A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation

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INTRODUCTION

The Model Rules of Professional Conduct prohibit a lawyer from engaging in the in-person solicitation of prospective clients when "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."\(^1\) This underlying proscription of professional conduct evolved from a traditional condemnation of solicitation by lawyers.\(^2\) The present focus on the financial incentive of the lawyer, when denouncing solicitous conduct, however, developed from a position enunciated by the United States Supreme Court when exploring the permissible scope of regulation of in-person solicitation.\(^3\) The Court determined that given the public interest in preventing overreaching inherent in solicitation, when motivated by a lawyer's own pecuniary gain, restrictions on in-person solicitation are justified.\(^4\)

A review of the analysis implemented by the Court in its treatment of in-person solicitation demonstrates that the emphasis on a lawyer's pecuniary gain is misplaced. Case law reveals minimal precedent to suggest that it is the pecuniary incentive of the lawyer which renders solicitous conduct impermissible.\(^5\) Provided important issues are being furthered as a result of the underlying interaction, in-person solicitation by the lawyer, and any remunerative motivation, has been overlooked.\(^6\) The purpose of prohibiting in-person solicitation is to prevent lawyers from exerting undue influence on prospective clients.\(^7\) Little basis exists to support the assertion that a lawyer whose incentive is financial is more likely to overreach a potential client than a lawyer who is motivated by other personal concerns.\(^8\)

It is problematic to implement a standard which evaluates lawyer solici-
tation on the basis of significant motive for pecuniary gain. The term "pecuniary gain" is imprecise, and discerning motivation and its significance is subjective. This results in the implementation of ambiguous criteria which leave the evaluation process with no meaningful basis for objective review. Notwithstanding these impediments, the *Model Rules of Professional Conduct* prohibit in-person solicitation when pecuniary gain is a significant motive of the lawyer.

This article will examine proscriptions against solicitation, beginning with the historical development of the attitude that solicitation is improper. Part II of this article will discuss the Supreme Court’s prohibition of in-person solicitation and demonstrate that its emphasis on motivation of pecuniary gain in delineating impermissible solicitation lacks foundation. Part III of this article will focus on the *Model Rules* language which prohibits solicitation, asserting that the standard enunciated therein is subjective and ambiguous. Finally, the effect of nonsolicitation rules on the profession will be described, noting that as in the past, the preclusion of solicitation negatively impacts the solo practitioner and the small law firm.

### I. A Historical Perspective of Proscriptions Against Solicitation

Historically, the legal profession has considered the solicitation of business to be inappropriate. This condemnation of solicitation developed as a principle of good taste among a small and homogeneous group of practitioners during the formative period of the profession. In medieval England, where the legal profession as we know it today originated, men who

9. See infra notes 141-152 and accompanying text.
11. The formative period of the legal profession was from the reign of Edward I (1272) until the reign of Henry VI (1422). Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 78 (1953). In the beginnings of English law, representation in litigation was regarded as exceptional and developed slowly, although it was customary for litigants in the neophyte English system to take their friends and advisors with them to trial. *Id.* at 79; See Drinker, *supra* note 10, at 12. Trial in medieval England was itself perilous, typically being by battle or judicial combat, an ordeal brought to England by Norman conquerors. See Frederic W. Maitland & Francis C. Montagu, *A Sketch of English Legal History* 14 (1915 & reprinted 1978). In trial by battle, one would swear to the truth of his cause and, in personal combat, seek to prove the truth of his position. *Id.* at 49-50. This process was not devoid of representation, however, for in certain situations a person could retain a champion to intervene on his behalf. L. B. Curzon, *English Legal History* 77 (2d ed. 1979). This champion, who would intervene for hire, maintained a fiction of a personal connection with the proceedings, asserting that he knew the truth of the cause for which he was fighting. William Holdsworth, *A History of English Law* 309 n.4 (7th ed. 1958). As trial by battle became obsolete and the judicial machinery evolved and became more complicated, expertness in dealing with the legal system in England lay with a relatively small number of persons. See generally Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935). A class of legal advisors who were experienced and competent in legal technicalities
practiced law generally trained in the classics\(^1\) and were drawn from England's leading families.\(^2\) Many of these individuals regarded their profession as a public service,\(^3\) and it was not characteristic for these men to depend on their profession for a livelihood.\(^4\)

In the English Inns of Court, which were societies of lawyers responsible for the education and admission of members to the profession,\(^5\) the lawyers were few in number and formed a closely knit group.\(^6\) They refused to compete for clients because of concern that to do so would destroy their intimacy and reduce them to the status of tradesmen.\(^7\) This notwithstanding, it was unnecessary for lawyers to overtly seek business since there were few legal experts and many clients.\(^8\) During the formative period of the legal profession, principles of etiquette and good taste, along with the existence of readily available business, tempered solicitation by lawyers.\(^9\)

In colonial America, it was customary for some young men desiring to be members of the legal profession to return to England to study law at the Inns of Court.\(^10\) In light of their training and position in their communities, these men helped to establish high standards of education and conduct for

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\(^1\) Drinker, supra note 10, at 79. As skill and learning were required in the process of the law, resort to these practitioners naturally followed. \(\text{POUND, supra, at 79-80.}\)


\(^3\) \textit{DRINKER, supra note 10, at 5.}\n
\(^4\) \textit{Id. In defining the essence of a "profession," Dean Roscoe Pound stated the following:}\n
\textit{The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.}\n
\textit{POUND, supra note 11, at 5. H. Drinker states that a “duty of public service, of which the emolument is a by-product and in which one may attain the highest eminence without making much money” is a primary characteristic which distinguishes the legal profession from business. DRINKER, supra note 10, at 5.}\n
\(^5\) \textit{Id.}\n
\(^6\) With respect to the legal profession in England, the Inns of Court had powers of education, discipline and government. \(\text{POUND, supra note 11, at 88-89. However, by the 20th century, The Inns of Court had ceased to be great educational or disciplinary bodies, their primary function being examining students for admission to the upper branch of the profession. EDWARD STANLEY ROSCOE, THE GROWTH OF ENGLISH LAW, 219-20 (1911).}\n

\(^8\) \textit{Id. See infra note 33, at 277.}\n
\(^9\) \textit{Id.}\n
\(^10\) \textit{See Louise L. Hill, Solicitation by Lawyers: Piercing the First Amendment Veil, 42 ME. L. REV. 369, 378 (1990).}\n
\(^11\) \textit{DRINKER, supra note 10, at 18; FRANCIS ROBERT AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 32 (1969).}\n
the legal profession upon their return to America.\textsuperscript{22} As in England, the number of trained lawyers in colonial America was small and the factors which discouraged solicitation during the formative period of the profession in England translated to the colonies.\textsuperscript{23}

Over time in America, a widespread perception developed that special privileges were accorded members of the legal profession.\textsuperscript{24} Because of the special treatment which lawyers were perceived to receive, a hostility emerged toward the profession.\textsuperscript{25} Bar associations, viewed as secret trade unions of a privileged class, not equally open to all citizens, were considered undemocratic and un-American.\textsuperscript{26} As a result, states enacted significant legislation detrimental to the legal profession which lowered, or eliminated, required qualifications of character, education and training to practice law.\textsuperscript{27} The effect was the existence of an essentially open bar in the United States, comprised of many lawyers competing for business insufficient to accommodate their number.\textsuperscript{28} Practitioners were no longer composed of a small homogeneous group who shunned the overt pursuit of clients.

In the latter part of the nineteenth century, leaders of the bar, who were predominantly business lawyers,\textsuperscript{29} attempted to stop the rampant commer-

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\item \textsuperscript{22} Drinker, supra note 10, at 18.
\item \textsuperscript{23} See supra notes 12-14 and accompanying text. Lawyers were to remain in "demure, discrete and decorous roles, according to traditional courtship rituals of the bar." Deborah L. Rhode, Solicitation, 36 J. Legal Educ. 317, 318 (1986). For a detailed treatment of the development of the legal profession's nonsolicitation mandate from a historical perspective, See Hill, supra note 20, at 370-88.
\item \textsuperscript{24} See Lawrence M. Friedman, A History of American Law 95 (2d ed. 1985); Drinker, supra note 10, at 19.
\item \textsuperscript{25} See Drinker, supra note 10, at 19; Bernard Schwartz, The Law in America 9-10 (1974); Philip J. Wickser, Bar Associations, 15 Cornell L.Q. 390, 393 (1930).
\item \textsuperscript{26} Bernard Schwartz, The Law in America 11-13 (1974).
\item \textsuperscript{27} Id. See Friedman, supra note 24, at 316-18; Comment, Controlling Lawyers by Bar Associations and Courts, 5 Harv. C.R.-C.L. Rev. 301, 303-04. Just after the Civil War, the legal profession in the United States reached its lowest point. Schwartz, supra note 26, at 20. Some states enacted laws upholding the inherent right of every voter of good moral character to practice law. Id.; See, e.g., N.H. Rev. Stat. Ann. ch. 177, § 2 (1842) amended by N.H. Stat. Ann. ch. 311, sec. 2 (1973) ("any citizen of the age of twenty one years, of good moral character, on application of the Superior Court shall be admitted to practice as an attorney").; Ind. Const. art. VII, § 21 (1850) ("Every person of good moral character who is a voter is entitled to practice law in any of the courts of this state.") See also Anton-Hermann Chroust, The Rise of the Legal Profession of the Legal Profession in America 280 (1965); Robert Stevens, Democracy and the Legal Profession, Cautionary Notes, 3 Learning & the Law 12, 15 (1976).
\item \textsuperscript{28} It is estimated that in 1850 there were 21,979 lawyers in the United States. By 1880 that number had grown to approximately 60,000; and by 1900 to approximately 114,000. Friedman, supra note 24, at 633.
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cialism in the unregulated legal profession.\textsuperscript{30} Reestablishment of the standards of character, education and training within the profession were sought.\textsuperscript{31} Reform was also sought, however, because a business crisis was perceived and the bar felt the "hot breath of competition" from a commercial perspective.\textsuperscript{32} As a means of achieving the dual objectives of fostering professional values and quelling a business crisis, lawyers did that which was common among the trades\textsuperscript{33} when confronted with a threat; they undertook "to organize and fight back."\textsuperscript{34} This was accomplished by the reorganization of bar associations throughout the country.\textsuperscript{35}

Within this synergy, in 1887, the Alabama State Bar Association formulated and adopted the first formal Code of Ethics for the American legal profession.\textsuperscript{36} As a general rule for guidance to the members of the Alabama State Bar, the matter of solicitation of clients was specifically addressed. In a condemnation of the practice, the Code of Ethics stated that "special solicitation of particular individuals to become clients ought to be avoided."\textsuperscript{37}

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30. See Drinker, supra note 10, at 28.

31. Id.

32. Friedman, supra note 24, at 649.

33. Interestingly, while the crafts and trades were distinguishable from the learned professions of theology, medicine and law by demarcations of society, economy and education, significant distinctions were not present in the initial organization of these entities. See Rubin, supra note 12, at 32. The special training that was concomitant with each craft or profession generated solidarity among the various associations' memberships. Id. The centrality of licensing in the trades and the professions arose from these early organizations and gave autonomy of control to the associations' individual practices. See Stanley J. Gross, The Myth of Professional Licensing, Am. Psychologist 1009, 1010-11 (1978).

34. Friedman, supra note 24, at 649.

35. Drinker, supra note 10, at 20. Since the time of the early regulatory structuring of the professions and trades, the adoption of a special set of rules to regulate members has been a characteristic attributable to the professions. See Wilbert E. Moore, The Professions: Roles and Rules 113-116 (1970). See also supra note 33.

36. 118 Ala. XXIII (1899); See Drinker (citing Ala. Code of Ethics), supra note 10, at 23. The Code of Ethics formulated by the Alabama State Bar Association was based largely on David Hoffman’s Fifty Resolutions in Regard to Professional Deportion and George Sharswood’s An Essay on Professional Ethics. Id. at 23 n.7. Hoffman’s work was published as part of a general course of study on professional ethics for attorneys. David Hoffman, A Course of Legal Study Addressed to Students and the Profession Generally 752-75 (2d ed. 1836). Mindful of a lack of professional community, Hoffman sought to encourage good behavior among lawyers by relying on individual moral persuasion. See Stephen E. Kalish, David Hoffman’s Essay on Professional Deporation and the Current Legal Ethics Debate, 61 Neb. L. Rev. 54, 58 (1982). Sharswood’s work was authored as an inspirational guide to the practicing bar, urging that high moral principle was the foundation of professional dignity. George Sharswood, An Essay on Professional Ethics 55 (5th ed. Philadelphia 1897). Sharswood warned of “a horde of pettifogging, barratrous, custom-seeking, money-making lawyers” and suggested the virtues of passivity and patience. Id. at 147. “Let business seek the young attorney”. Id. at 131.

37. 118 Ala. XXIII. Lawyer advertising, as a general premise, was not condemned by the Alabama State Bar Association. The Code of Ethics stated that “[n]ewspaper advertisements, circulars and business cards, tending professional services to the general public, are proper.” Id. at XXVII.
The Alabama Code of Ethics served as a principle antecedent to the *Canons of Professional Ethics* which the American Bar Association (ABA) promulgated and adopted in 1908. The *Canons of Professional Ethics*, subsequently adopted in whole or in part throughout the United States, continued to denounce lawyer solicitation, asserting that “solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional.” The lawyers associated with the ABA, who formulated and implemented the *Canons of Professional Ethics*, primarily were commercial lawyers who represented large clients. The “small-time,” less dignified practitioners at the turn of the century were not represented in the selective membership of the early ABA. As might be expected, the proscriptions against solicitation and advertising contained in the *Canons* did not impact the practice of the well established lawyer, but rather worked to the disadvantage of the small law firm and solopraction who had problems procuring clients. One may question whether prohibiting advertising and solicitation worked to defend the values of the profession or “to mask the self-seeking stratagems of a conservative elite.” This notwithstanding, although primarily criticized as presupposing “the vanished homogeneous community whose citizens recognized their own legal problems and knew where to turn for assistance,” the proscriptions against solicitation and advertising essentially remained intact during the six-decade pendancy of the *Canons*.

In 1969, the ABA replaced the *Canons of Professional Ethics* with the

38. WILLIAM M. TRUMBELL, MATERIALS ON THE LAWYERS' PROFESSIONAL RESPONSIBILITY 4 n.2 (1957).
39. The *Canons of Professional Ethics* were adopted by the American Bar Association at its 31st Annual Meeting on August 27, 1908. Id. at 373.
40. See DRINKER, supra note 10, at 25.
41. 41 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 27 (as adopted in 1908) (1967) [hereinafter MODEL CODE]. In addition to denouncing solicitation, the *Canons of Professional Ethics* also condemned lawyer advertising, a practice which was condoned by the Alabama Code of Ethics. See supra note 37.
42. See JEROLD S. AUERBACH, UNEQUAL JUSTICE, 41-42 (1976); FRIEDMAN, supra note 24, at 651. With the improvement in legal education and the standard for bar admission as an initial concern, the ABA was organized in August, 1878 at Saratoga, New York, a fashionable and well known summer resort. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW, THE LAW MAKERS 287 (1950). The atmosphere of the association was social, with annual meetings being held only at Saratoga Springs for the first decade. Id. Membership in the ABA was selective, by 1900 1.3 % of the country's lawyers were members; this grew to only 3 % by 1910. Id. at 287, 289. It is within this synergy that the proscriptions against advertising and solicitation were promulgated.
43. See FRIEDMAN, supra note 24, at 651.
44. See AUERBACH, supra note 42, at 42-43.
45. See MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876 348 (1976).
46. Id. at 42.
The Model Code of Professional Responsibility.\textsuperscript{47} The Model Code, as initially passed, contained proscriptions against advertising and solicitation which were much the same as they had been under the Canons.\textsuperscript{48} While the Model Code eventually permitted limited advertising,\textsuperscript{49} a lawyer effectively continued to be prohibited from soliciting business, in that by accepting employment resulting from "unsolicited advice to a layman that he should obtain counsel or take legal action" subjected a lawyer to discipline.\textsuperscript{50}

More recently, in 1983, the ABA adopted the Model Rules of Professional Conduct\textsuperscript{51} as the alternative to the Model Code of Professional Responsibility.\textsuperscript{52} The Model Rules continued the rebuke of solicitation, providing that "[a] lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship," by mail, in-person or otherwise, when a significant motive

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\textsuperscript{47} See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1969). Leading to the adoption of the Model Code of Professional Responsibility, a consensus grew among the bar that the Canons of Professional Ethics were incomplete, unorganized and failed to recognize the distinction between the inspirational and the prescriptive. See Edward L. Wright, The Code of Professional Responsibility: Its History and Objectives, 24 ARK. L. REV. 1, 5 (1970).

\textsuperscript{48} See MODEL CODE DR 2-101-105 (1969). The Model Code of Professional Responsibility is composed of three parts: 1) Canons—concise statements setting forth the basic duties of lawyers; 2) Ethical Considerations—statements of activity and conduct to which practitioners should aspire; 3) Disciplinary Rules—statements setting forth minimum standards of conduct which must be met or a lawyer may be subject to disciplinary action. Id. at Preliminary Statement.

\textsuperscript{49} See infra note 55 and accompanying text. The Model Code amended DR 2-101 to allow advertising, by explicitly designating that which a lawyer could include in publishing information regarding his services. MODEL CODE DR 2-101 (1980).

\textsuperscript{50} MODEL CODE DR 2-104(A) (1969). The Model Code of Professional Responsibility, as initially passed, contained proscriptions against advertising as well as solicitation. MODEL CODE DR 2-101-05 (1969). Ethical Consideration 2-3 further provided the following in pertinent part: "A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation. Id. at EC 2-3. The Code was amended to allow limited advertising, by explicitly designating that which a lawyer could include in publishing information regarding his services. MODEL CODE DR 2-101 (1974).

\textsuperscript{51} The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983. As of January 1, 1991, 35 jurisdictions had adopted the Model Rules, either in their entirety or with some modification. The 35 jurisdictions now implementing the Model Rules are as follows: Arizona; Arkansas; Connecticut; Delaware; District of Columbia; Florida; Idaho; Illinois; Indiana; Kansas; Kentucky; Louisiana; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New Mexico; North Carolina; North Dakota; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Texas; Utah; Washington; West Virginia; Wisconsin; and Wyoming. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING 1269-70 (2d ed. 1990).

\textsuperscript{52} The Model Code was criticized as being irrelevant, ambiguous and contradictory. See Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702 (1977); Robert J. Kutak, Model Rules: Law For Lawyers or Ethics For The Profession, 38 REC. ASS'N BAR CITY N.Y. 140, 142-43 (1983).

\textsuperscript{53} The Model Code, permits lawyers to send professional announcement cards to "lawyers, clients, former clients, personal friends, and relatives." MODEL CODE DR 2-102 (A)(2) (1978). Some refer to this rule as the "'country club' exception to the nonsolicitation rule," in that it enabled established
for the lawyer's doing so is the lawyer's pecuniary gain." This *Model Rule* proscription against solicitation was softened somewhat by a 1989 amendment which forbade lawyer, from engaging in in-person or live telephone solicitation, but permitted written or recorded solicitation as long as the contents were neither deceptive nor involved coercion, duress or harassment.

In amending the *Model Rule* which addresses solicitation, the ABA retained the language relating to pecuniary gain, thereby reaffirming its position that the overwhelming factor in determining the impermissibility of solicitation rests upon the lawyer's financial incentive being a significant motive. However, if the potential for coercion, duress and harassment is that which we seek to deter in proscribing in-person contact between a lawyer and a prospective client, an emphasis on pecuniary gain appears to be arbitrary and misplaced.


54. *Id.* The *Model Rules of Professional Conduct's* treatment of advertising differed from that asserted in the disciplinary rules of the *Model Code*. Rather than explaining what advertisements could or could not contain, the *Model Rules* generally stated that communications relating to a lawyer's services could be neither false nor misleading. *Id.* at Rule 7.1.

55. *Id.* at Rule 7.3 (1989). Following the United States Supreme Court decision in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the American Bar Association redrafted Rule 7.3 to adopt a resolution that had been promoted in drafts of the *Model Rules* but ultimately was rejected. Rule 7.3, as amended in February, 1989 states as follows:

**Rule 7.3 Direct Contact With Prospective Clients**

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

II. PRIMUS AND OHRALIK

A. IN-PERSON SOLICITATION PROHIBITED WHEN MOTIVATED BY LAWYER'S PECUNIARY GAIN

In 1978, the United States Supreme Court addressed the matter of in-person solicitation by lawyers in the companion cases of *In re Primus* and *Ohio v. Ohio State Bar Association*. Having held in *Bates v. State Bar of Arizona* the previous year that the ban on lawyer advertising violated the first amendment, the Supreme Court used *Primus* and *Ohralik* to explore the permissible scope of regulation of in-person solicitation by lawyers. In doing this, the Supreme Court placed significant emphasis on the pecuniary gain of the lawyer when evaluating permissible attorney

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57. 436 U.S. 447 (1978). The Supreme Court handed down the decisions in *Ohralik* and *Primus* on the same day.
58. 433 U.S. 350 (1977). In *Bates*, two lawyers, in hopes of generating business for their legal clinic, placed an advertisement in a newspaper listing their fees for certain routine legal services. *Id.* at 354. While admittedly violating an Arizona state disciplinary rule prohibiting lawyer advertising, the lawyers argued that they were impermissibly disciplined pursuant to such rule since it was an unconstitutional restriction of commercial speech. *Id.* at 355-56.

The decision in *Bates* came on the heels of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the first of several Supreme Court decisions declaring that commercial speech is entitled to partial first amendment protection because of its informational value to individual consumers and the general public. *Id.* at 754-65. In addressing the issues of commercial speech and the regulation of professionals, the Court invalidated a Virginia statute which forbid licensed pharmacists from advertising the prices of prescription drugs. *Id.* at 773. The Court determined that the consuming public's first amendment interest in the free flow of truthful information about a lawful commercial activity outweighed the state's interest in maintaining professionalism of licensed pharmacists. *Id.* at 770.

59. 433 U.S. at 379, 383. The Court applied a balancing test to determine the constitutionality of the rule prohibiting lawyer advertising. *Id.* at 368-79. The Court weighed the public's need for accurate information and their right to know about the cost and availability of legal services against the state's arguments in favor of the ban which centered primarily on matters relating to professionalism. The Court determined that the interests presented by the state's position were outweighed, which resulted in a first amendment prohibition of blanket suppression of lawyer advertising. *Id.*

In rejecting the arguments advanced by the state, the Court found "the postulated connection between advertising and the erosion of true professionalism to be severely strained." *Id.* at 368. The Court noted that the early lawyers viewed the law as a public service and that the ban on advertising originated as a rule of etiquette which evolved into an aspect of the ethics of the profession. *Id.* at 371. The Court stated "habit and tradition are not in themselves an adequate answer to a constitutional challenge." 433 U.S. at 371. The Court asserted that the advertising ban could be seen to reflect the profession's failure to meet community needs for legal services. *Id.* at 370. In discussing the public's need for information regarding the availability and terms of legal services the Court noted the following: the public has a right to make an informed, intelligent choice concerning legal counsel; the legal profession suffers from an adverse public image which may be due in part to a fear of price of services or an inability to locate a competent lawyer; and, advertising may reduce prices and assist in making legal services fully available, particularly for the not-quite poor and the unknowledgeable. *Id.* at 370, 376-77.

60. *Primus*, 436 U.S. at 422; *Ohralik*, 436 U.S. at 449.
conduct.61

Both Primus and Ohralik stemmed from disciplinary actions against lawyers for soliciting clients.62 In Primus, the lawyer involved was a cooperating attorney for the American Civil Liberties Union (ACLU) who addressed a group of women who had been sterilized as a condition of continued receipt of government benefits under the Medicaid Program.63 The lawyer advised the women of their legal rights and suggested that a lawsuit was possible.64 Following the meeting, the lawyer sent a letter to one of the women who had been present, advising her that the ACLU would provide her with free legal representation should she institute suit against the doctor who performed her sterilization surgery.65

In contrast to the situation in Primus, the attorney disciplined in Ohralik solicited two eighteen-year-old automobile accident victims on a face-to-face basis, offering his services for a contingency fee.66 The attorney's contact with the victims occurred shortly after the time of the accident, one victim being visited in the hospital while in traction, the other being visited in her home the day after she was released from the hospital.67 Upon review of these cases involving markedly different factual set-

61. See Primus, 436 U.S. at 428-31; Ohralik, 436 U.S. at 459-64.
62. Attorney Edna Primus was charged with and found to have violated DR 2-103(D)(5)(a)&(c) and DR 2-104(A)(5) of the disciplinary rules of the Supreme Court of South Carolina. Primus, 436 U.S. at 418-19, 418 n.10, 420 n.11. Attorney Albert Ohralik was charged with and found to have violated DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility. Ohralik, 436 U.S. at 453.
64. Id. at 416.
65. Id.
67. Id. at 450. The Court found that the facts associated with the case presented "a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." Id. at 468. The Court's condemnation of Albert Ohralik's conduct in its synthesis of the case reflects the following:

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 interests. He solicited Carol McClintock 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 from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O.K." in response to his solicitation. He employed a concealed tape recorder, seemingly to insure that he would have evidence of Wanda's oral representation. 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 and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

Id. at 467.
ings. The Supreme Court condoned the conduct of the lawyer in the former, while condemning the attorney conduct in the latter.

Granting full first amendment protection to the conduct of the lawyer in Primus, the Court approached the matter as involving political speech rather than commercial speech. Finding that the lawyer's conduct constituted an expression of her political beliefs and the civil-liberty objectives of


70. Ohrlik, 436 U.S. at 459.

71. Primus, 436 U.S. at 431-32. See Lori B. Andrews, Lawyer Advertising and the First Amendment, 1981 AM. B. FOUND. RESEARCH J. 967, 976 n.48. In its analysis, the Court relied primarily on the case of NAACP v. Button, 371 U.S. 415 (1963). In Button, activities by the attorneys of the National Association for the Advancement of Colored People (NAACP), in which they arranged community meetings to discuss school desegregation and offered to represent attendees in legal proceedings to achieve desegregation, were held to be "modes of expression and association protected by the First and Fourteenth Amendments." 371 U.S. at 421, 428-29. The Court held that solicitation of prospective desegregation litigants was within the right to engage in association for the advancement of political goals and ideas, and thus could not be prohibited by the state under its power to regulate the legal profession. Id. at 428-30.

72. Commercial speech is "speech of any form that advertises a product or service for profit or for business purpose." JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 923 (2d ed. 1983). Prior to the mid 1970's, the United States Supreme Court excluded commercial speech from the purview of constitutional protection. In Valentine v. Chrestensen, 316 U.S. 52 (1942), the Court rejected constitutional challenges to a city ordinance banning distribution of commercial and business advertising matter in the streets, originally intimating that the commercial motivation of the advertiser rather than the content of the speech rendered commercial speech undeserving of and exempt from the protection of the first amendment. Id. at 54-55. The Court acknowledged that states and municipalities may not "unduly burden or proscribe" the freedom of "communicating information and disseminating opinion", but stated that "the Constitution imposes no such restraints on government as respects purely commercial advertising." Id. at 54. As the Court considered additional commercial speech questions, the content of the speech, rather than the motive behind the speech, began to assume a greater role in its analysis. The Court distinguished commercial advertisements that proposed a commercial transaction from advertisements expressing an editorial position on matters of social or political concern. See New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)(advertisement of civil rights organization communicated information vital to public interest deemed worthy of constitutional protection); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973)(ordinance restricting newspapers from carrying "help wanted" advertising in sex-designated columns was not commercial speech unworthy of constitutional protection by mere fact speech related to advertisement). The mere fact that speech appeared as a paid advertisement did not make it commercial speech and mandate its loss of first amendment protection. See id.; Bigelow v. Virginia, 421 U.S. 809, 818 (1975)(statute making it misdemeanor to encourage procurement of abortions by advertisement infringement of first amendment). The Court required case-by-case balancing and held that a state may not deny speech first amendment protection simply by denoting it as commercial. See id., 421 U.S. at 826. The value of "commercial" speech in the marketplace required weighing the first amendment interests at stake against the public interest purportedly advanced by regulating the commercial activity. Id. at 826. The Court maintained that an advertisement, like all public expression, could be regulated when the regulation reasonably furthered a legitimate public interest. Id.
the ACLU, the Court stressed that the lawyer's actions were not motivated by her own financial benefit.\textsuperscript{73} Devoting considerable attention to the issue of the absence of pecuniary gain to the lawyer, the Court stressed that had an award of counsel fees been generated in the ACLU sponsored litigation, all proceeds would have gone to the ACLU.\textsuperscript{74}

In an apparent attempt to rebut the position that no pecuniary gain insured to the lawyer, the appellee in \textit{Primus} raised the proposition that the potential for pecuniary gain existed since as a result of her representation, the lawyer's reputation could be enhanced, thereby generating increased support from private funding sources.\textsuperscript{75} The Court dismissed this premise, however, since the potential financial benefit from such a situation would be realized by the ACLU and the evidence did not support a finding of solicitation on the lawyer's "own behalf".\textsuperscript{76} The Court argued, "Although the benefit to the organization may increase with the maintenance of successful litigation . . . [t]hat possibility, standing alone, offers no basis for equating the work of lawyers associated with the ACLU . . . with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees."\textsuperscript{77} The Court specifically declined to state whether its analysis in the case would be different were the ACLU cooperating attorneys allowed to share in an award of attorneys fees.\textsuperscript{78}

In addition to being a cooperating lawyer with the ACLU, the lawyer in \textit{Primus} was associated with a firm in which the lawyers, by agreement, shared office expenses and retained their own fees.\textsuperscript{79} Two other attorneys involved in the ACLU-sponsored litigation also were associated with this firm and maintained some connection with the ACLU.\textsuperscript{80} While the Court was aware of this fact, it elected to attach no significance to this matter, focusing on the ACLU as being the ultimate beneficiary of the solicitation.

\textsuperscript{73} \textit{Primus}, 436 U.S. at 422, 431.
\textsuperscript{74} Id. at 430-431. At the time of the litigation in question, an ACLU policy was in effect which precluded cooperating attorneys associated with the ACLU from receiving an award of counsel fees in ACLU-sponsored cases. \textit{Id.} at 430 n.24.
\textsuperscript{75} Id. at 428 n.21.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 430-31.
\textsuperscript{78} Id. at 431 n.24. In 1977, the ACLU policy which precluded cooperating attorneys from receiving an award of counsel fees in ACLU-sponsored litigation was changed to allow the sharing of court-awarded attorneys fees between cooperating attorneys. \textit{Id.} The South Carolina Chapter of the ACLU did not adopt the policy as revised. \textit{Id.}
\textsuperscript{79} Id. at 414 n.1. Edna Primus was associated with the "Carolina Community Law Firm". \textit{Id.} at 414. The firm later changed its name to Buhl, Smith & Bagby. \textit{Id.} at 414 n.1.
\textsuperscript{80} Id. at 418 n.8. Bagby, an associate of Primus, was a cooperating attorney with the ACLU and an attorney of record for the plaintiffs in the ACLU-sponsored litigation. Buhl, also an associate of Primus, was a staff counsel for the ACLU and may have represented a plaintiff in the ACLU-sponsored litigation. \textit{Id.}
effort. 81 Even though it appeared that the lawyers who worked on the ACLU-sponsored litigation received fees and expenses arising from their representation, the Court refused to let this fact taint the solicitation effort in Primus so as to render it inappropriate. 82 While addressing the pecuniary gain of the lawyer as a decisive factor in determining inappropriate solicitation conduct, Primus indicates that the vindication of important legal rights of individuals will override the fact that remuneration may inure to the lawyer.

In Ohralik, when granting only marginal first amendment protection to the lawyer's speech, 83 the Court made explicit reference to the fact that the

81. Id. at 428-29 n.21.
82. Id. at 429 nn.21-22. Apparently a per diem fee was paid to the lawyers associated with the litigation. Id.
83. The Court deemed in-person solicitation of remunerative employment entitled to only marginal first amendment protection subject to regulation in furtherance of important state interests. Ohralik, 436 U.S. at 458.

In 1980, the Supreme Court rendered a decision which helped clarify the degree of constitutional protection to which commercial speech was entitled in the case of Central Hudson Gas & Elec. v. Public Service Comm'n, 447 U.S. 557 (1980). In Central Hudson, a utility company challenged an order of the New York Public Service Commission banning promotional advertising which tended to stimulate the use of electricity. 447 U.S. at 558-9. Implementing a fact-specific evaluation of the Commission's order prohibiting advertising, the Court set out a four-part test to be employed in cases involving commercial speech restrictions. First, the speech at issue must concern a lawful activity and must not be misleading. Second, the restriction on commercial speech must serve a substantial governmental interest. Third, the regulation must directly advance the asserted governmental interest. Fourth, the regulation must be no more extensive that is necessary to achieve the substantial governmental interest. Id. at 566. Applying the four-part analysis to the Commission's arguments, the Court held that the Commission's prohibition violated the first amendment because it was not the least restrictive means of serving the state's interest. Id. at 572.

The case of In re R.M.J., 455 U.S. 191 (1982), gave the Supreme Court an opportunity to implement the four-part analysis of Central Hudson in a situation which involved published attorney advertising and the use of direct mailings. In R.M.J., a lawyer was disciplined for including information in advertisements other than that which explicitly was permitted by a Missouri state disciplinary rule. 455 U.S. at 194-95. Additionally, the lawyer was subjected to discipline for mailing a letter announcing the opening of his new office to individuals with whom he had no personal or professional ties, also contrary to an applicable state disciplinary rule. Id. at 196. Unable to find the questioned speech of the lawyer misleading, "inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception", the Court determined that the state's strict regulation of language used in advertising and its absolute prohibition against mailing announcement cards to persons other than those falling within the specified delineated classifications, violated the first amendment. Id. at 207.

In 1985 the Supreme Court again addressed the regulation of commercial speech by attorneys in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). In Zauderer, the attorney was charged with violating numerous disciplinary rules as a result of two newspaper advertisements, rules which limited the realm of permissible information that attorneys could disseminate and required that other information be disclosed. Id. at 634. Focusing on whether a state may discipline an attorney for publishing nondeceptive newspaper advertisements to solicit business, and on whether a state may seek to prevent the public from being deceived by requiring attorneys to disclose fee arrangements in their advertisements, the Court applied the test enunciated in Central Hudson to determine whether the commercial speech at issue was entitled to limited first amendment protection. Id. at 638. The Court
conduct of the lawyer was primarily for the benefit of his own pecuniary interests rather than a pursuit to vindicate the legal rights of others, involving political expression or the exercise of associational freedom. Focusing on the pecuniary gain to the lawyer when condemning the solicitation conduct in *Ohralik*, the Court noted that "[a] lawyer who engages in personal

found the prohibitions against soliciting legal business through advertisements containing advice and information regarding specific legal problems, and the prohibitions against the use of illustrations in advertising, impermissible. *Id.* at 639-49. The state failed to meet its burden of showing that the ban on advertising directly advanced substantial state interests through the least restrictive means available. *Id.* at 644, 648-49. While striking down absolute prohibitions on advertising, the Court in *Zauderer* did not invalidate the rule which required that attorney advertisements disclose certain information, specifically, that matters relating to the computation of contingency fees be disclosed when advertising that cases would be undertaken on a contingency-fee basis. *Id.* at 653. Although recognizing that in some situations a compulsion to speak may be equally violative of the first amendment as a prohibition against speech, the Court held that an advertiser's rights receive adequate protection in such situations as long as disclosure requirements are reasonably related to a state's interest in preventing deception of the consumer. *Id.* at 650-51.

In *Shapero v. Kentucky Bar Ass'n*, the Court again turned its attention to the commercial speech of lawyers. 486 U.S. 466 (1988). In *Shapero*, the Court further focused on the advertising-solicitation controversy, when reviewing whether a state may permissibly categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and nondeceptive letters to a closely defined set of potential clients known to face a designated legal problem. 486 U.S. at 468. In its fact-specific review of the case, the Supreme Court distinguished written advertisements containing truthful and nondeceptive information from in-person solicitation by lawyers for profit. *Id.* at 472 (citing *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 641-42 (1985)). With its focus on the mode of commercial speech communication which attorneys use, the Court in *Shapero* stated that the mode of targeted, direct-mail solicitation poses much less risk of overreaching or undue influence than does the mode of in-person solicitation. *Id.* at 475. The Court reasoned that as with any print advertising or general mailing, targeted letters convey information upon which one can reflect and exercise personal choice as to whether or not such information is to be acted upon. *Id.* at 475-76. Mindful of the fact that targeted, direct-mail solicitation may present greater opportunities for abuse or mistake that other forms of print advertising, the Court stated that this alone does not justify a total ban on direct-mail solicitation. *Id.* Less restrictive means exist for regulating potential abuses in this area, such as requiring that lawyers file all solicitation letters with the state. *Id.*

For a decade following *Central Hudson*, the courts implemented the four-part test enunciated therein when determining the validity of restrictions placed on commercial speech. However, in 1989, in the case of *Board of Trustees of State Univer. of New York v. Fox*, 109 S. Ct. 3028 (1989), the Court rendered an opinion in a commercial speech case which sought to modify the least restrictive means analysis formulated in *Central Hudson*. In advocating modification of the least restrictive means analysis formulated in *Central Hudson*, the Court indicated that "a more flexible meaning" was applicable in commercial speech cases. 109 S. Ct. at 3033. The Supreme Court asserted that in evaluating restrictions on commercial speech, its decisions require the following:

a "fit" between the legislature's ends and the means chosen to accomplish those ends, " - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means, but . . . a means narrowly tailored to achieve the desired objective.

*Id.* at 3035.

While the effect which the implementation of the standard enunciated in *Fox* will have on regulations that restrict lawyer solicitation is uncertain, clearly a more lenient standard than least restrictive means now exists for evaluating a restriction on in-person solicitation by lawyers.
solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests.\textsuperscript{84} Such a situation "is inherently conducive to overreaching and other forms of misconduct".\textsuperscript{85} Mindful of the atmosphere which may be created when a lawyer confronts a potential client, the Court sought to differentiate the in-person solicitation in \textit{Ohralik} from the kind of advertising which was approved in \textit{Bates}.\textsuperscript{86} The focus of the Court in making this distinction rested on the possibility of overreaching by a lawyer, especially when his personal financial interest is at stake.\textsuperscript{87} Acknowledging that in-person solicitation may provide a potential client with useful information, the Court noted that "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person."\textsuperscript{88} It is not like reading a written advertisement where one can simply look away.\textsuperscript{89} Also, the conduct of the lawyer is not publicly presented and thus it is difficult to monitor what actually occurs.\textsuperscript{90} With

\textsuperscript{84} Id. at 461 n.19. The Court went on to state the following:

Even if unintentionally, the lawyer's ability to evaluate the legal merits of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.

\textit{Id.}

\textsuperscript{85} Id. at 464.

\textsuperscript{86} \textit{Ohralik}, 436 U.S. at 455.

\textsuperscript{87} \textit{Id.}, 436 U.S. at 464-67.

\textsuperscript{88} \textit{Id.} at 465. Albert Ohralik defended his actions by saying that in-person solicitation constituted commercial speech and was therefore protected by the first amendment. \textit{Id.} at 455. In asserting that in-person solicitation was permissible, Ohralik argued that an individual may be provided with information that concerns his remedies or legal rights resulting in the facilitation of informed decision making. \textit{Id.} at 458. In rejecting this justification, the Court noted that the applicable disciplinary rules neither prohibit a lawyer from communicating information to individuals or from recommending that they obtain counsel. \textit{Id.} What is prohibited is using information to obtain a client for a fee and accepting employment as a result of the unsolicited advice given. \textit{Id.}

\textsuperscript{89} \textit{Id.} at 465 n.25. The Court noted that where advertising provides information to the public and leaves individuals free to act upon it or not, in-person solicitation may exert pressure and often demands immediate response with no opportunity for reflection or comparison. \textit{Id.} at 457. "The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making, there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual." \textit{Id.}

\textsuperscript{90} \textit{Ohralik}, 436 U.S. at 466. While opportunities for abuse exist in the in-person solicitation situation, there are methods by which attorney conduct can be monitored. Lawyers could be required to notify a designated state entity of purported in-person contact, to report any subsequent meeting and to record and retain the initial meeting with a prospective client on tape. Additionally, any fee agreement entered into as a result of the contact could be made subject to a lengthy rescission right by the client. \textit{See generally} Nomi W. Zomick, \textit{Note, Attorney Solicitation of Clients:Proposed Solutions}, 7 Hofstra L. Rev. 755 (1979).
little emphasis given to the useful information-providing aspects of in-person solicitation, the Court condemned the practice.\footnote{Ohralik, 436 U.S. at 464-467. It has been noted that the Court abandons the analytical framework developed in commercial speech cases when it considers non-advertising forms of promotion by professionals; specifically, it does not discuss benefits and the test applied to measure the importance of costs is less rigorous. Fred S. McChesney, Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers, 134 U. Pa. L. Rev. 45, 57 (1985). Furthermore, it has been asserted that balancing tests are skewed toward suppression when courts employ them in commercial speech restriction matters. Jonathan Weinberg, Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 746 (1982). Since commercial speech advances only listener and process interests, expressive interests of the speaker against the interest of society in regulatory speech are not weighed; rather, what is weighed is the interest of the public in hearing speech against the interest of the same public in not hearing it. \textit{Id.}} Given the state's compelling interest in preventing the potential overreaching inherent in solicitation, when motivated by his own pecuniary interests, the Court found the restriction of a lawyer's in-person solicitation of employment justified.\footnote{Ohralik, 436 U.S. at 464-67. \textit{See supra} note 83.}

B. Emphasis on Motivation of Pecuniary Gain Is Misplaced in Delineating Impermissible Solicitation

In \textit{Ohralik}, the Supreme Court maintained that a historical basis exists to support the contention that it is the pecuniary gain of the lawyer which renders the in-person solicitation of clients impermissible.\footnote{Ohralik, 436 U.S. at 463 n.20.} Specifically, the Court relied on two ABA Formal Opinions from the 1930s to support the position that solicitation undertaken for the attorney's pecuniary gain is not permitted, whereas "offers of service to indigents without charge" are permitted.\footnote{\textit{Id.}} In Formal Opinion 148, decided in 1935, the Committee on Professional Ethics and Grievances of the ABA considered the propriety of a radio broadcast in which a lawyer, on behalf of an organization of attorneys, offered to represent indigents free of charge in the defense of their constitutional rights.\footnote{ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935).} The Committee praised the representation of indigent clients and sanctioned this public proffer of such a service.\footnote{\textit{Id.}} In determining that the conduct did not offend the \textit{Canon of Professional Ethics} prohibiting the solicitation of business, the Committee noted the following:

The Canon proscribing the solicitation of business is aimed at the commercialization of the profession. It announces the principle that the practice of the law is a profession and not a trade, and that the effort to obtain clients by advertisement is beneath the dignity of the self-respecting lawyer. It has to do, moreover, with the effort to obtain remunerative business - the endeavor to increase the lawyer's practice with the end in view of...
enlarging his income. It certainly was never aimed at a situation such as this, in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed.97

In contrast to the situation in which a lawyer seeks to devote time to the cause of the indigent or oppressed, the Committee on Professional Ethics and Grievances of the ABA considered a matter raised in Formal Opinion 169, where a lawyer hoped gratuitous services would lead to future employment.98 In Formal Opinion 169, delivered in 1937, the Committee condemned a lawyer's offer to render free services to labor unions hoping that his contacts would lead to subsequent employment from union members.99 Relying on Formal Opinion 148, the Committee found "the offer of such service is clearly solicitation of professional employment for the purpose of ultimately profiting thereby and is condemned by Canon 27".100 While the Committee interpreted Canon 27 as condemning efforts to capture remunerative employment, it is significant to note that the text of Canon 27 makes no mention of compensation to the lawyer when prescribing appropriate attorney conduct. The emphasis of Canon 27 is that reputation is the means to professional dignity and success.101 In that specific language addressing the income of the lawyer did not originate from the Canons of Professional Ethics, at best it can be asserted that the matter of remunerative employment, as it relates to lawyer solicitation, was implied from Canon 27. In actuality, it is probably more correct to say that the concept of a lawyer's pecuniary gain, as it relates to impermissible solicitation, 97. Id. Canon 27 of the Canons of Professional Ethics, as adopted in 1908, states the following:

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been engaged, or concerning the manner of their conduct, the magnitude of interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

Canons of Professional Ethics Canon 27 (1908).


99. Id.

100. Id.

101. See supra note 90.
originated as a negative inference. For instance, if one considers its use in Formal Opinion 148, arguably it was raised as dictum when the Committee considered whether it was appropriate for lawyers to offer to represent indigents free of charge.  

In support of the premise that impermissible solicitation encompasses the presence of pecuniary motivation by the lawyer, the Ohralik Court also looked to its 1963 decision in *NAACP v. Button* and the 1924 Illinois case of *People ex rel. Chicago Bar Ass'n v. Edelson.* In *Edelson,* the Supreme Court of Illinois considered whether Canon 27 was violated when attorneys solicited claims for the purpose of having sufficient creditors to authorize the filing of a bankruptcy petition to collect a claim for a client. Focusing on the motivation of the lawyers, the Supreme Court of Illinois stated the following:

The motive of the solicitation was important in determining the propriety of the action. If it was to begin litigation in order to enable the respondents to secure fees for themselves the action was unprofessional and dishonorable; if it was to secure their clients' claims it was not unprofessional or dishonorable.

Apparently the Supreme Court of Illinois was not troubled by lawyers obtaining fees for their services, or even wanting to receive fees, as long as legitimate claims of their clients were being pursued.

When considering solicitous conduct in *NAACP v. Button,* where lawyers offered to represent individuals in legal proceedings to achieve school desegregation, the United States Supreme Court condoned such activity by the lawyers and stated that modern regulations of such unprofessional conduct “have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest.” The Court went on to note that “truly nonpecuniary arrangements involving the solicitation of legal business have been frequently upheld.” In support of this contention, spe-
specific reference was made to a case in which a lawyer volunteered his services to a litigant where "'important issues' were at stake"110 and a situation in which a bar association offered to represent victims of usury at no cost.111 While the Court addresses the matter of remuneration of the lawyer, clearly the vindication of important issues is the paramount focus of the Court, a matter which trumps the question of a lawyer's fee.

If one reflects on the asserted historical basis for finding that in-person solicitation is improper when motivated by the financial interests of the lawyer, it appears that the Supreme Court's emphasis on the pecuniary gain of the lawyer is misplaced. The fact that a lawyer may have earned a fee, or may have wanted to earn a fee, in a particular representation did not necessarily render a solicitous act reprehensible. Rather it was the validity of the substance of the particular undertaking which appeared determinative of permissible solicitous conduct. Whether couched in terms of political or commercial expression, if one was acting to further a public interest or to protect the rights of an individual, in-person solicitation was not condemned when used to achieve these ends. From a historical perspective, looking to the language of Canon 27 and considering Primus, NAACP v. Button and Edelson,112 as long as a valid or important issue was the subject of the litigation, being paid for one's services did not render solicitous conduct impermissible.

III. CRITERIA FOR IMPERMISSIBLE SOLICITATION SUBJECTIVE AND INAPPROPRIATE

A. STANDARD OF SIGNIFICANT MOTIVE SUBJECTIVE AND AMBIGUOUS

While neither the Canons of Professional Ethics nor the Model Code of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation.

Id. at 442-43.

110. Id. at 440 n.19. See In re Ades, 6 F. Supp. 467, 475 (DC Md. 1934) (not improper for lawyer to volunteer services to needy litigants or for cases involving important issues, even though they may be controversial or political).

111. 371 U.S. at 440 n.19. See Gunnels v. Atlanta Bar Ass'n, 12 S.E. 2d 602, 610 (Ga. 1941) (not improper for bar association to offer to represent victims of usury free of charge).

112. Plaintiff lawyers in ACLU-sponsored and NAACP-sponsored litigation solicit business and are compensated for their services. See supra note 82. While the litigant himself may not be the source of the remuneration, funding exists to pay these lawyers for their representation. The lawyers in Edelson, who solicited business to validate a petition on behalf of a client, were compensated for their services and were found to have acted appropriately since they were securing a client's claim. See supra notes 106-107 and accompanying text.
Professional Responsibility relegated client contact impermissible solicitation based on the financial motivation of the lawyer, the Supreme Court’s position on solicitation as stated in Primus and Ohralik, focusing on the lawyer’s pecuniary interest, is incorporated into the Model Rules. Rule 7.3(a), as amended in 1989, designates in-person and live telephone contact with a potential client impermissible solicitation when a “significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” Seeking to incorporate the essence of the Supreme Court’s rulings in Rule 7.3, the drafters chose to qualify the pecuniary gain of the lawyer by making it impermissible only when the lawyer’s financial motivation is significant.

When reviewing the enunciated standard in Model Rule 7.3 for evaluating solicitous conduct, the qualifying language of “significant motive” is troublesome. Motivation is a subjective term and any attempt to evaluate compliance with a standard grounded in the abstract is likely to lead to unreliable results. Adding to this the qualification of significance, the criteria for evaluating acceptable lawyer contact rest upon an ambiguous standard which has no objective basis for review. In Ohralik, the Supreme Court noted that since the anti-solicitation rules “can be expected to operate primarily if not exclusively in the context of commercial activity by lawyers, the potential effect on protected noncommercial speech is specula-

113. While the Disciplinary Rules of the Model Code of Professional Responsibility make no mention of remuneration to the lawyer within the context of client solicitation, Ethical Consideration 2-3 does provide the following as an aspirational goal: “A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.” Model Code EC 2-3. See supra note 50.

114. As originally passed by the ABA, Rule 7.3 provided in part that “[a] lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” Model Rules Rule 7.3 (1983). In defining the term “solicit,” Model Rule 7.3 excluded general mailings by lawyers, but condemned targeted mailings to individuals known to face designated legal problems as prohibited solicitous conduct. Id. at Rule 7.3 comment.

In 1988, the Supreme Court reviewed the categorical prohibition of targeted mailings by lawyers in Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988). In Shapero, the attorney prepared a letter to be sent to potential clients known to be respondents in foreclosure suits, offering to give such individuals “FREE information” on how they could keep their homes. Id. at 469. The Court distinguished written advertisements containing truthful and nondeceptive information from in-person solicitation by lawyers for profit. Id. at 472 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641-642 (1985)). The Court viewed targeted mailings as written advertisements or general mailings and determined that less restrictive means existed for regulating their potential abuse. Id. at 475-76.

In response to Shapero, the ABA amended Rule 7.3 and condemned only in-person or live telephone contact as solicitation, indicating that written and recorded communication, along with media advertising, were permissible means of conveying information to those who may need legal services. Model Rules Rule 7.3 comment 2.


tive.” However, when something as subjective as one’s motivation is at issue when determining the propriety of solicitous conduct, it is difficult to determine at what point one’s financial interest gives way to incentives more akin to associational freedom. Being subjective, motivation is difficult both to discern and to monitor.

Not surprisingly, very little case law exists to suggest when the motivational factor crosses the line from that which is permitted to that which is prohibited in in-person solicitation situations. It has been suggested that the lack of reported decisions on this aspect of solicitation indicates that the “line has probably been drawn in approximately the right place, and is probably informally self-enforced.” While this may be so, the lack of reported cases may also suggest that when an important legal issue is being pursued, courts tend to ignore or deemphasize the motivation of the lawyer in matters involving in-person solicitation.

Although few reported decisions exist on the motivational aspect of the solicitation problem, an examination of decisions since Primus and Ohralik which have addressed the issue of solicitation reveal that as in the past, when important matters are involved in litigation, the fact that a lawyer may be motivated by financial interests has been overlooked. In the 1979 case of In re Teichner, the Supreme Court of Illinois considered the propriety of a lawyer contacting victims of a train derailment and explosion in Laurel, Mississippi, and offering to represent these individuals on a contingency fee basis. The lawyer’s contact was at the request of a local pastor who believed that railroad representatives were trying to take advantage of the victims, many of whom were poor. Focusing on the protection of “the flow of information and the effective association of the individuals,” the action of the lawyer was upheld as protected by the first amendment.

Although the associational values being preserved in this situation were noted, if one considers the text of Formal Opinion 148, the lawyer was clearly exerting an “effort to obtain remunerative business . . . with the end in view of enlarging his income.” The Supreme Court of Illinois, recognizing the lawyer’s “intent to benefit financially” as “unmistakable,” revealed that a prevailing pecuniary motive is not determinative of solicita-

117. 436 U.S. at 463 n.20.
118. See HAZARD & HODES, supra note 117, at 524.
120. See id. at 268, 271.
121. Id. at 271.
122. Id. The lawyer in Teichner was suspended from the practice of law for reasons relating to another in-person solicitation following an explosion in Decatur, Illinois. Id. at 273.
tion impropriety, provided some harm can be obviated.\textsuperscript{124}

In the 1981 case of \textit{Matter of Discipline of Appert},\textsuperscript{125} the Supreme Court of Minnesota considered the situation where a lawyer, acknowledging a monetary motivation, distributed letters and brochures regarding litigation against the manufacturer of an intrauterine device.\textsuperscript{126} Through the actions of a non-lawyer assistant, a mix-up occurred and the lawyer telephoned a person who previously had told the assistant she was not ready to bring suit.\textsuperscript{127} In reviewing the matter, the Supreme Court of Minnesota did not find that improper solicitation occurred, but rather focused on the public interest which the lawyer performed by informing injured parties of their rights.\textsuperscript{128} In that the lawyer sought to be compensated on a one-third contingency fee basis,\textsuperscript{129} it follows that solicitation which is primarily for pecuniary gain has been tolerated if an important interest is being furthered by the resulting litigation.

Not surprisingly, neither the public interest which a lawyer may perform, nor the flow of information and effective association of individuals, will consistently be sufficient mandates to extinguish what might otherwise be improper solicitation by a lawyer. In 1989, the Alabama State Bar Disciplinary Commission rendered an opinion which rejected a request by a lawyer that he be permitted to personally contact prospective members of a

\textsuperscript{124} In commenting on the lawyer's conduct, the Supreme Court of Illinois stated the following:

In the instant case, we are faced with an attorney whose activities are tinged with the sort of associational values strongly protected by the first and fourteenth amendments, yet whose intent to benefit financially also is unmistakable. If we were to base our judgment solely upon what we believe to be the prevailing motive of the respondent, we would have to conclude that his motive is pecuniary, not ideological. Yet our analysis cannot stop there for as Mr. Justice Marshall aptly pointed out in his separate opinion, activity and expression which fall within the core of protected first amendment values do not automatically lose their protection because the actor or speaker stands to benefit financially from his actions. It is the flow of information and the effective association of individuals which are protected. (citations omitted)

\textsuperscript{387} N.E.2d at 271.

\textsuperscript{125} 315 N.W.2d 204 (Minn. 1981).

\textsuperscript{126} \textit{Id.} at 213.

\textsuperscript{127} \textit{Id.} at 207.

\textsuperscript{128} \textit{Id.} at 213, 215. In addressing the lawyer's assertion that he was serving a public interest, the Supreme Court of Minnesota stated the following:

The injuries sustained by women using the Dalkon Shield were sometimes severe and disabling. Like the overreaching by railroad adjusters in \textit{Teichner}, the Robbins Company evidenced a disregard for the health and safety of women using the Dalkon Shield by continuing to market the product after serious defects were discovered. The litigation that resulted from respondents' contacts further publicized the injuries suffered and the dangers associated with the use of the Dalkon Shield.

\textit{Id.} at 213.

\textsuperscript{129} \textit{Id.} at 206.
class of individuals on which experimental surgery had been performed.\textsuperscript{130} At the time of the request to the commission, the lawyer was representing approximately twenty-five class members who were “mostly elderly, uneducated, and under the care of a guardian or in a nursing home.”\textsuperscript{131} Believing that direct mail solicitation would be ineffective with prospective class members,\textsuperscript{132} and mindful of approaching statute of limitations deadlines, the lawyer proposed to contact similarly situated persons\textsuperscript{133} and advise them of various options that they possessed, one of which was becoming a member of the class of persons whom he was representing.\textsuperscript{134} Despite the interest which would be served, the Alabama State Bar Disciplinary Commission determined that contacting these individuals, by telephone or in person, would be impermissible solicitation.\textsuperscript{135}

While the public interest served will not always insulate a lawyer from assertions of improper solicitation, distinct from the situation where clients solicited by an attorney appear to be in need of protection or in pursuit of important interests, is the routine personal injury or criminal matter in which a lawyer directly contacts individuals seeking retention as counsel. The Rule 7.3 language of “significant motive” places “cases of mixed motivation in the prohibited zone,”\textsuperscript{136} and it appears to be the criminal defense lawyer or the contingency fee-seeking personal injury lawyer who most often falls into the impermissible motivation category. Courts have readily condemned lawyers who solicit clients in these situations, with little regard given to whether the sought-after clients may have subsequently pursued a valid claim or benefited from the representation.\textsuperscript{137} When a lawyer's solici-

\begin{itemize}
\item \textsuperscript{130} 5 Laws. Man. on Prof. Conduct (ABA/BNA) (1989).
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} The lawyer was fearful that it would be difficult for these individuals to understand written communications concerning class actions due to the age of the prospective class members and “their potential lack of ability to read.” \textit{Id.}
\item \textsuperscript{133} The lawyer had the names and addresses of approximately 150 other prospective class members. \textit{Id.}
\item \textsuperscript{134} \textit{Id.} The lawyer stated that he did not desire “to do anything unethical but cannot simply sit by and allow this injustice which has occurred to go unchallenged and unknown by most of the victims.” \textit{Id.}
\item \textsuperscript{135} \textit{Id. But see} Gulf Oil Co. v. Bernard, 452 U.S. 89, 103 (1981) (imposition of order restraining communication with potential class members was an abuse of discretion).
\item \textsuperscript{136} HAZARD & HODES, supra note 115, at 524.
\item \textsuperscript{137} See, e.g., \textit{In re Galbasini}, 786 P.2d 971, 976 (Ariz. 1990) (solicitation of collection business in lawyer's name by improperly supervised non-lawyer employees constituted solicitation for pecuniary gain for which lawyer was responsible); Disciplinary Proceedings Against Mandelman, 460 N.W. 2d 749, 750-51, 753 (Wis. 1990) (paying people to refer potential clients and initiation of personal contact with prospective client constituted professional misconduct by attorney); Mississippi State Bar v. An Attorney: L., 551 So. 2d 129, 131-32 (Miss. 1989)(seeking out hospitalized personal injury victim to solicit employment was pursuit of interest of lawyer, not client, and contrary to professionally responsible representation); O'Quinn v. State Bar of Tex., 763 S.W.2d 397, 398-99, 403 (Tex. 1988) (paying non-lawyers to recommend employment of lawyer to accident victims was solicitation to obtain benefit
tation conduct is invasive to a would be client and the potential for over-reaching exists, reviewing courts will typically uphold sanctions against lawyers for impermissible solicitation. Conversely, in situations where lawyers solicit employment from individuals who have been harmed and are subject to overreaching by an entity that committed the harmful act, courts have been reluctant to condemn a lawyer’s conduct even though an underlying reason for his motivation may be pecuniary gain.

B. DELINEATION OF PECUNIARY GAIN IMPRECISE AND INAPPROPRIATE

Just as there is little existing case law to distinguish significant motivation from insignificant motivation when determining whether solicitation conduct is appropriate, little case law exists to define what constitutes a lawyer’s pecuniary gain. In *Primus*, the Supreme Court noted it was not dealing “with a situation where the income of the lawyer who solicits the perspective litigant or who engages in the actual representation of the solicited client rises or falls with the outcome of the particular litigation.” If income derived from the litigation at hand constitutes pecuniary gain, then the receipt of an hourly or a per diem fee, no matter how modest, would fall within the perimeters of this definition. Viewing this categorization strictly, the litigation from which *Primus* and *NAACP v. Button* sprang, where plaintiffs’ lawyers received fees and expenses, would fall within the meaning of pecuniary gain. Conversely, doing work on a voluntary basis with hopes that contacts made might generate future income for the lawyer would not be pecuniary gain. Under this categorization, that which the committee on Grievances and Ethics found reprehensible in Formal Opinion 169, where a lawyer hoped gratuitous services would lead to subsequent employment, would not fall within the definition of conduct motivated by pecuniary gain.

While undertaking voluntary representation with hopes of future em-

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138. See id.
139. 436 U.S. at 436 n.30.
140. See supra notes 79-82 and accompanying text.
141. In *Primus*, the Court declined to comment on whether future remuneration resulting from an enhanced reputation would constitute pecuniary gain. See 436 U.S. at 430-31. See also supra notes 100-01 and accompanying text.
142. See supra notes 99-101 and accompanying text.
employment has been condemned.\footnote{143 See \textit{supra} notes 100-01 and accompanying text.} forbidding contact such as that of the lawyer in \textit{Formal Opinion 169} could seriously impact the pro bono services which are currently being rendered.\footnote{144 Lawyers are encouraged to provide public interest legal services for those unable to pay costs. \textit{See MODEL RULES Rule 6.1; MODEL CODE EC 2-25.}} While lawyers may often undertake representation for the cause of the disadvantaged or oppressed, it stands to reason that the possibility of future employment, or an enhanced reputation which would lead to future employment, may loom in the minds of the lawyers involved. Were we to preclude lawyers from engaging in pro bono work who held such aspirations, the availability of voluntary public interest legal services could be greatly impacted. This situation again causes us to address the issue of motivation associated with an individual's actions and the difficulties which arise when one uses a subjective standard to measure appropriate conduct. Whether motivated by the contacts a lawyer hopes to make, publicity he hopes to receive, experience he hopes to gain, a political cause, or by strictly humanitarian reasons, if the solicitation conduct of the lawyer is not oppressive, it should be condoned.\footnote{145 The United States Department of Justice has suggested that "except the kinds that are false, misleading, undignified, or champertous," all solicitation should be permitted. Remarks of Lewis Bernstein, Chief, Special Litigation Section, Antitrust Division, Department of Justice, [1969-1983 Transfer Binder] Rep. (CCH) 50,197 (1974).} A lawyer motivated by a personal conviction not related to remuneration may be just as likely to overreach a potential client to obtain a cause of action as a lawyer motivated by a fee. As Justice Rehnquist stated in his dissenting opinion in \textit{Primus}, the dangers associated with the powers of persuasion possessed by lawyers are not "minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain."\footnote{146 \textit{Primus}, 436 U.S. at 445 (Rehnquist, J., dissenting).}

The problem with solicitation is not that a lawyer gets paid, or wants to get paid, but that a lawyer may overpower an individual and use pressure tactics to capture a potential client.\footnote{147 In the ABA's brief as Amicus Curiae in \textit{Ohralik}, the in-person solicitation of lawyers was compared to door-to-door selling. Noting deception, high pressure tactics, misrepresentation, and high prices for low quality as common abuses associated with the latter, the following was noted: If such problems are presented by these attempts to sell simple consumer products, the problems would be greatly magnified in the context of solicitation by lawyers offering complex services about which the consumer is likely to have little information. Moreover, solicitation by lawyers poses unique dangers because the persons most likely to be the targets of solicitation, such as accident victims, members of a decedent's family, and persons charged with crimes are particularly vulnerable to high pressure tactics and deception. \textit{Brief for ABA as Amicus Curiae at 7-8 n.2, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (No. 76-1650).}} Justice Marshall wrote an eloquent dissent in \textit{Ohralik} in which he stated that "[w]hat is objectionable about
Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it."148 The underlying rationale for prohibiting in-person solicitation is to prevent the potential overreaching and undue influence which may be exerted by a trained advocate on a layperson.149 While this is a legitimate objective, there is little basis for using the lawyer's motivation for pecuniary gain as the criterion for appropriate in-person contact. Case law suggests that it is not objectionable for remuneration to be a lawyer's incentive when there are important issues at stake. Furthermore, these important issues need not rise to the level of fundamental rights but may be legitimate interests pursued in good faith.

In the classic ambulance-chaser type case where a lawyer pursues an injured victim in hopes of obtaining a client and subsequently receiving a fee, it is apparent that the compensation he receives will constitute pecuniary gain. Determining the presence of pecuniary gain is less clear in the situation where a lawyer hopes representation in a case will result in an enhanced reputation which will lead to future remunerative employment. However, determining a precise definition of pecuniary gain should not be necessary. As long as no overreaching is apparent and legitimate interests of an individual are being furthered, whether a lawyer seeks compensation for his services should not condemn contact which can potentially provide the public with meaningful information.150

IV. NON-SOLICITATION RULES DISPROPORTIONATELY IMPACT SMALL LAW FIRMS AND SOLO PRACTITIONERS

The non-solicitation rules have the effect of placing the small law firm and the solo practitioner at a disadvantage relative to the more established lawyer. In his concurring opinion in *Ohralik*, Justice Marshall stated the following:

The impact of the nonsolicitation rules, moreover, is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as

149. See supra notes 86-91 and accompanying text. Although it is the "untutored and vulnerable layperson" for whom protection is sought in Model Rule 7.3, interestingly, the rule also includes potential clients who are lawyers. See Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 686 (1986).
150. It is interesting to note that a situation which eludes Rule 7.3 is that in which a lawyer associated with a firm decides to leave the firm and contacts clients in hopes of retaining their business upon his departure. See Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEXAS L. REV. 1, 15 (1988). In that a "prior professional relationship" exists between the lawyer and client, Rule 7.3 is inapplicable. See supra note 55. However, the potential for overreaching in this situation is just as great, if not greater, as in the situation where the lawyer and client are not acquainted.
the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, so the Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms. Indeed, some scholars have suggested that the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession.\textsuperscript{151}

While cases tend to focus on the dissemination of truthful information to consumers when analyzing solicitation restrictions rather than on the use of restrictions to disadvantage certain competitors within the profession,\textsuperscript{152} it appears that the motivational language of Rule 7.3 is operating against the small practitioners.\textsuperscript{153}

In an effort to obtain further information on the type of practitioner who is most frequently impacted by the nonsolicitation rules, toward the end of 1990, this author submitted a written request to fifty-seven lawyer disciplinary agencies, asking that they respond to several questions regarding lawyer solicitation.\textsuperscript{154} Commencing with the year 1985, disciplinary agencies were asked to provide information relating to the number of lawyer solicitation matters pursued by their agency; the number of solicitation cases in which discipline was imposed; and a description of each instance of solicitation conduct.\textsuperscript{155} Whether the lawyer involved was a solo practitioner, a

\textsuperscript{151} Ohralik, 436 U.S. at 476 (Marshall, J., concurring) (citations omitted). See supra note 45 and accompanying text.

\textsuperscript{152} See Fred S. McChesney, supra note 92, at 99.

\textsuperscript{153} See supra note 138.

\textsuperscript{154} A letter was sent to Lawyer Disciplinary Agencies listed in the directory of the American Bar Association Center for Professional Responsibility. From the year 1985 forward, disciplinary agencies were asked to provide data on the following matters relating to lawyer solicitation: the frequency of instances in which impermissible solicitation was alleged; the circumstances surrounding the solicitation; the ultimate resolution of such matters; and the size of the practice in which the lawyer respondent was involved. Letter from Louise L. Hill to Lawyer Disciplinary Agencies (October 1, 1990).

\textsuperscript{155} Id. Addressees of the October 1, 1990 letter were provided with an information sheet and self-addressed envelope to facilitate their responses. The information sheet had the following four entries:

1) Total number of cases relating to lawyer solicitation pursued by your disciplinary agency since 1985; 2) Of the solicitation cases noted in question #1, the number of instances in which discipline was imposed; 3) Total number of disciplinary cases on any issue pursued by your disciplinary agency since 1985; and 4) If available, please provide a brief description of each instance of solicitor's conduct related in question #1. (copies of decisions would be appreciated) Kindly note its disposition and whether the lawyer was a solo-practitioner, a member of a small law firm (2-15 lawyers), a medium law firm (16-40 lawyers) or a large law firm (over 40 lawyers).

Information Sheet included with letter from Louise L. Hill to Lawyer Disciplinary Agencies (October 1, 1990).
member of a small law firm (2-15 lawyers), a member of a medium sized law firm (16-40 lawyers) or a member of a large law firm (over 40 lawyers) was also requested. Thirty-eight lawyer disciplinary agencies to which the request was sent responded. Due to time restraints, reporting procedures and the private nature of some dispositions, many responses were incomplete and included information which was informal in character, based on the recollection of the individuals who were kind enough to respond to the request. An assimilation of the responses, however, revealed that the responding disciplinary agencies were able to report a total of fourteen cases within the designated time frame in which discipline had been imposed, or, which were pending. Where the subject matter of the underlying case was provided, it was revealed that a significant number of the reported instances of improper solicitation involved a lawyer pursuing a personal injury matter. Looking at the associations of the lawyers in-
volved in the reported cases, in seven of the fourteen matters, information was provided indicating the size of the practice of the lawyers involved. Of the seven cases, one matter involved a member of a three-person firm, one matter involved two members of a medium sized law firm and five matters involved solo practitioners.160 This information, while incomplete and unverified, suggests that the motivational language of Rule 7.3 is operating against the small practitioner.

The current nonsolicitation proscriptions seem to be echoing their predecessors of a century ago when, to the disadvantage of small practitioners, well established lawyers implemented guidelines and rules precluding solicitation and advertising in the legal profession.161 As courts continue to review allegations of improper lawyer conduct and address the matter of pecuniary gain motivation, it is likely that it will be the small law firm and solo practitioner who will continue to be most significantly impacted. This is not to suggest that current nonsolicitation rules were formulated as an intentional barrier to small personal injury and criminal defense lawyers, but rather to illustrate that the current rules appear to disproportionately impact a particular segment of lawyers. Not only are the nonsolicitation provisions of Model Rule 7.3 subjective, ambiguous and lacking in an objective basis for review, they keep meaningful information from the public and perpetuate a historic bias in the legal profession.

V. Conclusion

The underlying rationale for restricting in-person solicitation by lawyers is to prevent the potential for overreaching or undue influence which exists when a trained advocate confronts a layperson. Qualifying the permissibility of such direct contact on whether the lawyer's motivation is financial, however, is misplaced. A review of the case law reveals little precedent to suggest that it is the pecuniary incentive of the lawyer which should taint

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160. Id. The lawyer involved in Mississippi State Bar Ass'n v. An Attorney : L, 551 So. 2d 129 (Miss. 1989) was a member of a three person law firm. The two lawyers involved in the unreported case from Alabama, where discipline was imposed for the improper solicitation of an investigator hired by the firm, were members of a medium-sized law firm. Solo-practitioners were involved in the following cases: Mississippi State Bar Ass'n v. Moyo, 525 So.2d 1289 (Miss. 1988); Attorney Grievance Comm. of Maryland v. Hirshman, 536 A.2d 646 (Md. 1988); In re VonWiegen, 537 N.Y.S. 2d 76 (1989); matter pending - Vermont. Id.

such in-person overtures. When important interests are the subject of the underlying litigation, the remunerative motivation of a lawyer has been overlooked. Furthermore, it is unclear whether one motivated by money is likely to be more zealous in his approach to a potential client than a lawyer motivated by a humanitarian or political concern. The determination of whether solicitous conduct is appropriate depends on the facts of the underlying matter, not merely on whether a substantial motive of the lawyer is monetary.

The actual implementation of a standard which evaluates conduct on the basis of pecuniary gain being a significant motive of the lawyer is replete with problems. The category of “pecuniary gain” is itself imprecise and open to many interpretations. Using “significant motive” as a criterion for permissible behavior adds a classification which is unclear and subjective, contributing more ambiguity to the evaluation process. Considering these fundamental and mechanical impediments along with the tenuous historical basis for the rule, it is clear that motivational concerns relating to pecuniary gain should not be weighed when determining whether solicitous conduct is appropriate. In-person solicitation should be prohibited only when it involves overreaching or undue influence. This would serve the function of protecting individuals from oppressive confrontations, eliminating a restriction which has a negative impact on a segment of the profession, offering the public needed information, and, providing society with avenues for pursuing legitimate interests.