CAB also clarified the Final Rule to ensure that minor assistance with meals was not considered feeding assistance
restrict its jurisdiction exempted all major airlines from compliance with the specific regulations of the Final Rule.\(^6\) In response, the Paralyzed Veterans of America, American Coalition of Citizens with Disabilities, and American Council of the Blind sought judicial review of the CAB order by filing suit in the Court of Appeals for the District of Columbia Circuit.\(^7\) Petitioners specifically challenged three aspects of the Final Rule, arguing that: (1) the CAB wrongfully limited the application of the Final Rule to those carriers receiving direct subsidies under the Federal Aviation Act;\(^8\) (2) the Final Rule contained subjective guidelines for defining which handicapped passengers are qualified; thus forcing selective, arbitrary and confusing conditions on disabled passengers;\(^9\) and (3) the requirement of the Final Rule that handicapped

requiring that a personal attendant accompany the passenger or that the passenger forego meals. 14 C.F.R. § 382.13(b), 47 Fed. Reg. at 25,949.

\(^{16}\) See infra notes 74-75 and accompanying text.

\(^{17}\) Paralyzed Veterans of America, 752 F.2d at 694, 695. 49 U.S.C. app. § 1486(a) (1982) provided jurisdiction in this case by allowing petition for review:

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after entry of such order, by any person disclosing a substantial interest in such order.

\(^{18}\) See 49 U.S.C. app. §§ 1551(a), (b) (1982).

\(^{19}\) 752 F.2d at 705. See 47 Fed. Reg. at 25,937-38 for the CAB’s rationale in restricting its jurisdiction to those carriers receiving direct subsidies from the federal government. The CAB had initially applied its Proposed Rule to all certificated air carriers but decided to restrict the Final Rule’s reach to small commercial carriers, in light of Angel v. Pan American World Airways, discussed infra notes 120-130, 230-233 and accompanying text. See infra notes 69-75 and accompanying text for a further discussion of the CAB’s decision to limit the Final Rule’s application to small airlines.

\(^{20}\) 752 F.2d at 703. One of the requirements to make a handicapped person qualified is that he or she must not “in the reasonable expectation of carrier personnel . . . jeopardize the safe completion of the flight or the health or safety of other persons.” 14 C.F.R. § 382.3(c)(2), 47 Fed. Reg. at 25,948. Petitioners argued that the criteria for determining which handicapped passengers are qualified should be more objective. 752 F.2d at 720. In upholding the CAB’s definition of “qualified handicapped person”, the court commended the CAB’s consideration
passengers needing "extensive special assistance" notify the airline 48 hours in advance of their flight was unreasonable. Held, so ordered: Civil Aeronautics Board's final regulations implementing the Rehabilitation Act of 1973, which prohibit exclusion of qualified handicapped individuals from programs receiving federal financial assistance, apply to all commercial airlines. Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694 (D.C. Cir. 1985), cert. granted sub nom. United States Department of Transportation v. Paralyzed Veterans of America, 106 S. Ct. 244 (1985). This note discusses the question of whether the CAB wrongly restricted the application of the Final Rule to those airlines receiving financial assistance directly from the federal government (in effect the smaller airlines).

of the views of the handicapped. Id. at 720-21. The court felt that airline personnel are in the best position to judge whether a handicapped individual is qualified: Because of the unique nature of every individual, because of the infinite variety of disabling conditions and the varying extent to which they may handicap a particular person the vesting of some discretion in airline personnel to make case-by-case determinations is unavoidable. This is especially so where, just as individuals differ, so do airlines and aircraft. Id. at 722. The court stated that the Final Rule reduced the risk of arbitrary decisions by airline personnel because each airline must designate an employee responsible for making the decision to refuse service. Id. See 14 C.F.R. § 382.13(b), 47 Fed. Reg. at 25,949.

20 "Extensive special assistance" includes: "(1) Medical oxygen for on-board use; (2) Boarding and deplaning assistance using mechanical boarding lifts, aisle chairs, other special equipment, or requiring the presence of more than the usual complement of personnel; and (3) Ground wheelchairs at facilities where they are not usually available." 14 C.F.R. § 382.15(c), 47 Fed. Reg. at 25,949.

21 752 F.2d at 704. See also 47 Fed. Reg. at 25,945 for the CAB's disposal of the handicapped's argument that advance notice of 48 hours is unreasonably long. Petitioners contend that the forty-eight hour notice requirement allows an airline to arbitrarily refuse service. 752 F.2d at 724. The Paralyzed Veterans of America court made the same basic argument for practicality as it made in approving the CAB's definition of "qualified handicapped person". Id. at 723. See supra note 19. The court thus felt more comfortable with the CAB's judgment since the CAB "conscientiously and rationally sought to implement section 504 in a manner likely to be reasonable and effective." 752 F.2d at 729.

A. The Rehabilitation Act of 1973

Beginning in 1918, Congress provided steadily increasing funding for state-administered programs designed to supply the training necessary for employment of the handicapped. Until the seventies, the federal government had emphasized rehabilitating the handicapped by providing jobs, training and counseling. Congress first focused its attention to the needs of the disabled when it passed the Vocational Rehabilitation Act of 1918. Pub. L. No. 65-178, 40 Stat. 617 (1918). See also R. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 20 (1984). The purpose of the Vocational Rehabilitation Act was to provide job training for disabled veterans. Pub. L. No. 65-178, 40 Stat. at 617. See R. SCOTCH, supra, at 20. The vocational rehabilitation program began for civilians when President Woodrow Wilson signed the Smith-Fess Act of 1920. Pub. L. No. 66-236, 41 Stat. 735 (1920). See R. SCOTCH, supra, at 20. Initially, the Act provided for the training, counseling and placement of physically handicapped persons. Pub. L. No. 66-236, § 1, 41 Stat. at 735. The Act also established a program whereby state and federal government would contribute equally to that particular state's rehabilitation program. Id. § 1, 41 Stat. at 735. This joint contribution will be referred to as "matching." Until the late seventies, the Rehabilitation Act's basic goal of vocational rehabilitation remained virtually unchanged throughout its many amendments. See S. REP. No. 318, 93d Cong., 1st Sess. 9-12, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076, 2082. The vocational rehabilitation program became permanent in 1935 when the Social Security Act passed, in which Congress authorized annual appropriations for vocational rehabilitation. Pub. L. No. 74-271, § 531(a), 49 Stat. 633, 634 (1935). By 1935, all states had vocational rehabilitation programs in operation. R. SCOTCH, supra, at 20.

With World War II in full swing, Congress passed amendments in 1943 to the Vocational Rehabilitation Act. Pub. L. No. 78-113, 57 Stat. 374 (1943). These amendments were designed to employ disabled workers in war production and to ready society for the disabled veterans returning to the workforce. Id., 57 Stat. at 374. See also R. SCOTCH, supra, at 22. Congress also for the first time authorized the provision of medical, surgical, and restorative services for the physically handicapped. Pub. L. No. 78-113, § 3(a)(3), 57 Stat. at 376.

In its next amendments, Congress in 1954 greatly expanded the funding for the research and training aspects of the vocational rehabilitation program. Pub. L. No. 83-565, 68 Stat. 652 (1954). Greater support was provided to smaller states who otherwise would have been unable to provide the services themselves. The act provided for a minimum funding amount to each state. Id. § 2, 68 Stat. at 653. In an effort to spur the states to expand rehabilitation services, Congress reduced the requirement that states match federal contributions dollar for dollar to seventy-five percent federal and twenty-five percent state contributions. Id. § 2, 68 Stat. at 653-54.

The next major set of amendments to the Vocational Rehabilitation Act were
tion shifted to removing the physical barriers preventing the handicapped from participating in certain programs.\textsuperscript{23} Congress realized that trained and qualified handicapped individuals often could not obtain employment because physical barriers prevented their access to the workplace.\textsuperscript{24}

Initially, Congress attempted to reduce handicapped discrimination in government-supported programs through proposed amendments to the Vocational Rehabilitation Act\textsuperscript{25} and the Civil Rights Act of 1964.\textsuperscript{26} Congress enacted in 1965. Pub. L. No. 89-333, 79 Stat. 1282 (1965). These amendments were part of President Lyndon Johnson's Great Society Programs during the mid-1960s. R. SCOTCH, supra, at 23. Congress increased the funding to three hundred million dollars in order to reach a greater number of handicapped individuals. Pub. L. No. 89-333, § 1, 79 Stat. at 1282. See also 1973 U.S. CODE CONG. & AD. News 2076, 2083. Two years later Congress established the National Center for Deaf-Blind Youths and Adults. Pub. L. No. 90-99, 81 Stat. 251, 251-52 (1967). Pursuant to the reorganization of HEW in 1967, the Office of Vocational Rehabilitation became the Rehabilitation Services Administration (RSA) and was made one of the program bureaus of the newly established Social and Rehabilitative Services Administration (SRS). Pub. L. No. 93-112, § 3, 87 Stat. 355, 357-58 (1973). See also R. SCOTCH, supra, at 23. SRS also included the Children's Bureau, the Administration on Aging, the Public Welfare Assistance Payments Administration, and the Medical Services Administration. R. SCOTCH, supra, at 23-24.

In 1968, Congress again passed amendments to the Vocational Rehabilitation Act. Pub. L. No. 90-391, 82 Stat. 297 (1968). Congress increased federal contributions to eighty percent of every dollar spent on handicapped rehabilitation, and Congress gave authority to increase recruiting of handicapped individuals for public service employment positions. Id. §§ 7, 10(0, 82 Stat. at 299, 302. Rehabilitation services were increased by number and definition to include more activities than ever before. See id. § 10, 82 Stat. at 301. The Architectural Barriers Act of 1968 mandated that all new federal construction be accessible to the handicapped. Pub. L. No. 90-480, 82 Stat. 718 (1968). Between 1920 and 1973, over three million handicapped individuals were rehabilitated. 1973 U.S. CODE CONG. & AD. News 2076, 2084.

\textsuperscript{23} S. REP. NO. 318, 93d Cong., 1st Sess. 18-19, \textit{reprinted in} 1973 U. S. CODE CONG. & AD. News 2076, 2092. \textit{See also infra} note 34 and accompanying text.

\textsuperscript{24} See R. SCOTCH, supra note 22, at 51-52.

\textsuperscript{25} H.R. 8395, 92d Cong., 1st Sess., 118 CONG. REC. 35,141, 35,142 (1972). The history of the Vocational Rehabilitation Program is discussed supra notes 22-24 and accompanying text.

\textsuperscript{26} H.R. 12154, 92d Cong., 1st Sess. 1 (1971); S. 3044, 92d Cong., 2d Sess. 1 (1972). \textit{See infra} note 48 and accompanying text for a comparison of the Rehabilitation Act, Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972. The proposal would have amended the Civil Rights Act to prohibit discrimination on the basis of physical or mental handicap. H.R. 12154, 92d Cong., 1st Sess. 1-2 (1971); S. 3044, 92d Cong., 2d Sess 1-2 (1972). Con-
gress chose the former as the vehicle for reform, and Congress passed the Rehabilitation Bill in 1972.\textsuperscript{27} President Nixon pocket vetoed the bill,\textsuperscript{28} and Congress\textsuperscript{29} redrafted the vetoed bill\textsuperscript{30} in an atmosphere conducive to sweeping reforms of civil rights legislation.\textsuperscript{31} After a second veto and minor changes, Congress resubmitted the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{27} H.R. 8395, 92d Cong., 1st Sess., 118 CONG. REC. 35,179 (1972).
\item\textsuperscript{28} President's Memorandum of Disapproval of Nine Bills Passed by Congress, 8 WEEKLY COMP. PRES. Doc. 1577, 1579 (Oct. 27, 1972)(President Nixon issued a Memorandum of Disapproval stating that the bill would change the emphasis of the Rehabilitation Program from vocational to non-vocational objectives and would have a prohibitive cost).
\item\textsuperscript{29} The Senate Committee on Labor and Public Welfare (now the Labor and Human Resources Committee) was charged with responsibility for redrafting the Rehabilitation Act. R. SCOTCH, supra note 22, at 45. The committee was one of the most liberal and activist in Congress during this period. \textit{Id.} The Committee on Education and Labor had similar responsibilities in the House of Representatives. \textit{Id.} Several provisions in the bill originated in the Senate Subcommittee on the Handicapped of the Committee of Labor and Public Welfare. \textit{Id.} at 46. Members of the subcommittee included Jennings Randolph, Harrison Williams, Alan Cranston, Jacob Javits, and Robert Stafford. \textit{Id.} All of the members and their staff were moderately liberal. \textit{Id.} John Brademas and Albert Quie were the respective Congressmen involved with the bill in the House. \textit{Id.}
\item\textsuperscript{30} S. 7, 93d Cong., 1st Sess., 119 CONG. REC. 5901 (1973). A Congressional member usually introduces a bill and hearings are subsequently held to gather information and expert opinion. R. SCOTCH, supra note 22, at 45. After the hearings, the staff members typically redraft the bill in light of the results of the hearings. \textit{Id.}
\item\textsuperscript{31} R. SCOTCH, supra note 22, at 46-49. See also supra note 29 for a discussion of those congressmen involved with the bill. Due to the great conflict between the Nixon Administration and Congress, "Congress was willing and often eager to throw down a liberal gauntlet." R. SCOTCH, supra note 22, at 47. Many of the social and economic costs of such sweeping legislation were deemphasized because of the great potential for the handicapped to make giant strides in ending discrimination. \textit{Id.} at 48. One Congressional staff member responsible for much of the bill stated:

\begin{quote}
I'll tell you the frame of mind we all had. We had lived for three years under Richard Nixon, and under being told no, no, no, no, no, by an executive branch which was totally unresponsive to the programs of the sixties, and to the things that were still felt important during that time of the seventies by a vast majority of the Congress . . . We were angry at the Nixon Administration, and we wanted to do everything we could to do as much as we could to help people.
\end{quote}
\end{enumerate}
\end{footnotesize}
bill to the President in 1973, and the President signed it into law.

The stated purpose of the Rehabilitation Act of 1973 was to provide equal rights to handicapped people. The Rehabilitation Act shifted the purposes of the rehabilitation program from training the handicapped for employment to promoting independent living for those handicapped individuals who might never work. Congress expressed its desire that the rehabilitation program become more responsive to those with severe handicaps. Therefore, the Rehabilitation Act expressly included the severely handicapped in its various programs.

Whether it be disabled people, minorities, poor people, you name it. Even the middle class . . . .

*Id.* at 48 (statement of Nik Edes, staff member to Senator Harrison Williams). After amendment, S. 7, 93d Cong., 1st Sess., 119 CONG. REG. 5901 (1973), Congress returned the bill to the President, who vetoed the bill again for economic reasons. S. Doc. No. 10, 93d Cong., 1st Sess. 1-2, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076, 2087. President Nixon stated that the program would cost over one billion dollars at a time when the federal budget was alarmingly high. *Id.* at 1-2, 1973 U.S. CODE CONG. & AD. NEWS at 2088-90. The President also stated that the regulations would be duplicative and would blur the lines of authority over vocational rehabilitation. *Id.* at 1-2, 1973 U.S. CODE CONG. & AD. NEWS at 2088-90.


S. REP. No. 1297, 93d Cong., 2d Sess. 50, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6373. Estimates of the number of physically and mentally handicapped then ranged from twenty-eight to fifty million. *Id.* at 50, 1974 U.S. CODE CONG. & AD. NEWS at 6400.

S. REP. No. 318, 93d Cong., 1st Sess. 18-19, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076, 2092. The word "vocational" was dropped from the title "Vocational Rehabilitation Act" to emphasize this change in the statute's purpose. *Id.* See also supra note 23 and accompanying text.


Title I of the Rehabilitation Act provides for vocational rehabilitation services. Rehabilitation Act, supra note 32, §§ 100-50, 87 Stat. at 363-74. Each state must designate an agency primarily concerned with the rehabilitation of handicapped individuals. *Id.* § 101(a), 87 Stat. at 363-64. This title also provides for other required state actions. *Id.* § 101, 87 Stat. at 363-68. The scope of vocational rehabilitation services was broadened to include follow-up services and an individualized written rehabilitation program. *Id.* § 102, 87 Stat. at 368. Title II provides for research and training with an emphasis on biomedical engineering
In 1974, Congress amended the Rehabilitation Act, strengthening programs for the blind and providing for a White House Conference on the problems that handicapped individuals face. Most importantly, Congress changed the definition of “handicapped individual” from a definition that spoke in terms of employment to a broader definition not limited to employment.

Congress amended the Rehabilitation Act again in 1978, authorizing federal grants to the states for the establishment of comprehensive rehabilitation centers to provide information and assistance to those entities required to comply with the Rehabilitation Act. Congress also provided enforcement mechanisms for the victims of handicapped discrimination.

B. Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against the handicapped in programs receiving federal financial assistance. Staff members re-
sponsible for making revisions to the vetoed Rehabilitation Bill\footnote{See supra notes 28-31 and accompanying text for a discussion of the presidential vetoes of the Rehabilitation Bill. Staff members had a large amount of discretion in making revisions to the bill. \textit{See supra} note 30.} perceived that the Rehabilitation Act would be ineffective if rehabilitated handicapped individuals could not enter "the mainstream of society."\footnote{R. Scotch, supra note 22, at 51. Staff members were concerned that negative attitudes and discrimination would block the goal of rehabilitation of providing the handicapped with a means to enter society. \textit{Id.}} The staff members agreed that the Rehabilitation Act should contain a provision prohibiting discrimination against the handicapped in federally assisted programs.\footnote{\textit{Id.} at 52.} Roy Millenson, a member of Senator Jacob Javits' staff, borrowed language from Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and the staff members drafting the bill inserted this wording in section 504.\footnote{\textit{"Roy Millenson . . . had been involved in the development of the Education Amendments, and he ran out to his office and brought back language from Title VI." \textit{Id.} Title VI states that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, \S 601, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. \S 2000d (1982)) [hereinafter cited as Title VI]. Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Education Amendments of 1972, Pub. L. No. 92-318, \S 901(a), 86 Stat. 373 (codified at 20 U.S.C. \S 1681(a) (1982)) [hereinafter cited as Title IX]. \textit{See supra} text accompanying note 2 for similar language of section 504. \textit{See also} Wegner, \textit{The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973, 69 Cornell L. Rev. 401, 403-04 n.5 (1984).}} Staff members avoided the current practice of promulgating detailed regulations and instead sought simplicity in drafting section 504.\footnote{R. Scotch, supra note 22, at 58.}

Throughout both presidential vetoes,\footnote{\textit{See supra} notes 28-31 and accompanying text for a discussion of the President's vetoes of the Rehabilitation Act.} section 504 remained virtually untouched by Congressional debate and Presidential comment.\footnote{R. Scotch, supra note 22, at 53. Section 504 had a low political profile, so} Congress did not discuss its im-
pact; neither did it project any public expenditures.\textsuperscript{52} One commentator noted, "in short, there was nothing to indicate what Congress had intended when it had passed Section 504."\textsuperscript{53} Either Congress was not aware of section 504's existence, or thought the section merely stated a broad, idealistic goal.\textsuperscript{54} Section 504's low political profile enabled it to pass Congress and the President unscathed because Congress and the President would probably not have passed a controversial, detailed antidiscrimination provision.\textsuperscript{55}

C. The CAB's Regulations Implementing Section 504

Unlike Title VI of the Civil Rights Act of 1964\textsuperscript{56} and Title IX of the Education Amendments of 1972,\textsuperscript{57} section 504 did not provide for its implementation.\textsuperscript{58} In 1976, the President directed HEW to coordinate the implementation of section 504 by all federal agencies.\textsuperscript{59} A court order spurred HEW into action,\textsuperscript{60} and HEW published
regulations in 1977.\textsuperscript{61} In 1978, HEW issued guidelines for the implementation of section 504\textsuperscript{62} which most federal agencies have followed in drafting their own rules.\textsuperscript{63}

The CAB, a governmental agency required to comply with section 504, initiated its rulemaking proceedings on June 6, 1979 with the issuance of its Proposed Rule.\textsuperscript{64}

Congress intended that the government implement section 504 swiftly. \textit{Id.} at 924. The court did not establish a deadline but retained continuing jurisdiction to ensure section 504's swift implementation. \textit{Id.}

\textsuperscript{61} See 45 C.F.R. pt. 84 (1985). HEW provisions establish regulations in the areas of employment; program accessibility; preschool, elementary, and secondary education; post-secondary education; and health, welfare, and social services. \textit{id.} There was a four year span from enactment of the Rehabilitation Act until HEW's regulations took effect.


Regardless of whether a federal agency publishes an advance notice of proposed rulemaking, it must publish a proposed rule. 5 U.S.C. § 553(b). Generally, the proposed rule is published in the Federal Register. \textit{Id.} The proposed rule is prefaced by a preamble which explains the rule. \textit{Id.} The preamble contains detailed facts and data and often the objectives of the proposed rule. \textit{J. O'REILLY, supra, at 77.} The text of the proposed rule will normally follow the preamble, although the exact terms of the new rule are not required to appear in the proposed rule. 5 U.S.C. § 553(b)(3). \textit{See J. O'REILLY, supra, at 75.} The purpose of the proposed rule is to notify potential commenters of the agency's possible action. \textit{S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).}

Interested parties have a minimum of 30 days after the proposed rule is published to file comments. 5 U.S.C. § 553(d). The agency may allow a longer period. \textit{Id.} Interested parties must file comments by letter, brief or other means generally in the form of a factual presentation rather than a petition of signatures. \textit{J. O'REILLY, supra, at 92, 95-96.} The agency drafting the rules must consider all material facts and issues presented to it, but the agency is not required to respond to the comments. \textit{Id.} at 93.

After the deadline for comments passes, the agency composes its final rule.
The CAB, however, only issued its Proposed Rule after the National Federation of the Blind filed a petition for rulemaking, and HEW and the White House pressured the CAB. Additionally, a district court ordered the CAB to notify all federally-subsidized air carriers that those carriers must comply with section 504.

The CAB initially applied its Proposed Rule to all certificated air carriers using aircraft having more than thirty seats. Therefore, all of the larger commercial airlines were subject to the regulations. The airlines and the handicapped commented on the Proposed Rule, and the CAB issued its Final Rule in 1982. In promulgating its

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The preamble in the final rule must be a concise statement of the basis and purpose of the rule. 5 U.S.C. § 553(c). If the agency has written a preamble that clearly states the need for the rule and the objectives of the agency, the rule will be less susceptible to invalidation through judicial review. J. O'Reilly, supra, at 137-138. The statement of the final rule generally contains a subsection on scope, a subsection on definitions, the actual regulations, plus miscellaneous provisions. Id. at 142. Only the mandates of the agency are enforceable, not the prefatory material. Id. at 143. After the final rule is published in the Federal Register, it is codified in the Code of Federal Regulations, where it is effective as law until modified or withdrawn by the agency, or invalidated by a federal court. 44 U.S.C. § 1510 (1982); 1 C.F.R. § 8.1 (1985). See also J. O'Reilly, supra, at 141.


HEW Secretary Joseph Califano wrote a letter to the CAB in 1979 urging it to expedite its rulemaking proceedings. Paralyzed Veterans of America, 752 F.2d. at 697 n.12.

In 1980, the White House formally requested that the CAB fulfill its section 504 obligations. Id.


See infra note 170 for a definition of “exclusive operating certificate.”


See supra note 13 for sample comments made by the airlines and the handicapped.

Final Rule, the CAB reversed its position regarding large carriers and concluded that the only airlines subject to the specific requirements of the Final Rule were those smaller airlines receiving direct federal financial assistance under sections 406 or 419 of the Federal Aviation Act. Ironically, the only carriers required to comply with the specific regulations of the Final Rule were those smaller carriers exempted by the CAB under the Proposed Rule.

D. *The Application of Section 504—What Constitutes Federal Financial Assistance*

Section 504 applies only to "any program or activity re-
ceiving federal financial assistance." Federal financial assistance is defined as:

[A]ny grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department [of Transportation] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real or personal property or any interest in, or use of such property. Direct disbursement to a program or activity automatically brings that program within the scope of section 504. Since the government may only regulate the specific program or activity receiving federal financial assistance, the recurring question is whether an entity receives federal financial assistance when the government indirectly provides financial assistance to that entity. Courts have discussed several types of such indirect federal financial assistance including licenses and favorable tax treatment, as well as indirect grants of federal monies.

1. Licenses

Government agencies have argued that the great financial benefit conferred upon recipients of federal licenses should be considered financial assistance within the purview of section 504, although licenses admittedly do not constitute direct financial assistance. In Gottfried v. Federal

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76 Section 504, supra note 2.
78 See supra notes 2, 77 and accompanying text.
79 See infra notes 152-155, 163-164 and accompanying text.
80 Wegner, supra note 48, at 409.
81 Types of direct federal financial assistance, defined supra at text accompanying note 77, may become indirect assistance if the government does not provide the assistance initially to the activity it seeks to regulate. See infra notes 157-167 and accompanying text. For example, scholarships, although provided directly to students, indirectly assist the financial aid office of a college. See infra notes 157-161 and accompanying text.
Communications Commission (FCC), the Court of Appeals for the District of Columbia Circuit held that a government-provided broadcast license to a television station does not constitute federal financial assistance under section 504. The plaintiff claimed that certain television stations discriminated against the hearing impaired. In order to bring the television station under section 504's antidiscrimination regulations, the plaintiff argued that the government financially assisted broadcasters by giving the television stations valuable broadcast licenses for free. The Gottfried court acknowledged that the great demand for broadcast licenses made them extremely valuable, sometimes exceeding $1.5 million in value. The court also noted Supreme Court Justice Brennan's dissent in Columbia Broadcasting System v. Democratic National Committee, where the Justice argued that the government effectively subsidizes a broadcaster when it gives a radio station a free license. However, the Gottfried court held that Congress did not intend broadcast licenses to constitute financial assistance. In examining the relevant congressional hearings and floor debates, the court found no reference to federal licenses as financial assistance.

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82 655 F.2d 297 (D.C. Cir. 1981), rev'd on other grounds sub. nom. Community Television v. Gottfried, 459 U.S. 498 (1983). In the discussion that follows, cases concerning federal financial assistance under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 are included because of the virtual identity of Titles VI, IX and section 504. See, e.g., Brown v. Sibley, 650 F.2d 760, 767-68 (5th Cir. 1981)(comparing section 504 to Titles VI and IX); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1280-81 (7th Cir. 1977)(comparing section 504 to Title VI). See also supra note 48 for a comparison of the language in Titles VI, IX, and section 504.

83 Gottfried, 655 F.2d at 300-01.

84 Id. at 304.

85 Id. at 306.

86 Id. at 312 n.55. The court emphasized the fact that the FCC granted a limited number of licenses. Id. This limited supply of licenses greatly increased the value of stations who possessed them because a station cannot operate unlicensed. See id.


88 Id. at 174 n.5.

89 Gottfried, 655 F.2d at 312.

90 Id. at 313. The court examined congressional hearings and floor debates, and none of the speakers had referred to licenses as financial assistance. Id.
court also noted that the Justice Department excluded recipients of broadcast licenses from its list of programs receiving federal financial assistance under Title VI of the Civil Rights Act. Furthermore, the court relied on a statement by the Justice Department that licenses are not considered federal financial assistance. The absence of any government-issued directives ordering commercial broadcasters to follow section 504 also indicated that Congress did not intend broadcasters to follow section 504. Based on the foregoing findings, the court concluded that licenses were not regarded as establishing property rights covered under section 504. Thus, receipt of a license did not constitute receipt of federal financial assistance.

2. Favorable Tax Treatment

In deciding whether certain indirect benefits constitute federal financial assistance, some courts have defined favorable tax treatment as federal financial assistance. These courts have reasoned that if the government did not provide tax deductions for a particular program, the government would either have to fund the program di-

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91 Id. The Justice Department is the agency that now coordinates the implementation of section 504. Exec. Order No. 12,250, 3 C.F.R. 298 (1980). See also supra note 59.

92 Gottfried, 655 F.2d at 314 n.65 (citing Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11,914, 45 Fed. Reg. 37,620, 37,632 (1980)).

93 Gottfried, 655 F.2d at 314.

94 Id. See supra text accompanying note 77 for the delineation of property rights as federal financial assistance.

95 655 F.2d at 314. Accord Jacobson v. Delta Airlines, 742 F.2d 1202, 1212 (9th Cir. 1984)(holding that airline’s operating certificate is not federal financial assistance).

rectly or run the program itself. Not all tax benefits, however, constitute federal financial assistance. Courts must determine the relationship of the tax deduction to the nature of the program or activity receiving financial aid, and favorable tax treatment may constitute federal financial assistance only if the nature of the deduction is sufficiently similar to the nature of the activity sought to be regulated. Therefore, the courts must first determine whether the tax assistance is fundamental to the operation of the program in question. This determination will guide the court in deciding if the tax assistance constitutes federal financial assistance to that program.

In McGlotten v. Connally, a black man brought suit claiming that a fraternal, nonprofit organization discriminated against him by denying him membership. The District Court for the District of Columbia held that since the government allowed taxpayers a deduction for charitable contributions, the entities receiving the charitable contributions received federal financial assistance by virtue of the tax incentives. Thus, the fraternal society fell within the ambit of the Civil Rights Act of 1964. For purposes of determining whether the entity received federal financial assistance, the court held that the manner of distributing the funds was not as important as the purpose

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97 See infra notes 98-118 and accompanying text for a discussion of the reasoning used in McGlotten, Bob Jones and Regan.
98 See infra note 100 and accompanying text.
99 See infra note 107 and accompanying text.
100 In the McGlotten court's words, "the deductions provided in the [Internal Revenue] Code are not all cut from the same cloth. Most relate primarily to the operation of the tax itself, and thus would not constitute a grant of federal financial assistance." McGlotten v. Connally, 338 F. Supp. 448, 461 (D.D.C. 1972), discussed infra notes 102-107 and accompanying text.
101 See supra note 100 and accompanying text.
103 Id. at 450. The by-laws of the organization expressly limited membership to white males. Id. at 450 n.1.
104 Id. at 461, 462. The court stated that Congress had merely chosen the tax code as the funding mechanism instead of using direct payments to the organization. Id. at 458.
105 Id. at 461.
of the deduction. The court carefully noted that most of the tax deductions or exclusions such as accelerated depreciation and the interest deduction are related to the operation of the tax itself rather than the operation of a particular program or entity.

Recently, the United States Supreme Court in *Bob Jones University v. United States* and *Regan v. Taxation with Representation of Washington* decided the similar issue of whether discriminatory nonprofit organizations could achieve tax-exempt status. *Bob Jones* involved a university denied tax-exempt status because of its racially discriminatory admissions policy. The Supreme Court affirmed the Court of Appeals' denial of tax-exempt status, reasoning that public policy prohibited government subsidation of schools that discriminate. The court determined that the tax benefits provided to the school had the same effect as a subsidy; thus, the court denied tax-exempt status. The concern for the welfare of the general public dictated a policy against government subsidation of racial discrimination.

*Regan* also involved a nonprofit organization seeking tax-exempt status. The Internal Revenue Service contended that a substantial portion of the plaintiff's activities constituted attempts to influence legislation, resulting in non tax-exempt status under the Internal Revenue Code. The Supreme Court again emphasized that tax exemptions and deductions are a type of government subsidy having the same effect as a direct cash payment.

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106 Id.
107 Id. See supra note 100.
110 *Bob Jones*, 103 S. Ct. at 2019-20. Bob Jones University denied admission to applicants "engaged in an interracial marriage or known to advocate interracial marriage or dating." *Id.* at 2020.
111 *Id.* at 2028-29, 2036.
112 *Id.*
113 *Id.* at 2028.
115 *Id.* See I.R.C. § 162(c) (1982).
denying tax-exempt status, the court reasoned that Congress did not intend to subsidize lobbying organizations as extensively as those nonprofit organizations promoting the public welfare.117 Although the federal financial assistance issue was not before the Supreme Court in Bob Jones and Regan, both cases support the general proposition that tax assistance can be a subsidy to an organization receiving the tax benefits if directly related to that program's purpose.118


Subsequent to section 504's passage, cases arose challenging its application to commercial airlines.119 Angel v. Pan American World Airways120 presented the issue of whether a commercial air carrier was subject to CAB regulations on the transportation of handicapped individuals by virtue of its indirect receipt of federal financial assistance.121

In Angel, a handicapped plaintiff brought suit against Pan American World Airways (Pan Am) for wrongfully refusing to provide him with air transportation.122 Some time before the plaintiff arrived at the airport, Pan Am assured the plaintiff, who had cerebral palsy, that he could board their transatlantic flight alone.123 At the airport, a

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117 Id.
118 See supra notes 112,116 and accompanying text. Importantly, the tax exemptions denied the organizations in Bob Jones, Regan and McGlotten were fundamental to their operation. Bob Jones, 103 S. Ct. at 2023; Regan, 103 S. Ct. at 1999; McGlotten, 338 F. Supp. at 450.
119 See, e.g., Jacobson v. Delta Airlines, 742 F.2d 1202, 1211-15 (9th Cir. 1984) (commercial airlines do not receive any indirect federal financial assistance which would subject them to section 504); Nodelman v. Aero Mexico, 528 F. Supp. 475, 488-92 (C.D. Cal. 1981) (services of federal air traffic controllers and federal grants to airports do not constitute federal financial assistance to commercial airlines).
121 See infra notes 168-236 and accompanying text for further discussion of this issue.
122 Angel, 519 F. Supp. at 1175-76.
123 Id. at 1176.
Pan Am employee informed him that an attendant must accompany him, even though the plaintiff had a medical certificate from his doctor stating that he could travel alone. In seeking to bring Pan Am within section 504’s prohibition of discrimination against the handicapped, the plaintiff argued that the airline received federal financial assistance through the government’s provision of air traffic controllers and subsidies to airports.

The Angel court rejected both of the plaintiff’s arguments. The court concluded that the definition of federal financial assistance only contemplates direct recipients of federal funds and that services of air traffic controllers and federal funding of airports were both forms of indirect financial assistance not within the reach of section 504. The court relied on Gottfried and cases in other districts to reach this direct funding requirement. Thus, the Angel court’s primary consideration in determining whether an activity received financial assistance is whether the government makes direct payments to that activity.

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125 519 F. Supp. at 1178. Plaintiff contended that the provision of air traffic controllers was a provision of federal services of federal personnel and that federal grants to airports were a provision of federal funds to the airlines. Id. See supra text accompanying note 77 for the definition of “federal financial assistance.”

126 519 F. Supp. at 1178.

127 Id.

128 See supra notes 82-95 and accompanying text for a discussion of Gottfried.

129 519 F. Supp. at 1178 (citing Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980)(holding that financial aid to one part of a business does not bring entire business within scope of section 504); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977)(holding that government contractor had not received federal financial assistance since effective date of section 504, section 504 does not bind contractor), aff’d, 611 F.2d 1074 (5th Cir. 1980), cert. denied, 449 U.S. 889 (1980). See also Jacobson v. Delta Airlines, 742 F.2d 1202, 1213 (9th Cir. 1984)(holding that federal airport grants and federal air traffic controllers do not constitute federal assistance), cert. dismissed, 105 S. Ct. 2129 (1985).

130 519 F. Supp. at 1178. The court stated its position:

Subsidies to airports to be sure, subject those locales to the broad
E. Recent Court Decisions Defining the Scope of Federal Financial Assistance

Though part of a program may come under federal regulation because it receives federal financial assistance, the government may not control the remaining portion of the program that does not receive federal financial assistance. In other words, the ability of the government to control activities through the provision of financial assistance extends only to the "program or activity" actually receiving federal financial assistance.

proscription of Section 504, but this does not translate into binding law upon the users of the airports, whether they be commercial airlines or individual passengers. To hold that commercial airlines fall within Section 504 merely because of assistance provided to airports would expand improperly the accepted proposition that Section 504 is limited to direct recipients of federal funds.

Id. 131 See infra notes 148-166 and accompanying text.

132 In addition to restricting the definition of federal financial assistance, constitutional provisions may limit Congress’ power to condition disbursement upon compliance with federal programs. Noting the trend toward increased federal control over government-subsidized activities, one commentator expressed the fear that Congress may seek the power to control those activities left to state control by the Constitution. Comment, The Federal Conditional Spending Power: A Search for Limits, 70 Nw. U.L. Rev. 293 (1975). The United States Constitution limits Congress’ ability to regulate only those matters named in the Constitution.

U.S. Const. amend. IX states that “the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” See U.S. Const. art. I, § 8, cl. 1 for enumeration of the congressional taxing power. The states are to regulate all matters other than these “enumerated powers.” U.S. Const. amend. X states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” “[F]or example, Congress could conceivably go so far as to require that grants for highway construction be made only to states which decriminalize the use of marijuana.” Comment, supra, at 294. In United States v. Butler, 297 U.S. 1 (1936), the Supreme Court stated that article I, section 8 did give Congress the right to tax and appropriate money for the general welfare. Id. at 65-66. Both the majority and dissent agreed that this “power of the purse” must be limited to keep Congress from infringing on state powers. Id. at 87. The dissent argued that the conditions upon which the disbursement rests should be reasonably related to the purposes of the federal aid. Id. at 85-86.

Subsequent Supreme Court cases have expanded Congress’ power to condition disbursement of federal funds upon compliance with federal regulations, so constitutionality does not appear to be an issue in Paralyzed Veterans of America. See, e.g., Steward Machine Co. v. Davis, 301 U.S. 548 (1937)(holding that Social Security tax did not involve an unconstitutional attempt to coerce the States to adopt unemployment compensation approved by the federal government); Helvering v.
Courts have taken various approaches to defining the program or activity receiving federal financial assistance. The various approaches can be classified as the direct funding approach,\(^1\) the institutional approach,\(^2\) or the infection theory.\(^3\) The direct funding approach limits the definition of "program or activity" to those actually receiving direct disbursement from the federal government.\(^4\) The approach is based on a restrictive reading of the statute prohibiting discrimination in any program or activity receiving federal financial assistance.\(^5\) This direct funding view argues also that financial assistance indirectly provided by the federal government will not constitute federal financial assistance to the program for the purpose of determining whether the program is subject to antidiscrimination regulations.\(^6\) Thus, under the

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**Footnotes:**

1. See infra notes 136-138 and accompanying text.
2. See infra notes 139-144 and accompanying text.
3. See infra notes 145-147 and accompanying text.
4. See, e.g., Hillsdale College v. HEW, 696 F.2d 418, 430 (6th Cir. 1982)(receipt of student aid funds subjected only the student grant and loan program to Title IX); University of Richmond v. Bell, 543 F. Supp. 321, 332 (E.D. Va. 1982)(the fact that general budget of school provided funds received from federal government to athletic department did not subject athletic department to Title IX); Othen v. Ann Arbor School Bd., 507 F. Supp 1376, 1387, 1389 (E.D. Mich. 1981)(holding that federal government could not terminate funds given to a university because of sex discrimination in athletic program since no funds were earmarked for athletic program), aff'd on other grounds, 699 F.2d 309 (6th Cir. 1983); cf. Steward v. New York Univ., 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976)(holding that the federal government may only terminate aid to the particular program that discriminates). See Note, The Program-Specific Reach of Title IX, 73 COLUM. L. REV. 1210, 1213-15 (1983) for a discussion of the direct funding approach. See also Angel, discussed supra notes 120-130 and accompanying text, for delineation of the direct funding theory under the CAB's rules implementing section 504.

5. See supra text accompanying note 2 for the pertinent language of section 504. The debate is essentially over the meaning of the phrase "program or activity". Some suggest that only direct recipients of federal aid must comply with the statute while others argue that Congress contemplated indirect recipients of federal aid to be covered by section 504. See supra notes 127-130, 136 and accompanying text.

6. Indirect assistance is that aid not provided directly to a program or activity, but provided to another program which results in a substantial benefit to the indi-
direct funding approach only those programs receiving direct aid from the federal government are subject to the mandates of the antidiscrimination statutes.

Another means for determining the scope of federal financial assistance is the institutional approach.¹³⁹ Under this approach, any financial aid given to a portion of an entity subjects the entire entity to coverage.¹⁴⁰ Proponents of this theory argue that non-earmarked aid (general aid to the entire institution) benefits the entire institution, thus making it a recipient of federal financial assistance.¹⁴¹ Indirect aid also qualifies as financial assistance under this approach.¹⁴² "Program or activity" under this approach is a broad phrase limited only to those programs benefiting from the federal assistance.¹⁴³ The only real question under this approach is "who receives the benefits, directly or indirectly, of the federal funds?" The answer to that question constitutes the program or activity receiving federal financial assistance under the institutional theory.¹⁴⁴

The infection theory contends that the government may only terminate federally-provided funds if the program uses those funds in a discriminatory manner or if the

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¹³⁹ See Note, supra note 136, at 1212, 1215-17.
¹⁴⁰ See, e.g., Grove City College v. Bell, 687 F.2d 684, 700 (3d Cir. 1982), rev'd, 104 S. Ct. 1211 (1984), discussed infra notes 157-166 and accompanying text.
¹⁴¹ 687 F.2d at 695.
¹⁴² Id. at 700.
¹⁴³ See id. at 695-96.
¹⁴⁴ In Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), aff'd, 688 F.2d 14 (3d Cir. 1982), the District Court held that an institution should not be able to circumvent antidiscrimination laws by transferring money from a program receiving federal financial assistance to a program that does not receive federal financial assistance. 524 F. Supp. at 538-39. The court concluded that Congress intended a broad interpretation of "federal financial assistance." Id. at 536-37. The Court of Appeals affirmed the district court, relying heavily on the Third Circuit's decision in Grove City. 688 F.2d at 16. Since the Supreme Court recently reversed the Third Circuit's decision in Grove City, see infra notes 157-166 and accompanying text, the institutional theory is no longer acceptable for determining the scope of assistance the government provides to a program.
funds "support a program which is infected by a discriminatory environment." 145 One key tenet of this theory is that the government may only terminate the aid to the program that is discriminatory or "infected by a discriminatory environment." 146 Thus, the government may not terminate federal aid to nondiscriminatory activities because another program in the same institution is discriminatory, unless a discriminatory environment exists. 147 The infection theory is thus somewhat of a compromise between the direct funding and institutional theories. Although courts have not specifically referred to the aforementioned theories by name, a discussion of them is helpful to note the wide range of possible definitions for program or activity.

Two recent decisions by the United States Supreme Court have addressed the scope of federal financial assistance. In North Haven Board of Education v. Bell, 148 two school teachers brought actions claiming discrimination under Title IX of the Education Amendments of 1972. 149 Both school boards received federal funds directly from the government, but the school boards challenged HEW's authority to issue regulations governing their employ-

145 Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969). For example, "if discriminatory practices in one division, such as admissions, infect the entire university with a discriminatory environment, then all federal aid should be terminated." Note, Title VI, Title X, and the Private University: Defining "Recipient" and "Program or Part Thereof", 78 Mich. L. Rev. 608, 624 (1980).

146 Finch, 414 F.2d at 1078. The reason for determining the program actually engaging in discriminatory practices is that Title VI limits the termination of federal financial assistance to "the particular program, or part thereof, in which such noncompliance has been so found." 42 U.S.C. § 2000d-1 (1982).

147 The court in Finch reasoned that "the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." 414 F.2d at 1075.


149 Id. at 517-18. One teacher alleged that her employer refused to rehire her after a one year maternity leave. Id. at 517. The other teacher alleged that her employer had discriminated against her with respect to job assignments, working conditions, and the failure to renew her contract. Id. at 518. Title IX is similarly worded to section 504 and is useful to this discussion of federal financial assistance. See supra note 48 and accompanying text.
The Court of Appeals for the Second Circuit had held that HEW may promulgate antidiscrimination regulations not limited to the program or activity receiving federal funds. The Supreme Court held that the government's authority to enforce sanctions against a federally-funded activity only extended to the specific program that receives financial aid. The court concluded that Title IX's legislative history supported this program-specific finding and further compared Title IX to Title VI of the Civil Rights Act, which courts have interpreted as requiring program specificity. In addition, the court noted HEW's interpretation of Title IX as mandating program specificity. The Supreme Court did not, however, define "program or activity." Nor did the court define federal financial assistance; leaving open the question whether indirect aid could bring a program under federal regulation.

The Supreme Court affirmed North Haven's holding in Grove City College v. Bell. In Grove City, a private college refused to sign an assurance of compliance with Title IX. Grove City College did not receive any direct federal aid, but a large number of its students received Basic

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150 North Haven, 456 U.S. at 517-18.
152 North Haven, 456 U.S. at 536-38. See supra note 48. "Although we agree with the Second Circuit's conclusion that Title IX proscribes employment discrimination in federally funded education programs, we find that the Court of Appeals paid insufficient attention to the 'program-specific' nature of the statute." 456 U.S. at 536.
153 Id. at 537-38 (citing Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969)). Courts have typically applied case law from Title VI to Title IX and vice versa. See supra note 48 for a comparison of the two titles.
154 North Haven, 456 U.S. at 539.
155 Id. at 540.
156 Id.
158 Id. at 1214. See supra note 48 for the applicable language of Title IX. Every educational institution that applies for federal financial assistance must sign an "assurance of compliance," which states that the institution will not discriminate on the basis of sex in any program or activity receiving federal financial assistance. 34 C.F.R. §§ 106.1, 106.4 (1985).
Educational Opportunity Grants (BEOGs) from the government.\textsuperscript{159} The Supreme Court first held that awarding BEOGs to students, although indirectly benefiting the financial aid office, constituted federal financial assistance.\textsuperscript{160} The court rejected Grove City College’s argument that Title IX only covered those activities receiving direct financial assistance from the government and concluded indirect assistance could constitute federal financial assistance.\textsuperscript{161} The court cited North Haven and limited the scope of federal financial assistance to the college’s financial aid department.\textsuperscript{162} Although the entire institution was affected by the BEOGs, only the financial aid office met the program specific requirements of Title IX and North Haven.\textsuperscript{163} The Supreme Court expressed concern that an overly broad definition of program or activity would subject the entire school to Title IX regulations merely because one student received a BEOG or a small earmarked federal grant.\textsuperscript{164} The Supreme Court rejected

\textsuperscript{159} 104 S. Ct. at 1214. A BEOG is a “basic grant that . . . will meet 70 per centum of a student’s cost of [undergraduate] attendance not in excess of $3700.” 20 U.S.C. § 1070(a)(1)(B) (1982).

\textsuperscript{160} 104 S. Ct. at 1217, 1222.

\textsuperscript{161} The court noted that “there is no basis in the statute [Title IX] for the view that only institutions that themselves apply for federal aid directly from the federal government are subject to regulation . . . . As the Court of Appeals observed, ‘by its all inclusive terminology [§ 901(a)] appears to encompass all forms of federal aid to education, direct or indirect.’” Id. at 526. Thus, the court rejected the direct funding theory, discussed supra notes 136-138 and accompanying text.

\textsuperscript{162} 104 S. Ct. at 1222. The court found “no persuasive evidence suggesting that congress intended that the Department’s [of Education] regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity.” Id.

\textsuperscript{163} Id. at 1221-22. Even though some of the BEOGs might supply funds to the college’s general operating budget, student aid resembles earmarked grants only affecting part of the institution. Id. A non-earmarked grant would affect the entire institution since it is not reserved for any particular program. See id. at 1222.

\textsuperscript{164} Id. at 1221. The court cautioned that “the fact that federal funds eventually reach the College’s general operating budget cannot subject Grove City to institution-wide coverage.” Id. Justices Brennan and Marshall concurred in part and dissented in part, concluding that Congress intended the federal aid to serve as financial assistance for the whole college. Id. at 1226, 1235-37. Therefore, the justices reasoned that the entire institution should be covered by the antidiscrimination regulations. Id. at 1236-37.
the Court of Appeals' holding that the college's other programs received federal financial assistance because BEOGs allowed the college to divert its own financial aid funds to other areas in the institution. The court emphasized that the BEOGs were similar to earmarked grants and implied that non-earmarked grants may subject more programs in the institution to federal regulation since the grant is not reserved for any particular program. The court gave no definite rules for defining program or activity, so it remains unclear what criteria the court will use in subsequent cases seeking to define program or activity.

II. PARALYZED VETERANS OF AMERICA V. CAB

At issue in Paralyzed Veterans of America was the limit of the program or activity receiving federal financial assistance under section 504. Since the larger commercial airlines did not directly receive federal financial assistance, the court had to determine whether the airlines received indirect federal financial assistance sufficient to subject the airlines to section 504 regulation. In determining whether section 504 of the Rehabilitation Act applied to those commercial airlines receiving indirect federal financial assistance, the Court of Appeals for the District of Columbia Circuit discussed four possible types of federal financial assistance indirectly provided to the airlines: exclusive operating certificates, favorable tax treatment, the National Air Traffic Control System (via

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165 Id. at 1221-22.  
166 Id. at 1222. See also supra note 163.  
167 See 104 S. Ct. at 1220-22.  
168 Paralyzed Veterans of America, 752 F.2d at 707.  
169 Id. at 707-15.  
170 Id. at 707-09. Exclusive operating certificates are discussed infra notes 174-177 and accompanying text. See generally 14 C.F.R. §§ 121.1-121.9 (1985). Every domestic carrier is required to procure an operating certificate. Id. § 121.3(a). The issuance of these certificates gives the FAA the power to regulate the air transportation industry since a carrier is prohibited from operating without a license. See id.  
171 752 F.2d. at 708-09, discussed infra notes 178-187 and accompanying text.
services of federal air traffic controllers),\textsuperscript{172} and federal subsidies to airports.\textsuperscript{173}

The groups representing the handicapped argued before the CAB that operating certificates give air carriers exclusive control over valuable air routes and therefore constitute federal financial assistance.\textsuperscript{174} In determining that the airlines' operating certificates did not constitute federal financial assistance, the CAB relied on \textit{Gottfried} for its holding that broadcast licenses are not federal financial assistance.\textsuperscript{175} The Court of Appeals for the District of Columbia Circuit approved of the CAB's reliance on \textit{Gottfried}.\textsuperscript{176} The court added that airline operating certificates were no longer exclusive, therefore making them of lesser value than broadcast licenses.\textsuperscript{177} Thus, the amount of assistance given to the airlines through operating certificates is a small portion of the benefit broadcasters enjoy from broadcasting licenses.

The court also rejected the handicapped's contention that the airline's investment tax credit for the purchase of machinery and equipment constituted federal financial assistance to the airlines.\textsuperscript{178} The CAB failed to address this issue in its rulemaking proceedings.\textsuperscript{179} The court dis-

\textsuperscript{172} Id. at 709-12, discussed \textit{infra} notes 188-208 and accompanying text.
\textsuperscript{175} Id. at 712-15, discussed \textit{infra} notes 208-229 and accompanying text.
\textsuperscript{177} 47 Fed. Reg. at 25,937. \textit{See supra} notes 83-95 and accompanying text for \textit{Gottfried}’s rejection of the argument that operating licenses are federal financial assistance. The court noted briefly that \textit{Gottfried}, discussed \textit{supra} notes 82-95 and accompanying text, states that to require an agency to acquire a license and then hold that the agency receives federal financial assistance would constitute unreasonable bootstrapping. \textit{Paralyzed Veterans of America}, 752 F.2d at 712 n.121. The court distinguished the instant case by noting that licenses and airline operating certificates were regulatory in nature, while air traffic controllers were a service provided to the airlines. \textit{Id.} at 711.

\textsuperscript{176} \textit{Paralyzed Veterans of America}, 752 F.2d at 709-10.
\textsuperscript{177} \textit{See} 752 F.2d at 708. In other words, the value of non-exclusive license is not bid up by airlines seeking a finite number of routes. \textit{See also supra} note 170 for a definition of “operating certificate.”

\textsuperscript{178} 752 F.2d at 709-10.
\textsuperscript{179} Id. at 709.
tnguished McGlotten, Regan, and Bob Jones by stating that the tax breaks in those cases "were of a much more fundamental nature than the modest incentive to capital expenditures to which petitioners point here." The court admitted that accelerated depreciation and investment tax credits benefited the airlines but stated that the trilogy of cases discussed above only apply when the use of the tax benefit is fundamental to the organization's purpose. The court further stated that McGlotten, Bob Jones, and Regan all involved nonprofit organizations seeking tax-exempt status, while commercial airlines are profit-seeking enterprises to which the government grants the tax credit to encourage capital investment. In addition, the court stated that Congress did not intend to subject the airlines to federal scrutiny merely because of a subsidy affecting a small portion of an entire industry, reasoning that an airline could avoid compliance with the regulations altogether by foregoing the deductions. With the changing nature of the tax laws Congress could also decide in the future to abolish the deductions, leaving the government powerless to prevent discrimination against the handicapped.

Having rejected the handicapped's first two contentions, the court addressed the handicapped organizations' contention that the national air traffic control system constitutes federal financial assistance because the government provides the services of air traffic controllers to the

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1. See supra notes 102-107 and accompanying text for a discussion of McGlotten.
2. See supra notes 110-113 and accompanying text for a discussion of Bob Jones.
3. See supra notes 114-118 and accompanying text for a discussion of Regan.
4. Paralyzed Veterans of America, 752 F.2d at 710.
5. Id. The investment tax credit does not apply exclusively to airlines. It is a measure, as described in McGlotten, that relates "primarily to the operation of the tax itself." See McGlotten, 338 F. Supp. at 461.
6. Id. The court stated, "we think . . . that Congress did not intend, by granting a limited tax incentive to a particular industry or group, to thereby encompass every such industry or group . . . within some ever-widening and potentially almost limitless definition of 'federal financial assistance.'" Paralyzed Veterans of America, 752 F.2d at 709.
7. Id.
airlines.  The CAB rejected this argument in its formulation of the Final Rule and concurred with the position of the FAA that air traffic control services “are provided to the public generally to ensure flight safety” instead of to the airlines. The CAB reasoned that the air traffic control system did not directly provide the airlines with financial assistance.

In determining whether it agreed with the CAB’s position regarding air traffic controllers, the court analyzed the impact of air traffic controllers on commercial airlines. The air traffic controllers are highly trained individuals employed in a program that costs over two billion dollars annually. The services of these personnel are essential to the airlines and are a service the airlines would have to provide themselves in the absence of the government program. With these findings, the court concluded that utilization of the air traffic control system constituted federal financial assistance.

The court next attempted to define the program receiving the financial assistance of the federal air traffic controllers. The CAB argued that the general public, rather than the airlines, was the recipient of the safety benefits of the federal air traffic control system. The

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188 Id. at 709-712. See supra note 77 and accompanying text for the classification of services of federal personnel as financial assistance.
189 47 Fed. Reg. at 25,937. Thus, the CAB decided that the general public was the recipient of “federal financial assistance.” See id.
190 Id. The CAB stated no rationale for its position other than that the Federal Aviation Administration (FAA) took a similar position. Id.
191 Paralyzed Veterans of America, 752 F.2d at 710-12.
192 Id. at 709 n.109.
193 Id. at 712. The services of air traffic controllers are so essential to flight safety that someone must provide them. Id. at 711-12.
194 Id. at 711.
195 Id. at 712-13.
196 Id. at 710-11. The CAB argued:
The air controllers help to assure ‘safe skies’; this ‘assists’ airlines more directly than it assists other enterprises; yet it also assists all enterprises that use the airlines or fly private planes in the course of their business. It also protects those on the ground from plane crashes. It does not, however, amount to ‘Federal financial assistance.’
court, however, agreed with the groups representing the handicapped that the air traffic control system benefits the airlines more directly than it benefits the general public. The court stated that to exempt an organization from compliance with the handicapped regulations merely because the program incidentally benefits the public "would be absurd", since virtually all federal programs attempt to benefit society.

Although the court decided that the air traffic control system constituted federal financial assistance, it did not define the program receiving the assistance of the federal air traffic controllers. Grove City's program-specific requirement muddied the federal financial assistance waters by mandating a determination of the limits of the financial assistance. The Paralyzed Veterans of America court recognized that the implications of Grove City "are not completely clear." The court grew concerned that the activity of "commercial air transportation" may not constitute the "program or activity" receiving the "federal financial assistance" of federal air traffic controllers. The emphasis, as dictated by Grove City, is on the activity or program, not the method of assistance. The court did not attempt to define the activity or program receiving the financial assistance of the air traffic controllers but mentioned two possible definitions: (1) the federal air

Id. See supra note 189.

197 752 F.2d at 711.

198 Id. The court emphasized that "it would be absurd to exempt a federally-funded local transit authority or school system from compliance with section 504 on the ground that public transportation benefits passengers as well as transit systems and, like public education and safe air travel, it is a 'public good.'" Id.

199 Id. at 712.

200 See supra notes 160-164 and accompanying text.

201 Id. The court hesitated to embark on the Grove City mandate that federal financial assistance reach only the program actually receiving the funds. Id.

202 Id. Even though air traffic controllers are indispensable to the airlines, only the program receiving the assistance must meet section 504 requirements. Id.

203 Id. Thus, the key to determining whether federal air traffic controllers bring the airlines within the reach of section 504 is defining the limits of the program receiving the assistance.
traffic control system, or (2) commercial air transportation.\textsuperscript{204} If the court defined the program as the federal air traffic control system, then \textit{Grove City} mandates that only the federal air traffic control system be subject to section 504.\textsuperscript{205} On the other hand, if the court deemed the program to be commercial air transportation, then the services of air traffic controllers would constitute federal financial assistance to the airlines.\textsuperscript{206} Thus, the court’s dilemma was whether commercial air transportation was defined as the program or activity receiving federal financial assistance.\textsuperscript{207} The court, however, was able to escape this dilemma by finding that the federal government’s funding of airports and airways constitutes federal financial assistance to the airlines.\textsuperscript{208} This made the determination of whether the airlines receive federal financial assistance via air traffic controllers unnecessary.\textsuperscript{209}

By determining that the federal funding of airports constitutes federal financial assistance, the court concluded that any certificated air carrier using federally funded airports is subject to section 504 regulation.\textsuperscript{210} The Secretary of Transportation has the power to make grants for airport development and to generally provide for an adequate national airport system.\textsuperscript{211} The Airport and Airway Trust Fund provides airports with several billion dollars each year to ensure that the civil aviation industry has ade-

\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id. The court found the relationship of airports and airlines to be much closer than that of federal air traffic controllers and airlines. \textit{Id.} at 714-715; See infra notes 210-229 and accompanying text. Presumably, the court was wary of \textit{Grove City}’s statement that the economic ripple effects of freeing funds for use elsewhere in the organization does not constitute federal financial assistance. 752 F.2d at 713. See also supra note 165 and accompanying text for \textit{Grove City}’s discussion of this contention.
\textsuperscript{209} 752 F.2d at 712.
\textsuperscript{210} Id. at 715.
\textsuperscript{211} The Airport and Airway Development Act of 1970, 49 U.S.C. § 1714(a) as amended (1982). The purpose of the statute is "the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." \textit{Id.}
quate facilities and equipment.\textsuperscript{212} This federal money is used for research and development, to purchase land and build runways.\textsuperscript{213}

The court stated that the magnitude of this federal aid subjects all federally funded airports to section 504.\textsuperscript{214} However, the "critical question" for the court was whether the scope of section 504 ended with the airports or extended to the airlines themselves.\textsuperscript{215} The court first examined the administrative interpretation of civil rights statutes in order to define the program receiving federal financial assistance.\textsuperscript{216} The court reasoned that since the Department of Transportation (DOT), pursuant to its Title VI regulations, included businesses providing services to the public at the airport such as restaurants or car rental agencies in its list of those airport programs receiving federal financial assistance,\textsuperscript{217} "it . . . [would be] nonsensical to exclude the air carriers themselves, which surely are businesses 'catering to the public at the airport.'"\textsuperscript{218} The court noted that DOT intended to extend its section 504 regulations to in-flight activities; thus subjecting all commercial carriers to section 504, but backed

\begin{footnotesize}
\begin{enumerate}
\item[212] 49 U.S.C. § 1742. Grants from the Trust Fund are not earmarked but are given to the airports generally to assist in paying for "planning, research and development, construction or operation and maintenance of (i) air traffic control, (ii) air navigation, (iii) communications, or (iv) supporting services, for the airway system." 49 U.S.C. § 1742(f)(1)(B).
\item[213] Id. § 1714. See supra note 212. Other projects include "airport lighting, airport access and service roads, electronic and visual approach aids, taxiway construction, obstruction removal, and fire/rescue equipment and buildings." 752 F.2d at 712 (citing National Transportation Policy Study Commission Final Report, National Transportation Policies Through the Year 2000 187-88 (June 1979)).
\item[214] Paralyzed Veterans of America, 752 F.2d at 712.
\item[215] Id. at 713. Thus, the court was faced with the same dilemma as when it tried to determine whether the services of federal air traffic controllers constituted federal financial assistance. See supra notes 191-208 and accompanying text.
\item[216] 752 F.2d at 713. See supra note 48 for the application of the history of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 to section 504.
\item[217] 49 C.F.R. pt. 21, app. C (1984). Also listed were snack bars, gift shops, ticket counters, baggage handlers, taxis franchised by the airport sponsor, and insurance underwriters. Id.
\item[218] 752 F.2d at 713.
\end{enumerate}
\end{footnotesize}
off when the CAB formulated its Proposed Rule. The court stated that the CAB’s final interpretation was contrary to the CAB’s, DOT’s and HEW’s determination of similar issues.

The airlines argued that North Haven and Grove City restricted the definition of program or activity to the airports themselves since the airports were the only activity receiving federal financial assistance. In response, the court stated that “airports and airlines are inextricably intertwined”, and they both comprise the program or activity of air transportation, forming a single, functional unit. Airline services and airport services combine to produce air transportation. The court noted that some airlines may own their terminal or may control the design of most of their facilities. The court found the relationship of airlines to airports analogous to the situation in Grove City, where the court deemed only a part of the college to be receiving federal financial assistance. On the basis of Grove City, the Paralyzed Veterans of America court stated that only the program or activity of providing commercial air transportation, not the entire airline operation, receives federal financial assistance.

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219 Id. at 713-14. DOT had wanted to avoid duplicative regulations. Id. at 713.
220 Id. at 713. See also supra notes 69-75 and accompanying text.
221 See supra notes 148-156 and accompanying text for a discussion of North Haven.
222 See supra notes 157-167 and accompanying text for a discussion of Grove City.
223 Paralyzed Veterans of America, 752 F.2d at 714.
224 Id. at 714.
225 Id. at 714. The court defined the program or activity receiving the benefits of federally assisted airports as commercial air transportation. Id. Therefore, any activity in the program of commercial air transportation receives federal financial assistance if it uses federally funded airports.
227 752 F.2d at 714 n.142. The airline may also control its passengers’ parking at the airport. Id.
228 752 F.2d at 714. See supra notes 157-167 and accompanying text for a discussion of Grove City.
229 752 F.2d at 714. The court stated that a hotel owned and operated by an airline would not be covered by section 504 since it is not part of the program of commercial air transportation. Id.
Finally, the court discussed the CAB’s reliance on *Angel* in the CAB’s formulation of the Final Rule. The *Angel* court’s holding that federal funding of airports was not federal financial assistance stood in direct conflict with the court’s finding in *Paralyzed Veterans of America*. The Court of Appeals for the District of Columbia Circuit disapproved of the CAB’s reliance on *Angel* and squarely overruled *Angel* on three grounds: (1) Even if airlines do not receive federal financial assistance on a company-wide basis, their programs or activities providing air transportation receive assistance; (2) *Grove City* expressly states that coverage under antidiscrimination statutes is not limited to those programs that are direct recipients of federal funds; and (3) *Angel* is too liberal a reading of *Gottfried*, which only applies to licenses. The court remanded the Final Rule to DOT for further consideration in light of the court’s holding. Since the CAB had erroneously determined to restrict the application of its Final Rule to smaller carriers, the court instructed DOT to redraft any rules made specifically with small air carriers in mind to reflect section 504’s application to all commercial air carriers.

**III. CONCLUSION**

*Paralyzed Veterans of America* should have a significant future impact on larger commercial carriers. The Final Rule does not require the airlines to make structural modifica-

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230 See supra notes 120-130 and accompanying text for a discussion of *Angel*.

231 *Paralyzed Veterans of America*, 752 F.2d at 714-15.

232 See id.

233 752 F.2d at 714-15. The court stated that *Gottfried* only applied to the license/operating certificate issue and not to the issue of whether or not funding provided to airports was federal financial assistance to the airlines. Id. See supra notes 82-95 for a discussion of *Gottfried*.


235 *Paralyzed Veterans of America*, 752 F.2d at 725-26.

236 Id.
tions to their aircraft. Instead, the CAB left much of the manner of achieving compliance with section 504 to the airlines themselves. Therefore, the greatest impact will not be on current efforts by the airlines to accommodate the handicapped but on the future production of jetliners.

The purpose of the holding in Paralyzed Veterans of America was to avoid "the absurd result that handicapped persons are protected from discrimination in air transportation only up to the door of the aircraft." Perhaps the court's ulterior motive was to provide the handicapped with a uniform means of travel. The court emphasized that air travel is almost essential to participation in the modern work force, and accordingly air travel should be freely accessible to all persons. This finding played an important role in the court's determination to bring all major carriers within the ambit of section 504.

The court quickly eliminated the propositions that operating certificates and tax credits constituted federal financial assistance on the basis that (1) both arguments contradicted recent case law, and (2) both methods of financial assistance were too remotely related to the activity of commercial air transportation to constitute federal financial assistance. The court placed most of its emphasis on the contentions of the handicapped that federal air traffic controllers and federal funding of airports

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238 See 47 Fed. Reg. at 25,945 (airlines are free to decide type of boarding equipment they will use).
239 Paralyzed Veterans of America, at 718.
240 Id. at 716 nn.152-53.
241 See supra notes 174-177 and accompanying text for a discussion of operating certificates as constituting federal financial assistance.
242 See supra notes 178-187 and accompanying text for a discussion of tax credits as constituting federal financial assistance.
243 See supra notes 183-187 and accompanying text.
244 See supra notes 188-208 and accompanying text for a discussion of federal air traffic controllers as constituting federal financial assistance.
245 See supra notes 210-236 and accompanying text for a discussion of federal funding of airports as constituting federal financial assistance.
constitute federal financial assistance. The court devoted much of its opinion to discussion of the argument that federal air traffic controllers constitute federal financial assistance, yet declined to decide this issue because it was unsure of the implications of the recent Supreme Court decision in *Grove City* limiting a federal agency's ability to regulate recipients of federal financial assistance.\(^\text{246}\)

The court, however, did decide a substantially similar issue when it held that federal funding of airports constitutes federal financial assistance.\(^\text{247}\) Perhaps the court was eager to overrule *Angel*, since the *Angel* court had erroneously based its decision that federal funding of airports was not federal financial assistance on an overly broad interpretation of *Gottfried*.\(^\text{248}\) Once the Court of Appeals for the District of Columbia Circuit had disapproved of *Angel*, the court was free to apply the Final Rule to all air carriers.

Recently, the United States Supreme Court granted certiorari\(^\text{249}\) to *Paralyzed Veterans of America* and will hopefully resolve the "federal financial assistance" question. The central issue to be discussed is the scope of "program or activity."\(^\text{250}\) As indicated earlier, if the court defines "program or activity" narrowly, then the Final Rule will bind only the smaller airlines receiving direct federal aid.\(^\text{251}\) The Supreme Court, however, rejected this "direct

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\(^{246}\) Presumably, the court was concerned that the public, rather than the airlines, was the recipient of the safety benefits of federal air traffic controllers. See supra notes 196-198 and accompanying text.

\(^{247}\) The considerations in defining the program or activity seem to be the same for federal air traffic controllers and federal funding of airports. Both mechanisms provide an indispensable part of the airport's sustenance. Furthermore, both relate to the general safety of the public but seem to benefit the airlines to a greater degree. The only real difference, if any, between the two methods of assistance is that federal funds provided to the airports are primarily for the benefit of the airports and airlines, while air traffic controllers are more closely related to air safety.

\(^{248}\) *Paralyzed Veterans of America*, 752 F.2d at 714-15.

\(^{249}\) United States Dep't of Transp. v. Paralyzed Veterans of Am., 106 S. Ct. 244 (1985).

\(^{250}\) 752 F.2d at 714.

\(^{251}\) See supra notes 73-74 and accompanying text.
funding” view of federal financial assistance\(^{252}\) in *Grove City*,\(^{253}\) so the definition of program or activity should be somewhat broader than the position taken by the CAB in its Final Rule.\(^{254}\) Therefore, the government cannot limit the definition of “program or activity” to include only those airlines receiving direct subsidies from the federal government.\(^{255}\)

The court could also define “program or activity” broadly, including all airline activities, but this would probably contradict *Grove City’s* condemnation of the institutional approach.\(^{256}\) Thus, the “program or activity” receiving federal financial assistance must be somewhat broader than those carriers receiving direct subsidies and narrower than the entire operations of the airlines.

The Supreme Court should affirm the Court of Appeals for the District of Columbia Circuit’s holding that the government has the ability to regulate all certificated air carriers’ activities at federally funded airports. First, the airlines are clearly recipients of federal financial assistance either by virtue of the federally-operated air traffic control system or the provision of federal grants to airports.\(^{257}\) Even though the government indirectly provides the assistance, it is assistance vital to the continued survival of air carriers.\(^{258}\) *Grove City* specifically approves of indirect financial assistance as a means to bring programs within the reach of governmental antidiscrimination regulation.\(^{259}\) The airlines, as primary recipients, should be distinguished from the general public. Congress sought to regulate the former,\(^{260}\) and the fact that the public receives a large benefit from federal assistance to airlines

\(^{252}\) See *supra* notes 136-138 for a discussion of the direct funding approach to defining the scope of federal financial assistance.

\(^{253}\) See *supra* note 161 and accompanying text.

\(^{254}\) Id.

\(^{255}\) See *supra* notes 160-161 and accompanying text.

\(^{256}\) See *supra* notes 162-165 and accompanying text.

\(^{257}\) See *supra* notes 191-194, 210-214 and accompanying text.

\(^{258}\) See *supra* notes 193, 211-213 and accompanying text.

\(^{259}\) See *supra* notes 160-161 and accompanying text.

\(^{260}\) Nondiscrimination on the Basis of Sex in Education Programs and Activities
does not mean that the public is the "recipient." 261

Second, the airlines come within the "program or activity" receiving financial assistance. To define airports as the only program receiving federal financial assistance produces anomalous results. Under this restrictive definition of program, the handicapped would be able to get to the door of the plane, but no further. This restrictive approach effectively uses federal funds to subsidize discrimination, a result Congress sought to avoid by drafting section 504. 262 In addition, airports and commercial carriers are a single, functional activity. 263 To subject one to regulation while exempting the other ignores their interrelationship. This relationship is unique to commercial air transportation. 264 Airlines cannot operate without airports and vice versa. One may ask, "Why do we have large airports?" The answer is to provide facilities for commercial airlines, contrary to the focus on the general public with federally funded highways. Indeed, the public views airports and airlines as a single entity. To bring them both under section 504 regulation ensures a uniform system of granting the handicapped equal opportunity.

The "program or activity" receiving federal financial assistance is "commercial air transportation." This definition of program does not run afoul of Grove City's condemnation of the institutional approach 265 because airline activities such as hotel operations are not part of the program of commercial air transportation and thus are not subject to section 504 regulation. Rather, airline-owned hotels are a part of the airline "institution." Defining the program as commercial air transportation also avoids the er-

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261 See supra notes 195-198 and accompanying text.
263 See supra notes 224-227 and accompanying text.
264 Paralyzed Veterans of America, 752 F.2d at 714.
265 See supra notes 162-165 and accompanying text.
raneous positions of the Angel court and the CAB in its Final Rule that only those airlines receiving direct federal subsidies are subject to the Final Rule.

In Grove City, the government disbursed funds directly to students for scholarship purposes. The Supreme Court held that the aid constituted federal financial assistance to the student financial aid program. The indirect aid in Paralyzed Veterans of America is similar to the financial assistance in Grove City because the government did not give the aid directly to the program it sought to regulate. However, the government aid to airports in Paralyzed Veterans of America is different because the assistance is not earmarked. The airports have broad discretion to spend the federal funds. Therefore, the aid in Paralyzed Veterans of America is more comprehensive than the financial aid in Grove City. Logically, the program receiving federal financial assistance is larger because of this broader funding. The Grove City court suggested such a result where the funds were not earmarked for any particular use within an institution.

Those disagreeing with the holding in Paralyzed Veterans of America express the legitimate fear that the decision "would make every commercial enterprise a 'recipient' of federal aid when it merely makes use of a service or facility that receives any federal assistance." However, the issue in Paralyzed Veterans of America involves the unique relationship between the government and the program of commercial air transportation not present in most other

266 See supra notes 125-130 and accompanying text.
267 See supra notes 69-75 and accompanying text.
268 Grove City, 104 S. Ct. at 1214.
269 Id. at 1222. See supra notes 159-160 and accompanying text.
270 See supra notes 159, 161, 211-214 and accompanying text.
271 See supra notes 211-214 and accompanying text.
272 See supra notes 212-214 and accompanying text.
273 See supra notes 212-214 and accompanying text.
274 The result in Grove City might have been different if the government had disbursed funds directly to the College's operating fund. See Grove City, 104 S. Ct. at 1221-22.
275 See supra note 166 and accompanying text.
276 752 F.2d at 725. This was the view taken by the judges dissenting from the court's denial of respondent's suggestion for rehearing en banc. Id.
federal financial assistance situations. The government assumes a proprietary role in investing its money in commercial air transportation. Federal highways and courts involve different relationships between the recipients. In those programs, the public is the primary recipient of federal aid. For example, the public uses the federally-funded highway system much more extensively than the owner of a private plane would use a large, federally-funded airport. Therefore, the holding in *Paralyzed Veterans of America* will not subject a commercial enterprise to section 504 regulation when that business makes use of a federally-funded activity, unless that business, not the general public, is the intended recipient of the benefits of the activity. Since all carriers must now follow the same rules, *Paralyzed Veterans of America* affirms Congress' intent that the implementation of section 504 be uniform and consistent. Surely Congress did not intend to foster a system whereby a handicapped individual could get to the door of the airplane, but no further.

*Robert Randel Kibby*

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276. Neither would farmers receive federal financial assistance by virtue of the government-assisted National Weather Service. The intended recipient of the benefits of the National Weather Service is the general public, not farmers.


278. See id. at 39, 1974 U.S. CODE CONG. & AD. NEWS at 6390. "[S]ection [504] therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." *Id.* at 39, 1974 U.S. CODE CONG. & AD. NEWS at 6390.