The New York Lawyer's Code of Professional Responsibility Should Be Amended With Respect to Attorney Solicitation of Clients as Proposed by the House of Delegates of the New York State Bar Association

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The New York Lawyer's Code of Professional Responsibility should be amended with respect to attorney solicitation of clients as proposed by the House of Delegates of the New York State Bar Association

On January 24, 1997, the House of Delegates of the New York State Bar Association (the "N.Y.S.B.A.") adopted proposed modifications to the New York Lawyer's Code of Professional Responsibility (the "N.Y. Code") which amend client solicitation provisions in order to conform with recent United States Supreme Court decisions. The modifications are intended "to clarify or update existing provisions and to eliminate or modify rules that no longer comport with the reasonable and legitimate expectations of clients, lawyers, and society in general." These amendments are currently under review by the four Appellate Divisions of the Supreme Court of New York and are not binding on attorneys until adopted. The proposed modifications offer greater protection to a lawyer's constitutional right to free speech and may actually serve to improve the image of the legal profession.

Solicitation has long been considered a dirty word in the legal profession. The ban on client solicitation can be traced to

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1 See New York State Bar Association Special Committee to the Code of Professional Responsibility, Proposed Amendments to New York Lawyers' Code of Professional Responsibility (Mar. 4, 1997) [hereinafter Proposed Amendments]. The Special Committee to Review the Code submitted the modifications in a report to the New York State Bar Association. This report also contained comments from interested conglomerates which included various Bar Association Committees and Ethics Committees. See id. at I.


3 Proposed Amendments, supra note 1, at ii. The modifications are technical and substantive, and in some cases greatly impact the disciplinary rules. The N.Y.S.B.A. provided commentary at the end of each amended section. However, the explanations of the changes are not very detailed.

4 See id. at iv.

5 See, e.g., Ohralik, 436 U.S. at 454 ("The solicitation of business by a lawyer ... has long been viewed as inconsistent with the profession's ideal ....").

227
England. Lawyers, usually wealthy aristocrats, thought advising clients for monetary gain to be in poor taste and thus, advertising was not looked upon favorably. It has also been suggested that the ban on solicitation is the result of majoritarian efforts to curtail competition from immigrants. Early in this century, the American Bar Association issued its decree prohibiting client solicitation. Today, its view remains unchanged. Many of the ABA’s concerns focus on the fact that inherent in solicitation of clients, either by direct in-person or live telephone contact, lies the potential for abuse. Given the training of attorneys and the

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6 See Edward Simpson Stoffregen, III, Comment, Client Solicitation and the First Amendment: In re Rapport Characterized as Associational Freedom, 19 J. LEGAL PROF. 351, 352 (1994-95) (discussing briefly the history of client solicitation by attorneys). The English view was adopted by the American Colonies and continued in this country until the early 1800s. See id. In the nineteenth century this view changed and the prevailing view was that a ban on client solicitation was undemocratic and solicitation of clients grew to be accepted. See id. However, in the late nineteenth century this view was abandoned in favor of the former view and the American Bar Association banned solicitation of clients in 1908. See id. at 353; see also infra note 9.

7 See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 776 (1986) (“Victorian snobbery denigrating any calling that besmirched itself by taking on the trappings of a ‘trade’ led the socially ambitious elements of the organized bar to oppose lawyer advertising.”); Stoffregen, supra note 6, at 352.

8 See Stoffregen, supra note 6, at 353. However, this suggestion is still speculative. See WOLFRAM, supra note 7, at 776 (stating that “[t]he desire of some lawyers to control competition by eliminating advertising probably also played a part” in banning solicitation).

9 See CANONS OF PROFESSIONAL ETHICS Canons 27, 28 (1908). “It is unprofessional for a lawyer to volunteer advice to bring a lawsuit .... It is disreputable to ... breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients ....” Id. at Canon 28. “It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations.” Id. at Canon 27.

10 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1989) [hereinafter MODEL RULES]. This Rule states in part:

(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 a 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.

Id.

11 See id. at Rule 7.3 cmt. 1 (stating that “[t]he prospective client, who may al-
vulnerable position of the prospective client, the situation is "fraught with the possibility of undue influence, intimidation, and over-reaching."

In 1963, the Supreme Court considered possible First Amendment protection for client solicitation for the first time. In *NAACP v. Button*, the Supreme Court distinguished between solicitation as a form of political expression and solicitation for pecuniary gain, and afforded the former First Amendment protection as it serves a public interest. Fourteen years later, in *Bates v. State Bar of Arizona*, the Supreme Court lifted the strict prohibition on client solicitation and held that a state could not place constitutional restrictions on attorney advertising unless it is false, deceptive or misleading. In 1978, the Supreme Court addressed the constitutionality of in-person solicitation. In *Ohralik v. Ohio State Bar Ass'n*, the Court upheld a restriction against in-person solicitation by attorneys for pecuniary gain. However, the Court ruled that the state must have a substantial interest in averting harm to its citizens in order for the prohibition to be constitutional. In the companion case *In re
Primus, the Supreme Court held that a state could not prescribe in-person solicitation by a nonprofit organization that engaged in litigation as a form of political expression. Additionally, in Edenfield v. Fane, the Supreme Court noted that Ohralik "made clear that a preventative rule was justified only in situations 'inherently conducive to overreaching and other forms of misconduct.' Thus, it appears that a ban on solicitation is justified and not violative of the First Amendment when the "would be" solicited person is vulnerable. Further support for this notion can be drawn from Florida Bar v. Went For It, Inc., in which the Supreme Court upheld a Florida regulation requiring a thirty-day waiting period from the time of injury before lawyers may solicit potential clients by direct mail.

Since the advent of these decisions, many states have amended their Codes to reflect these views. The Codes generally ban in-person, telephone or written solicitation of clients where a significant motive of the solicitation is the attorney's pecuniary gain. Where solicitation is allowed, limits are still imposed in forms of "vexatious conduct" is compelling and outweighs the attorney's First Amendment concerns. Id. at 462. The Court stated that a finding of harm or injury to the public was immaterial. See id. at 464. The Court required a potential harm, such as overreaching, which "is inherent in a lawyer's in-person solicitation of professional employment." Id. at 468.

See, e.g., ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 7.3 (West 1993) [hereinafter ILLINOIS RULES]. However, the Illinois code specifically provides that solicitation is allowed if it is "under the auspices of a public or charitable legal services organization ... whose purposes include but are not limited to providing or recommending legal services." Id. at Rule 7.3(a)(3).

See, e.g., id. at Rule 7.3(a)(1) (permitting solicitation where the prospective client is a relative, close friend or a person with whom the lawyer had a prior professional relationship); COLORADO RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (Bradford 1997) [hereinafter COLORADO RULES] (prohibiting solicitation where a lawyer has no family or professional relationship with prospective clients); see also SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (Michie 1987 & Supp. 1989) ("A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship ....");
instances where states have a significant interest in protecting its citizens.30 Following the Supreme Court decisions, New York was confronted with similar attorney solicitation and advertising issues. In In re Koffler31 (decided prior to the Florida Bar32 decision), the court of appeals addressed the constitutionality of direct mail solicitation.33 The court concluded that solicitation by mail of real estate clients was constitutionally protected, but could be regulated.34 Koffler was extended by In re Von Wiegen,35 in which the court of appeals held that a blanket prohibition of direct mail solicitation of accident victims is violative of the First Amend-
ment. However, it appears that these decisions left open the question of in-person solicitation.

Koffler and Von Wiegen, along with recent constitutional jurisprudence, provided the impetus for the N.Y.S.B.A. to propose amendments to the Disciplinary Rules on solicitation of clients. The current N.Y. Code section, DR 2-103, states that an attorney cannot, directly or indirectly, seek employment from a person who has not sought advice in violation of a statute or court rule. The proposed amendment, however, allows for written or recorded communication or in-person or telephone contact to solicit professional employment, except in five circumstances: (1) the solicitation is false, deceptive or misleading; (2) the solicited expresses a desire not to be solicited; (3) the solicitation involves coercion, duress or harassment; (4) the attorney knows that the solicited is incapable of making a reasonable judgment in retaining an attorney; and (5) the service will be provided by another not affiliated with the attorney. The N.Y.S.B.A. explains that

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36 Id. at 841. The court stated that while the state interests of over-commercialization, potential for ambulance chasing, invasion of privacy, and potential for deception are apparent, they are insufficient to override the public's interest in obtaining information on availability of legal services. See id. at 844-45.

37 See supra note 1.

38 See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1994). This section states:

A lawyer shall not, directly or indirectly, seek professional employment for the lawyer or a partner or associate of the lawyer from a person who has not sought advice regarding employment of the lawyer in violation of any statute or existing court rule in the judicial department in which the lawyer practices.

Id.

39 See Proposed Amendments, supra note 1, at 25-26. The modification to the N.Y. Code provides:

A. A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact, if:

1. The communication or contact violates DR 2-101(A) [stating that lawyers cannot make statements or claims that are false, deceptive or misleading];
2. The prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
3. The solicitation involves coercion, duress or harassment; or
4. The lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney.
5. The lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed
these changes have been tailored to comport with previously mentioned Supreme Court rulings allowing solicitation unless the method of communication falls within the aforementioned defined areas of misconduct.\textsuperscript{40}

Some commentators question who, if anyone, benefits from the restriction on lawyer advertising and solicitation.\textsuperscript{41} They argue that the integrity of the profession can be maintained,\textsuperscript{42} while simultaneously protecting the public (or a potential client) notwithstanding solicitation.\textsuperscript{43} Others, however, raise concerns over the dissemination of false or misleading communication, for which solicitation may be a catalyst as direct in-person or live telephone conversations between an attorney and a prospective client are not open to public scrutiny.\textsuperscript{44} This school of thought asserts that direct solicitation can be a major source of potential

primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

\textit{Id.} \textsuperscript{40} See id. at 26. Steven Krane, the chair of the N.Y.S.B.A. Committee to Review the Code of Professional Responsibility, stated that “most of the changes are needed to conform with recent U.S. Supreme Court rulings, which appear to limit the regulation of commercial speech by attorneys to cases involving false or deceptive claims.” Gary Spencer, \textit{State Bar Endorses Relaxation of Advertising Rules}, N.Y. L.J., July 2, 1996, at 1, col. 3. He further stated that the modifications were “designed to prevent ambulance-chasing, among other abuses.” \textit{Id.}

\textsuperscript{41} See Anthony E. Davis, \textit{Proposed Changes to the New York Lawyers’ Code - Part II}, N.Y. L.J., July 1, 1996, at 3, col. 1 (suggesting that while the bar may have an interest in maintaining its integrity, there is little evidence that lawyer advertising adversely affects public perception of the profession).

\textsuperscript{42} See \textit{In re Amendment to S.J.C. Rule 3:07, DR 2-103 and DR 2-104}, 495 N.E.2d 282, 287 (Mass. 1986) (stating that “many lawyers believe that solicitation is an inherently undignified and unseemingly practice”); Mylene Brooks, \textit{Lawyer Advertising: Is There Really a Problem?}, 15 Loy. L.A. ENT. L.J. 1, 2 (1994) (noting that attorneys still believe advertising and solicitation are primary causes of the legal profession’s degrading image); Katherine A. LaRoe, \textit{Much Ado About Barratry: State Regulation of Attorneys’ Targeted Direct-Mail Solicitation}, 25 St. Mary’s L.J. 1513, 1540 (1994) (discussing attorneys’ concerns that communication with potential clients via targeted direct mail may convert the “profession” to simply a “business” due to commercialization).

\textsuperscript{43} See Comment, \textit{A Critical Analysis of Rules Against Solicitation by Lawyers}, 25 U. Chi. L. Rev. 674, 682 (1958) (stating that harm to potential clients occurs from overreaching, overcharging, and underrepresentation).

\textsuperscript{44} See \textit{MODEL RULES}, supra note 10, at Rule 7.3 cmt. 3 (stating that since such conversations “are not subject to third party scrutiny ... they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading”); \textit{Lawyer Advertising and Solicitation Formal Opinion 85-170}, 57 Pa. Bar A. Q. 17, 19 (1986) (stating that “[t]here are generally no independent witnesses or other objective proof of what took place”).
undue influence, overreaching, and intimidation. Over time, an increasing lack of trust of attorneys would result based upon the actions of a few rotten apples. Additionally, concerns include the possibility that solicitation would stir up litigation, corrupt public officials, cause the assertion of fraudulent claims, and degrade the profession as a whole.

Opponents of solicitation fail to recognize that the public can not truly protect itself without having adequate knowledge to realize it is in need of legal advice or representation. Solicitation may, in fact, ultimately serve to further the public interest. Advantages, such as an immediate need for legal representation, must be considered in light of the given circumstances. Persons with legal problems need to know their legal rights in order to act promptly and efficiently. Thus, “solicitation serves the function of educating and conveying information to individuals

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45 See Eric S. Roth, Note, Confronting Solicitation of Mass Disaster Victims, 2 GEO. J. LEGAL ETH. 967, 978 (1989) (discussing the significance of overreaching, undue influence, and intimidation on vulnerable people and their effects on the freedom of choosing an attorney).

46 But see LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 81 (1980) (“Nevertheless, many members of the public believe that advertising should be allowed even if some low-quality practitioners flourish as a result.”).

47 See Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 461 (1978) (noting that the goal of prohibiting solicitation is to reduce the potential for overreaching and undue influence, protect individual’s privacy, and prevent situations where an attorney’s pecuniary interest may affect the proper exercise of judgment); see also Comment, supra note 43, at 675 (discussing each of these potential results of solicitation).

48 See ANDREWS, supra note 46, at 79 (noting that evidence throughout the country demonstrates that “professional advertising has in many instances reduced the total cost to the consumer of legal services for routine matters”).

49 See Roth, supra note 45, at 977 (discussing the potential for the immediate need of legal assistance for victims and families in the wake of a mass disaster). For example, insurance companies wish to settle claims quickly and at a low cost and attempt to accomplish this by discouraging victims from hiring attorneys and filing law suits. Although the insurance companies have the right to protect their own interests, lack of legal representation, however, may cause the victims not to exercise fully their legal rights. See id. at 975-77.

50 See Ohralik, 436 U.S. at 473 (Marshall, J., concurring) (noting that “[m]any persons with legal problems fail to seek relief through the legal system because they are unaware that they have a legal problem”); see also Joe Wischamper, Comment, Benign Solicitation of Clients by Attorneys, 54 WASH. L. REV. 671, 678 (1979) (“Some persons with legal problems may fail to seek relief either because they are unaware that they have a legal problem or they are unaware of the availability of an adequate legal remedy.”). The lack of awareness that a legal problem exists can be very detrimental, for example, in filing claims against municipalities with short statutes of limitation. See WIS. STAT. ANN. § 893.77(1) (West 1997) (requiring an action contesting the validity of any municipal obligation to be commenced within 30 days).
regarding their legal rights and available legal services. Solicitation will undoubtedly provide a strong basis for informed and reliable decision-making when it comes to identifying potential legal problems, protecting one's rights, and selecting a proper, competent attorney.

Moreover, solicitation has secondary effects that serve to benefit the public. Since the ability to seek clients undoubtedly increases competition among attorneys, solicitation may increase the quality of legal work. With more attorneys competing for clients, prospective clients will be able to make a quality-based selection thereby stimulating a realization that improved quality is required. Finally, due to an increase in competition, attorneys would need to reduce fees in order to maintain and attract clients.

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51 Louise L. Hill, Solicitation By Lawyers: Piercing the First Amendment Veil, 42 Me. L. REV. 369, 421 (1990) (arguing that “rules restricting the commercial speech of lawyers are constitutionally impermissible”). Additionally, in-person solicitation is just as beneficial to the public as commercial advertising and the prohibition has an adverse effect on the public as it suppresses this important channel of disseminating information. See id. at 420-21; see also Evan R. Levy, Note, Edenfield v. Fane: In-Person Solicitation By Professionals Revisited - What Makes Lawyers Different?, 58 ALB. L. REV. 261, 298 (1994) (suggesting that a ban on “in-person solicitation deprives citizens of the opportunity to benefit fully from the services of lawyers”). But see LaRoe, supra note 42, at 1541-42 (noting that direct mail advertising suggesting that the targeted person may have a legal problem is insulting and may foster the distrust that the public has for lawyers).

52 See Judith L. Maute, Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine, 13 HASTINGS CONST. L.Q. 487, 525 (1986). Since solicitation promotes competition, the “competitive pressure on the marketplace may result in increasingly higher standards for the quality of legal work.” Id.; see also ANDREWS, supra note 46, at 80-81 (discussing studies and evidence that the quality of legal work may increase due to advertising); Russell G. Pearce, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. REV. 1229, 1273 (1995) (noting that the traditional view that increased competition will result in lower quality work is contrary to the market theory which recognizes that competition yields high quality-low cost services).

53 See ANDREWS, supra note 46, at 81 (noting that a similar survey of lawyers and pharmacists indicated that “states which allowed advertising delivered better services than those in states which did not allow advertising”).

54 See Ohralik, 436 U.S. at 475-76 (Marshall, J., concurring) (arguing that since poor clients are not favorable to large firms, in-person solicitation will allow solo practitioners and small firms, who usually earn less than those of large firms, to engage potential clients). The logical conclusion is that legal representation will be provided at a lower cost. See Fred S. McChesney, De-Bates and Re-Bates: The Supreme Court's Latest Commercial Speech Cases, 5 SUP. CT. ECON. REV. 81, 89 (1997) (summarizing the results of an FTC survey which indicates that attorney advertising results in lower fees); Roth, supra note 45, at 980 (noting that to remain com-
While the concerns on the effects of solicitation that courts and scholars have enumerated are real, perhaps their intensity has diminished. The application of constitutional rights to solicitation that has helped ease the restrictions and the benefits that solicitation confers on the public have become increasingly acknowledged. Although the amendment provides for in-person solicitation, attorneys will not be receiving an unqualified right to solicit. The remaining restrictions will adequately protect the public. Perhaps the legal profession needs to keep an open mind when evaluating this, as the public does not lack the sophistication required to evaluate attorneys and the profession maintains an adequate level of regulation for public protection.

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5 See ANDREWS, supra note 46, at 77-79 (noting that there is some evidence that advertising can actually improve the image of the legal profession and lower cost).

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