

Washington Law Review

Volume 54
Number 3 *Symposium on Indian Law*

6-1-1979

Benign Solicitation of Clients by Attorneys

Joe Wishcamper

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Legal Profession Commons](#)

Recommended Citation

Joe Wishcamper, Comment, *Benign Solicitation of Clients by Attorneys*, 54 Wash. L. Rev. 671 (1979).
Available at: <https://digitalcommons.law.uw.edu/wlr/vol54/iss3/8>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

BENIGN SOLICITATION OF CLIENTS BY ATTORNEYS

I. INTRODUCTION

The companion cases of *In re Primus*¹ and *Ohralik v. Ohio State Bar Association*² reflect the United States Supreme Court's latest views on the propriety of solicitation of clients by attorneys. The cases presented fact situations at the opposite ends of the solicitation spectrum: *Primus* dealt with solicitation by a civil rights attorney for purposes of political expression, whereas *Ohralik* was characterized as a classic example of "ambulance-chasing."³ While the two cases will be helpful in predicting the outcome of solicitation cases involving civil liberties activity and ambulance-chasing, they provide little guidance for determining the outcome of cases between those polar extremes.

Justice Marshall wrote an important concurring opinion to these companion cases⁴ which focused on the question of the legality of solicitation falling between the poles⁵ of *Primus* and *Ohralik*. Justice Marshall was particularly concerned with providing protection for benign commercial solicitation, which he defined as follows:

By "benign" commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.⁶

Justice Marshall contended that because of the significant benefits that can accrue to society from benign solicitation, such activity should not be stifled with a sweeping nonsolicitation rule.⁷

The Court has never been presented with a case of benign commercial solicitation, and Justice Marshall's concurrence raises the question whether the Court would protect such activity. The issue is par-

1. 436 U.S. 412 (1978).

2. 436 U.S. 447 (1978).

3. *Id.* at 469 (Marshall, J., concurring). See generally Comment, *Legal Ethics—Ambulance Chasing*, 30 N.Y.U.L. Rev. 182 (1955).

4. *Ohralik*, 436 U.S. at 468.

5. *Id.* at 471 (Justice Marshall referred to the fact that the two situations in *Primus* and *Ohralik* were at "opposite poles" of the problem of attorney solicitation).

6. *Id.* at 472 n.3.

7. *Id.* at 473-74.

ticularly important because benign commercial solicitation is currently prohibited by the American Bar Association's Code of Professional Responsibility (ABA Code).⁸ If Justice Marshall's position were ultimately adopted, Canon 2 of the ABA Code would have to be rewritten.

While *Ohralik* leaves the current nonsolicitation rule intact, the Court showed new willingness to inquire into the circumstances surrounding the solicitation activity.⁹ This willingness, combined with Justice Marshall's incisive concurrence, suggests that the Court, when directly confronted with the question of the extent to which benign commercial solicitation can constitutionally be restricted, might afford greater protection to such solicitation than would be expected under the ABA Disciplinary Rules and traditional court doctrine. That possibility is heightened by recent state court decisions which reveal that some state courts are avoiding the broad nonsolicitation rule in benign solicitation cases in order to prevent harsh outcomes.¹⁰

The purpose of this comment is to discuss the social benefits offered by benign commercial solicitation, examine the weaknesses in the current ABA rules and court doctrine, and suggest arguments¹¹ that could be presented to persuade a court to abandon the traditional doctrine and provide protection for such solicitation. An alternative approach is presented which suggests dealing with solicitation cases by applying a "circumstances" oriented test. The suggested test would avoid some of the infirmities of the present doctrine and would be more useful in predicting outcomes of such cases.

8. ABA CODE, DR 2-103(A) & 2-104(A)(1)-(5); see notes 13-15 and accompanying text *infra*.

9. The Court in *Ohralik* stated, "We agree that the appropriate focus is on appellant's conduct." *Ohralik*, 436 U.S. at 463.

10. For a discussion of these avoidance techniques, see notes 62-65 and accompanying text *infra*.

11. All of the major arguments against the present nonsolicitation rule are presented in Part III *infra* except the argument that the rule is based on an outmoded model of a small, homogeneous community which has no bearing on today's diverse urban society. See *Ohralik*, 436 U.S. at 475 (Marshall, J., concurring). The outmoded-model argument is not developed in this comment because of the *Ohralik* majority's view that "[t]he fact that the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve." *Id.* at 460.

II. THE PRESENT ABA RULES AND COURT DOCTRINE

A. *The ABA Code of Professional Responsibility*

Traditionally, solicitation of clients by attorneys has been forbidden,¹² and that rule is continued in the Disciplinary Rules of the ABA Code.¹³ For example, Disciplinary Rule (DR) 2-103(A) prohibits an attorney from recommending employment of himself to a layperson who has not sought out his legal advice.¹⁴ In addition, DR 2-104(A) provides as a general rule that if an attorney does give unsolicited legal advice to a layperson, then the attorney shall not accept any offer of employment resulting from that advice.¹⁵ The ABA Code lists five exceptions to this prohibition, one allowing an attorney to accept em-

12. See, e.g., H. DRINKER, *LEGAL ETHICS* 210-15 (1953). See also Note, *Advertising, Solicitation, and Legal Ethics*, 7 VAND. L. REV. 677 (1954).

13. The ABA Code consists of three separate but interrelated parts: the Canons are statements of axiomatic norms, the Ethical Considerations are aspirational in nature, and the Disciplinary Rules are mandatory and regulatory. Any attorney whose conduct violates a Disciplinary Rule is subject to disciplinary action by the bar. *Preliminary Statement*, ABA CODE.

14. "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." ABA CODE, DR 2-103(A).

15. The Disciplinary Rule provides:

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

- (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.
- (2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.
- (3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
- (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.
- (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

ABA CODE, DR 2-104(A)(1)-(5) [footnotes omitted].

ployment offers that result from activities conducted by a qualified legal assistance organization to educate laypersons to recognize legal problems¹⁶ and another allowing an attorney who is affiliated with a qualified legal service organization to solicit clients who are members or beneficiaries of such groups.¹⁷ The ABA Code does not, however, carve out an exception for the type of benign solicitation to which Justice Marshall alluded.

B. *Current Court Doctrine*

A part of the judicial doctrine which supplements the current bar rules can be seen in the *Primus* and *Ohralik* decisions. *Primus* involved an attorney who, while affiliated with the American Civil Liberties Union, wrote a letter to a woman who had attended a briefing presented by the attorney. The purpose of the briefing was to inform certain welfare recipients about their legal rights regarding a sterilization program instituted as a condition of continued receipt of medical assistance. In *Primus*' letter to the woman, she offered the free legal services of the ACLU if the woman wished to file suit. The South Carolina Bar Association charged that *Primus*' letter constituted "solicitation in violation of the [state's] Canons of Ethics."¹⁸ *Primus* was found guilty as charged and was publicly reprimanded. The United States Supreme Court reversed, holding that *Primus*' activity was protected by the first and fourteenth amendments to the United States Constitution as a form of political expression and an exercise of associational freedom.¹⁹

Primus is the most recent in a series of Supreme Court cases that protect solicitation undertaken in the context of "freedom of association." The case which established the solicitation-under-group-auspices exception to the general rule proscribing solicitation was *NAACP v. Button*,²⁰ in which the Court struck down a Virginia statute that would have had the effect of preventing the NAACP and its attorneys from soliciting lawsuits based on allegations of racial discrimination. Noting that the NAACP's purpose in bringing litigation was to achieve "the lawful objectives of equality of treatment of all government [agencies] . . . for the members of the Negro community

16. ABA CODE, DR 2-104(A)(2), reproduced in note 15 *supra*.

17. ABA CODE, DR 2-104(A)(3), reproduced in note 15 *supra*.

18. 436 U.S. at 417.

19. *Id.* at 439.

20. 371 U.S. 415 (1963).

in this country,"²¹ the Court held that the Virginia statute unconstitutionally restricted the NAACP's political expression and freedom of association.²² The associational freedom holding of *Button* was cited, in three subsequent cases, as authority for protecting the practice of labor unions of referring union members to selected attorneys.²³ Although these cases all involved challenges to the unions' and not the attorneys' practices, the Court in *Primus* cited them as though their reasoning applied equally to attorney solicitation challenges.²⁴ Thus, the Court in *Primus* clearly suggested that the associational rights of the group for which an attorney is working must be considered in determining whether that attorney's solicitation activities may be proscribed.

In contrast to the *Primus* setting, *Ohralik* presented a classic "ambulance-chasing" situation.²⁵ Attorney Ohralik solicited contingent fee arrangements from two 18-year-old women who were involved in an automobile accident. Ohralik approached one of the women while she was still in traction in her hospital bed, and he approached the second woman shortly after her discharge from the hospital. Ohralik recorded conversations with one of the women without her knowledge, and later used the tape to threaten her with suit for his fee when the woman attempted to discharge him. The Ohio Supreme Court suspended Ohralik from practice indefinitely for his conduct, and the United States Supreme Court affirmed.

The distinction drawn by the Court in these solicitation cases is that solicitation of clients for personal gain is subject to state prohibition, whereas solicitation of clients by attorneys who are asserting political rights under the auspices of a group in the freedom of association context is protected by the first amendment.²⁶

21. *Id.* at 429.

22. *Id.* at 437.

23. *United Transp. Union v. State Bar*, 401 U.S. 576, 581-83 (1971) (labor union practice of referring its members to certain selected attorneys for assistance in filing personal injury claims held protected as an exercise of freedom of association undertaken to obtain meaningful access to courts); *UMW Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) (labor union's right to hire attorney on a salary basis to assist its members in filing workmen's compensation claims held protected against charge of unauthorized practice of law as a proper exercise of associational freedom); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 7-8 (1964) (union practice of recommending specific lawyers to injured workmen held protected against state bar allegation of unauthorized practice of law and improper solicitation of legal business, such activity being protected by first and fourteenth amendments).

24. 436 U.S. at 426.

25. 436 U.S. at 469 (Marshall, J., concurring). See generally Comment, *supra* note 3.

26. *E.g., Primus*, 436 U.S. at 434. The allowable scope of state regulation is also de-

C. Application of the Current Court Doctrine to Benign Solicitation

The United States Supreme Court has not yet been presented with a case of benign commercial solicitation. It is unclear how such a case would be decided.²⁷ If the Court focused on the motive of the soliciting attorney and the commercial nature of the speech, as in *Ohralik*,²⁸ it is likely that the ABA Code would be upheld and benign solicitation would go unprotected. On the other hand, if the Court chose to focus on the benign circumstances surrounding the solici-

pendent upon the classification of the solicitation. In-person solicitation of clients for personal gain may be restricted with a prophylactic rule, *Ohralik*, 436 U.S. at 467, whereas solicitation in furtherance of freedom of association and political expression may be regulated only upon a showing of actual misconduct by the attorney, *Primus* 436 U.S. at 434.

27. The outcome of a benign solicitation case is not clear because much of the Court's analysis in *Ohralik* revolved around the motive of Ohralik and the characterization of his speech. 436 U.S. at 455-58, 464, 467. On the other hand, there are several indications that the Court might choose to place its primary focus on the circumstances surrounding the solicitation. If the Court did so, the result would favor protection of the benign solicitation.

The first indication of the Court's willingness to focus on the circumstances is the characterization of Ohralik's conduct as "in-person" solicitation. *Id.* at 454-55, 457-58, 466, 468. The Court used the in-person circumstance to distinguish the solicitation in *Ohralik* from that in *Primus*. *Primus*, 436 U.S. at 422. Additionally, the Court distinguished *Bates v. State Bar*, 433 U.S. 350 (1977) (state bar association rule proscribing advertising by attorneys held unconstitutional), from *Ohralik* by focusing on the circumstances of Ohralik's solicitation, *Ohralik*, 436 U.S. at 455-56.

Perhaps the strongest indication of the Court's willingness to place primary focus on the circumstances is the statement: "We agree that the appropriate focus is on [Ohralik's] conduct." *Id.* at 463. The Court then proceeded to examine the nature of Ohralik's conduct, placing particular emphasis on the potential for harm associated with direct, in-person circumstances. *Id.* at 464-66, 468. The Court concluded that the State was justified in "prohibiting solicitation in *circumstances*" where it is likely to result in harm to the client. *Id.* at 468 (emphasis added). Justice Rehnquist, while disagreeing with the *Primus* majority as to the nature of the circumstances surrounding attorney *Primus*' solicitation, also displayed a willingness to consider the circumstances: "I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved." *Primus*, 436 U.S. at 443 (Rehnquist, J., dissenting).

Finally, the Court made particular reference to the benign nature of the circumstances surrounding the solicitation by attorney *Primus*, noting that her solicitation was unlikely to create harmful consequences. *Id.* at 435-36. It is precisely this focus on circumstances in a case of benign commercial solicitation that would result in a decision protecting such activity.

28. 436 U.S. at 455-56 (discussion of commercial nature of the speech) & 458-59 (Court noted that Ohralik's speech was not political expression or an exercise of associational freedom, but rather was an attempt to procure remunerative employment). *See also id.* at 462-63 n.20 (Court observed that the Disciplinary Rules proscribing solicitation are addressed to the problem of the attorney whose motivation is for pecuniary gain).

Solicitation by Attorneys

tion, such activity might be protected. There is dictum in *Primus* to support such a decision:

The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. As we decide today in *Ohralik*, a State also may forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils.²⁹

This dictum is particularly interesting since the current ABA rules are not "narrowly drawn" nor do they focus on "circumstances likely to result" in harm. If they were so drafted, they would permit benign solicitation since, by definition, such activity is only undertaken in circumstances that are "noncoercive, nondeceitful and dignified."³⁰ The current broad nonsolicitation rule of the ABA Code does not take the "circumstances" aspect into consideration at all.³¹

III. ARGUMENTS AGAINST CURRENT DOCTRINE AND FAVORING PROTECTION OF BENIGN SOLICITATION

The ABA defends the current rules on grounds that they are designed to protect the layperson from the evils associated with overreaching,³² undue influence, invasion of privacy, and the subordination of the client's legal interests to the attorney's financial self-interest.³³ Nevertheless, the current rules have been heavily criticized by commentators primarily on the grounds that those same evils can be

29. 436 U.S. at 438-39. See also *Ohralik*, 436 U.S. at 449 ("the State . . . constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent").

30. See text accompanying note 6 *supra*.

31. See ABA CODE, DR 2-104(A), reproduced in note 15 *supra*. The nonsolicitation rule does not apply if the soliciting attorney qualifies under one of the five exceptions listed in DR 2-104(A)(1)-(5), see *id.*, but those exceptions do not directly address the matter of circumstances. There may be an assumption that any solicitation undertaken within those five exceptions would involve benign circumstances, but the validity of any such assumption is questionable. An example of a situation when such an assumption would not be valid is presented and discussed in note 49 and accompanying text *infra*.

32. "Overreaching" refers to two concepts: solicitation which prevents a free choice of lawyers due to the aggressive approach of the soliciting attorney, and solicitation which is offensive to the sensibilities of the client. Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 683 (1958).

33. *Ohralik*, 436 U.S. at 461 (ABA justifications for DR 2-103(A) and DR 2-104(A)).

curbed by less restrictive rules which would enable society to reap certain benefits afforded by benign solicitation for commercial gain.³⁴

A. Social Policy Arguments

While the current rules may serve to protect society against certain harms, they also deprive society of the benefits afforded by benign solicitation. 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.³⁵ Since the ABA rules prohibit an attorney from accepting employment offers arising from unsolicited legal advice, they restrict the free flow of commercial information which facilitates the proper functioning of the marketplace by allowing informed decisionmaking by the consumer and efficient allocation of scarce resources.³⁶

Furthermore, as Justice Marshall noted, the current rules discriminate against the less-privileged members of our society because those in the middle- and low-income brackets tend to know little about the law.³⁷ Additionally, by allowing solicitation under the auspices of "a qualified legal assistance organization,"³⁸ the present rules discriminate against those laypersons who are not members or beneficiaries of groups which will protect their legal interests.

Another undesirable social aspect to the current nonsolicitation doctrine observed by Justice Marshall is that the ABA rules are "discriminatory with respect to the suppliers as well as the consumers of legal services."³⁹ The current rules are more burdensome for the solo practitioner or member of a small partnership than for the attorney who is a member of a large corporate-oriented firm because the latter

34. See, e.g., Freedman, *Advertising and Solicitation by Lawyers: A Proposed Re-draft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183 (1976); Comment, note 32 *supra*; Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

35. *Ohralik*, 436 U.S. at 473 (Marshall, J., concurring). The decision in *Bates v. State Bar*, 433 U.S. 350 (1977), see note 57 *infra*, does nothing to help someone in this category since advertising is of assistance only to one who is aware that he has a legal problem which could be addressed by the type of legal service being advertised.

36. Cf. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (state statute which unconstitutionally proscribed advertising of drug prices restricted free flow of commercial information).

37. *Ohralik*, 436 U.S. at 474-75 (Marshall, J., concurring). See generally B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 128-34 (1970).

38. See ABA CODE, DR 2-104(A)(3), reproduced in note 15 *supra*.

39. *Ohralik*, 436 U.S. at 475-76 (Marshall, J., concurring).

does not need to solicit in order to attract business.⁴⁰ The solo practitioner, on the other hand, especially one commencing practice, faces a formidable task in trying to build up a clientele.⁴¹

A final shortcoming of the rules concerns the extent to which they impede certain types of public interest lawsuits.⁴² The group exception to the nonsolicitation rule is an excellent vehicle for the vindication of certain social goals when the potential plaintiff is a member or beneficiary of a qualified group, as demonstrated by the protection afforded the NAACP and ACLU in suits brought to eliminate racial discrimination and protect civil liberties.⁴³ Unfortunately, not every potential plaintiff whose legal claim has strong public interest overtones is going to be a member or beneficiary of a "qualified" group. It may be, however, that the particular social value can best be pursued through a class action suit. If so, then the current rules operate directly to stifle the vindication of that social concern since DR 2-104(A)(5) expressly forbids solicitation in class action suits.⁴⁴

B. Doctrinal Weaknesses of the Current Nonsolicitation Rule

1. Motive distinction

In deciding whether to protect solicitation of clients, courts commonly draw distinctions based on the motive of the attorney who attempts the solicitation.⁴⁵ If the attorney's motive for the solicitation is commercial gain, then the solicitation is subject to state proscrip-

40. See *id.* and authorities cited therein.

41. This discrimination between attorneys resulting from the group exception to the nonsolicitation rule is explored further under the equal protection analysis in Part III-C *infra*.

42. The United States Supreme Court has rejected the notion that instigating litigation is inherently evil. *Bates v. State Bar*, 433 U.S. 350, 375-76 (1977). "[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376.

43. The ABA rules say nothing about an interest in the elimination of racial discrimination as such, but the effect of DR 2-104(A)(3), reproduced in note 15 *supra*, is to extend protection to groups such as the NAACP and the ACLU which frequently bring suit in discrimination and civil liberties cases. See *Primus*, 436 U.S. at 427-28 (Court noted that ACLU only entered cases in which substantial civil liberties questions were involved); *NAACP v. Button*, 371 U.S. 415 (1963) (NAACP solicitation of cases involving racial discrimination).

44. ABA CODE, DR 2-104(A)(5), reproduced in note 15 *supra*.

45. See *Primus*, 436 U.S. at 422; *Ohralik*, 436 U.S. at 462-63 n.20 (Court notes that improper solicitation has historically been defined in terms of the attorney's pecuniary motive).

tion;⁴⁶ whereas, if the attorney's motivation is political expression or the furtherance of associational freedom, then the solicitation may be protected.⁴⁷

Using motive to determine which solicitation to protect and which to punish is defective for two reasons. First, an inquiry into motive does not address those substantive evils against which the rules are intended to protect.⁴⁸ The same dangers of overreaching and undue influence will be present in a situation when the attorney's motivation for political expression is so intense and overzealous that the client's interests are trampled by the attorney in his desire to bring suit.⁴⁹ Second, motive is often difficult to ascertain "and it is subject to manipulation by clever practitioners."⁵⁰

2. *Commercial speech distinction*

In addition to making distinctions based on the motive of the soliciting attorney, the courts also look to the nature of the speech to determine the extent to which they will protect the solicitation. Solicitation which is characterized as political expression or an exercise of associational freedom is protected⁵¹ to a greater degree than is "commercial speech."⁵²

The commercial speech doctrine was originally announced in 1942 in *Valentine v. Chrestensen*⁵³ when, without citing any authority for its distinction, the Supreme Court denied first amendment protection

46. *Ohralik*, 436 U.S. at 464.

47. See notes 19-24 and accompanying text *supra*.

48. As Justice Marshall observed, "What 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." 436 U.S. at 470 (Marshall, J., concurring).

49. Justice Rehnquist made particular note of this deficiency in the majority opinion:

A State may reasonably fear that a lawyer's desire to resolve "substantial civil liberties questions," . . . may occasionally take precedence over his duty to advance the interests of his client. It is even more reasonable to fear that a lawyer in such circumstances will be inclined to pursue both culpable and blameless defendants to the last ditch in order to achieve his ideological goals.

Primus, 436 U.S. at 445-46 (Rehnquist, J., dissenting) (citation omitted).

50. *Id.* at 442 (Rehnquist, J., dissenting). The *Primus* majority opinion concedes the difficulty of making distinctions which turn on the motive of the soliciting attorney. "The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw . . ." 436 U.S. at 438 n.32.

51. See notes 19-24 and accompanying text *supra*.

52. *Ohralik*, 436 U.S. at 455-59.

53. 316 U.S. 52 (1942).

to an advertising handbill because it was "purely commercial advertising."⁵⁴ The commercial speech doctrine has been seriously eroded in such recent Supreme Court cases as *Bigelow v. Virginia*,⁵⁵ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁵⁶ and *Bates v. State Bar*,⁵⁷ and heavily attacked in the commentaries.⁵⁸ Its continued viability is very much in question.⁵⁹ A court's decision not to protect solicitation rests on unstable grounds to the extent such decision is based on the severely eroded commercial speech doctrine.

3. *Limitations on predictability*

One of the desirable goals of any legal doctrine is to provide a reliable touchstone for predicting the outcome of any given legal issue. Unfortunately, the current nonsolicitation doctrine, encumbered as it is with the "motive" test and the commercial speech distinction, is of little use in predicting the outcome of a solicitation case that does not fall at or near the poles delineated by *Primus* and *Ohralik*. Justice Rehnquist, noting these difficulties, observed, "I do not believe that any State will be able to determine with confidence the area in which it may regulate prophylactically [as in the *Ohralik* setting] and the area in which it may regulate only upon a specific showing of harm [as in the *Primus* context]."⁶⁰

54. *Id.* at 54.

55. 421 U.S. 809 (1975) (state statute invoked against newspaper editor who published an advertisement dealing with abortion services held unconstitutional, notwithstanding commercial nature of the advertisement).

56. 425 U.S. 748 (1976) (state statute proscribing advertising of drug prices held unconstitutional and contention that advertising is outside of first amendment because of commercial nature rejected).

57. 433 U.S. 350 (1977) (state bar association rule proscribing advertising by attorneys held unconstitutional as violative of first amendment).

58. See, e.g., *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 205-08 (1977); Comment, *Bates v. State Bar of Arizona: A Consumers' Rights Interpretation of the First Amendment Ends Bans on Legal Advertising*, 55 DEN. L.J. 103, 106-07 (1978); Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C.L. L. REV. 77, 88-89 (1973).

59. As early as 1959, Justice Douglas viewed the ruling that established the commercial speech doctrine as "casual, almost offhand. And it has not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., dissenting).

60. *Primus*, 436 U.S. at 443 (Rehnquist, J., dissenting). Justice Blackmun, viewing the impact of the majority opinion, expressed his dissatisfaction with the predictability aspect: "I for one, am not now able to delineate in the area of political solicitation the extent of state authority to proscribe misleading statements." *Id.* at 439 (Blackmun, J., concurring).

Under the current nonsolicitation doctrine, one is left to speculate, for example, on the outcome of a case in which an attorney engages in solicitation out of the dual motives of political expression and commercial gain. The current doctrine proves to be of little use since political expression is protected by *Primus*, whereas solicitation for purposes of commercial gain is prohibited by *Ohralik*. The current doctrine gives no guidance for determining at what point one distinction should give way to the other.⁶¹

4. *Contemporary responses by the judiciary—avoidance techniques*

Historically, when a rule of law promulgated for a valid public policy reason has operated in a harsh and unfair manner in circumstances unrelated to the original evil contemplated by the rule, the courts have either struck down the old rule⁶² or have employed various ingenious judicial techniques to avoid the harshness of the rule.⁶³ Presently some courts are involved in just such judicial avoidance techniques in an effort to avoid the harshness of the current Disciplinary Rules in cases of benign solicitation. For example, California has devised a "primary purpose" test whereby an attorney accused of solicitation cannot be punished under the nonsolicitation rules unless the solicitation "viewed in its entirety . . . serves no discernible purpose other than the attraction of clients."⁶⁴ Kentucky has developed a transformation technique which changes otherwise proscribed solicitation into protected advertising. Kentucky recently performed this feat of metamorphosis in behalf of two enterprising attorneys who

61. The political versus commercial distinction can be drawn not only with regard to the motive of the soliciting attorney, but with regard to the nature of the speech as well. For example, an attorney who solicited the business of a black man who had been denied employment because of racial discrimination might do so because of a political motive, but the offer to represent him in a suit for lost wages for a one-third contingent fee is speech that proposes a commercial transaction.

62. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (common law rule of contributory negligence superseded by new doctrine of comparative negligence).

63. For example, the last clear chance doctrine was created to avoid the harshness of the common law rule of contributory negligence as a complete bar to recovery in a negligence suit. See *Cavanaugh v. Boston & Me. R.R.*, 76 N.H. 68, 79 A. 694 (1911).

64. *Jacoby v. State Bar*, 19 Cal. 3d 359, 371, 562 P.2d 1326, 1334, 138 Cal. Rptr. 77, 85 (1977) (attorneys' conduct in engaging in media interviews held protected against charges of solicitation of clients). The California primary purpose rule, while helpful in ameliorating the harshness of the current nonsolicitation doctrine, is unsatisfactory because it still places the focus on motive and not on those circumstances surrounding the solicitation which may pose the actual risk of harm.

wrote letters to real estate agencies offering to prepare title searches, deeds, and mortgages. The Kentucky Bar Association, which had satisfied itself that the letters constituted solicitation, was informed by the court that the letters were really just advertising.⁶⁵

It is an unfortunate comment on the current rules and doctrine that some courts feel the necessity of engaging in such avoidance techniques.⁶⁶ A well-drafted rule that properly serves the interests of society would obviate this need and encourage analysis which directly seeks a just result.

C. *Equal Protection Challenge to the ABA Rules*

Not only are there numerous social and doctrinal shortcomings to the current prohibition against solicitation, but the ABA Code Disciplinary Rules are susceptible to an equal protection challenge under

65. *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978) (per curiam). The Kentucky transformation rule, while helpful in diluting the harshness of the current nonsolicitation rule, is unsatisfactory. One can envision situations in which the court will have to draw spurious distinctions in order to protect benign solicitation as "advertising." Black's Law Dictionary defines "advertise" as: "To give notice to, inform or notify, give public notice of, announce publicly, notice or observe." BLACK'S LAW DICTIONARY 74 (4th rev. ed. 1968). "Solicit" is defined as: "To appeal for something The term implies a personal petition and importunity addressed to a particular individual to do some particular thing." *Id.* at 1564.

Kentucky has a history of approaching the issue of benign commercial solicitation with refreshing candor:

There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; others by asking their friends to send them business; others by applying directly, or through the medium of friends, for employment by firms and corporations; others buy stock in corporations with the understanding that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney Manifestly, if every kind of solicitation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If some forms are to be permitted, while others are to be condemned, where shall the line be drawn?

Chreste v. Louisville Ry. Co., 167 Ky. 75, 83-84, 180 S.W. 49, 53 (1915) (contract obtained by solicitation held valid as not against public policy). See also *Louisville Bar Ass'n v. Hubbard*, 282 Ky. 734, 139 S.W.2d 773, 775 (1940).

66. Not all state courts conclude that benign commercial solicitation should be protected. In a recent Louisiana Supreme Court case, the petitioners, who were attorneys in a professional law corporation, formed a legal group to provide prepaid legal services to selected employee groups. Petitioners mailed letters to certain employers describing the services offered and enclosed a brochure designed for the education of the employees. Under the proposed group plan, the employer agreed to withhold \$10.00 per month from the wages of each covered employee and remit such sum to the attorneys, who agreed to perform legal services specified in detail in the brochure.

the fourteenth amendment.⁶⁷ The general nonsolicitation rule is expressed by DR 2-103(A)⁶⁸ and DR 2-104(A).⁶⁹ In DR 2-104(A)(3) an exception to the general prohibition is provided for an attorney "who is recommended, furnished or paid by a qualified legal assistance organization."⁷⁰ An attorney so affiliated may solicit clients who are members or beneficiaries of such groups.⁷¹ Of course, the "members or beneficiaries" of a qualified legal assistance organization such as a legal aid office or public defender office⁷² include the general public. Thus, two classifications of attorneys are established: those who are affiliated with a qualified group and those who are not. Attorneys in the former class receive favored treatment denied to those of the latter. An attorney affiliated with a qualified group may engage in solicitation under the protection of DR 2-104(A)(3), but an attorney not affiliated with such an organization remains subject to the rigors of the nonsolicitation rule.

The classification scheme established by the ABA Code, with its

Notwithstanding the benign nature of the solicitation, *see* text accompanying note 6 *supra*, the Louisiana State Bar Association notified petitioners that they were being investigated for potential violations of DR 2-103. The petitioners sought an injunction against the bar association, claiming that the disciplinary rules were unconstitutional. The court rejected their claim. Drawing upon language from *Primus* and *Ohralik*, the court concluded that the letters written by the petitioners, although not face-to-face solicitation, were nevertheless "direct solicitation," and were thus proscribed by *Ohralik*. *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489, 496 (La. 1978). Focusing also on the motive involved, the court rejected petitioners' claim that they were simply trying to provide legal services at a reasonable cost to those who otherwise might not have such service, and instead concluded that "financial benefits for petitioners is [*sic*] at least an important motive for the solicitation." *Id.* The court continued:

Since we interpret petitioners' actions as direct solicitation for pecuniary gain, and since we find the State's traditional and important regulation of the practice of law by prohibiting solicitation would have no adverse impact upon constitutional rights (except the lawyer's own right to speak as he pleases in commercial solicitation) the prohibition against direct solicitation by lawyers for pecuniary gain will be upheld. *Id.*

The court did not discuss why the petitioners' group did not qualify as a "qualified" legal assistance organization within the meaning of the group exception to the nonsolicitation rule. Presumably, petitioners' group did not qualify because, contrary to the requirements of DR 2-103(D)(4)(a)-(b), the group was organized and operated by the petitioners to make a profit.

67. The fourteenth amendment provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

68. ABA CODE, DR 2-103(A), reproduced in note 14 *supra*.

69. ABA CODE, DR 2-104(A), reproduced in note 15 *supra*.

70. ABA CODE, DR 2-104(A)(3), reproduced in note 15 *supra*.

71. *Id.* For an enumeration of qualifying organizations, see ABA CODE, DR 2-103(D)(1)-(4).

72. ABA CODE, DR 2-103(D)(1).

differing treatment of attorneys, can be illustrated by means of a hypothetical based on facts similar to those in *Primus*. Attorney *A* is employed by the ACLU but, unlike *Primus*, *A*'s employment contract provides that she will receive part of her salary from court-awarded fees.⁷³ Attorney *A*, motivated by a desire to receive a court-awarded fee, has a meeting⁷⁴ with a low-income woman who has been sterilized by a local doctor as a condition of continued receipt of Medicaid payments. During the meeting attorney *A* encourages the woman to sue the doctor, and offers the free legal services of the ACLU for such a suit. The woman agrees to sue and asks attorney *A* to represent her. Attorney *A* accepts the offer and subsequently files suit.

Attorney *B*, on the other hand, is in private practice. Motivated by a desire for commercial gain, attorney *B* has a similar meeting with such a woman. Attorney *B* offers to represent the woman in hope of securing an award of attorney's fees. The woman agrees to sue, asks attorney *B* to represent her, and attorney *B* accepts the offer.

Attorney *A* is protected in her solicitation and can accept the client's offer of employment pursuant to DR 2-104(3) because she is affiliated with a qualified legal service organization as enumerated in DR 2-103(D)(1) through (4). This is so notwithstanding attorney *A*'s pecuniary motive for soliciting the client since motive is not a factor in the operation of the Disciplinary Rules. However, attorney *B* has violated DR 2-104(A) of the ABA Code and is subject to disciplinary action, including possible indefinite suspension.⁷⁵ The two hypothetical attorneys have engaged in substantially similar conduct arising from identical motives, yet they receive radically different treatment under the ABA Code by virtue of the exception to the general nonsolicitation rule for attorneys affiliated with a "qualified legal assistance organization."

Under the precedents which establish equal protection doctrine, the current rules and group solicitation exception neither create a "sus-

73. The Court noted in *Primus* that the ACLU now allows its local offices to experiment with this method of attorney compensation. 436 U.S. at 430-31 n.24.

74. The presentation of the attorney's unsolicited legal advice in a face-to-face meeting in this hypothetical, as opposed to solicitation by letter as in *Primus*, is to insure that the outcome of the hypothetical is not dependent on whether a letter is "in-person" solicitation within the meaning of DR 2-104(A). This issue was the basis of a successful defense in *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978) (per curiam). See note 65 and accompanying text *supra*.

75. An attorney who violates a Disciplinary Rule is subject to disciplinary action. *Preliminary Statement*, ABA CODE. Attorney Ohralik violated DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility and was indefinitely suspended as a result. 436 U.S. at 453-54.

pect classification"⁷⁶ nor infringe on a "fundamental right"⁷⁷ and therefore would not invoke strict judicial scrutiny. The relationship between the classifications established by the Disciplinary Rules and the prevention of the harm associated with overreaching and undue influence is sufficient to satisfy the traditional rational basis test.⁷⁸ There has been, however, a widely noted trend in Supreme Court doctrine away from the application of a rigid two-tiered equal protection analysis.⁷⁹ Several aspects of the operation of the solicitation rule and its group exception suggest that the Court might consider an equal protection challenge to these rules at a level of scrutiny more exacting than the deferential rational basis test.

First, the right being directly regulated is the right to commercial speech. The *Ohralik* Court found that the defendant's own conduct could be constitutionally regulated because of the dangers it presented to society.⁸⁰ The Court did not apply the overbreadth doctrine⁸¹ and

76. The Court has to date held only the following to be suspect classifications: race. *Loving v. Virginia*, 388 U.S. 1 (1967); national origin, *Oyama v. California*, 332 U.S. 633 (1948); and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971).

77. In the area of equal protection, the Court has to date held to be fundamental only those rights which relate to voting, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); access to the judicial process, *Douglas v. California*, 372 U.S. 353 (1963); and interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court has not settled on a technique for identifying fundamental rights. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 410-19, 674-87 (1978).

78. See *Ohralik*, 436 U.S. at 461-62. An example of the application of the rational basis test is *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). For a general discussion of the rational basis test, see Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969).

79. See Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12, 18-24 (1972). Professor Gunther analyzed fifteen equal protection cases and concluded that the Burger Court was developing a trend toward equal protection "bite" without reaching strict scrutiny. Cases which employ such an intermediate doctrine without reaching strict scrutiny include *Califano v. Goldfarb*, 430 U.S. 199 (1977) (gender classification); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimacy classification); *James v. Strange*, 407 U.S. 128 (1972) (wealth classification); and *Reed v. Reed*, 404 U.S. 71 (1971) (gender classification). Justice Marshall has long advocated use of a "spectrum of standards" which vary with the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1972) (Marshall, J., dissenting). Justice White has observed that "it is clear that we employ not just one, or two, but, as my brother Marshall has so ably demonstrated, a 'spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.'" *Vlandis v. Kline*, 412 U.S. 441, 458 (1973) (White, J., concurring).

80. 436 U.S. at 467-68.

81. See *id.* at 462 n.20 (Court noted that an overbreadth argument had not been made and would not have been successful in any case).

thus did not consider whether a person in the position of hypothetical attorney *B*, whose commercial solicitation was less harmful than *Ohralik's*, would be constitutionally protected from the rule's prohibition. Even if the nonsolicitation rule does not infringe on attorney *B's* interest in commercial speech to such an extent that it violates the first amendment, it certainly infringes on that interest to a certain degree. Although such subconstitutional infringement of a constitutionally protected right has not traditionally occasioned strict scrutiny in an equal protection context, such infringement would almost certainly, under a flexible equal protection analysis, affect the level of scrutiny applied.

A similar argument could be advanced regarding the rule's impact on attorney *B's* freedom of association. This right is generally considered to encompass the freedom not to associate.⁸² The nonsolicitation rule puts attorney *B* in a position which requires that she join a qualified group if she wants to engage in benign commercial solicitation.

82. The notion that freedom of association includes the right not to be compelled to associate against one's wishes is an emerging concept, the full extent of which is as yet unclear. The Court has held that freedom of association prohibits a state from compelling an individual to associate with a political party as a condition of retaining public employment, *Elrod v. Burns*, 427 U.S. 347, 355-59 (1976). More recently, the Court held in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-34 (1977), that the right of workers to prevent their union from spending a part of their required service fees to contribute to political candidates and to express political views with which they disagreed was constitutionally protected as an aspect of the right to freedom from compelled association. Additionally, a lower federal court, in a case dealing with compelled political association, observed, "At the core of the present case is the equally basic principle that the right to associate includes the right of affiliation with the political party of one's choice or the right not to affiliate with a political party at all." *Cullen v. New York State Civil Serv. Comm'n*, 435 F. Supp. 546, 551 (E.D.N.Y. 1977) (county policy of requiring employee contributions to designated political party held actionable under applicable civil rights statute as violation of freedom of association).

The Court in *Abood* noted that compelled association, although interfering with first amendment interests, is constitutionally justified by a legislative assessment of overriding interest. 431 U.S. at 222. The Court in *Elrod* observed that such first amendment interests were not absolute, but could be encroached upon "for appropriate reasons." 427 U.S. at 360. Justice Douglas felt that compelled association was constitutionally permissible only if the state showed "exceptional circumstances." *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting) (issue whether dues money of a member of the bar could constitutionally be used to support causes opposed by such member not reached by the Court).

In the situation created by the Disciplinary Rule classifications, the freedom from compelled association is not overcome by any such legislative determination of importance or a showing of exceptional circumstances. In the absence of such factors, it is unlikely that the compelled association that arises by implication from the Disciplinary Rules could be constitutionally sustained.

Finally, the alternative of drafting a rule which focuses directly on those evils to be protected against⁸³ is readily available.⁸⁴ Such a rule could avoid the creation of classifications which discriminate against attorneys soliciting on their own, and its availability would probably make the Court more receptive to the equal protection challenge outlined above.

IV. AN ALTERNATIVE APPROACH

The previous section outlined the benefits to society of benign commercial solicitation, together with the infirmities that are present with the current nonsolicitation doctrine. Several excellent alternatives to the current rules have been proposed in the commentaries,⁸⁵ and even the ABA's proposed revision of Canon 2 of the ABA Code which was rejected by the Board of Governors⁸⁶ offered much in the way of reform.⁸⁷ As noted previously, there is also language in *Primus* which, if read literally, would shift the Court's focus away from the irrelevant

83. See notes 32-33 and accompanying text *supra*.

84. See Part IV *infra* for a discussion of alternative means to protect against the evils to which the current nonsolicitation rules are addressed.

85. See, e.g., Freedman, *Advertising and Solicitation By Lawyers: A Proposed Re-draft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 198-203 (1976); Comment, *Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1192-201 (1972). Although these commentaries reflect suggestions that were adopted in part by the post-Bates revisions to the ABA Code, the suggestions contained therein relating to solicitation reforms are still relevant.

86. The ABA Task Force on Lawyer Advertising, formed in response to the decision in *Bates v. State Bar*, 433 U.S. 350 (1977), submitted two proposals to the Board of Governors. The more liberal proposal was termed "Proposal B" and the more restrictive, traditional approach was "Proposal A." *ABA Code of Professional Responsibility Amendments, Report to the Board of Governors of the Task Force on Lawyer Advertising*, 46 U.S.L.W. 1, 1-2 (Aug. 23, 1977). Proposal B was rejected by the Board of Governors, with the recommendation that the Code be amended as provided in Proposal A and that both proposals be circulated to the states. *ABA Code of Professional Responsibility Amendments, Report of the Board of Governors to the House of Delegates Concerning Lawyer Advertising*, 46 U.S.L.W. 1, 1 (Aug. 23, 1977).

87. Although Proposal B, see note 86 *supra*, purported to continue the traditional ban on solicitation, it focused on the circumstances of the solicitation:

(A) A lawyer who has given unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice if:

(1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or that violates the regulations contained in DR 2-101(C); or

cies of the motive of the soliciting attorney and the characterization of the speech as "commercial" or "political expression" and focus instead on the circumstances under which the solicitation took place.⁸⁸

The essence of the suggestions for revision presented by these sources can be synthesized into the following two-pronged test:

(1) any form of solicitation of clients in which the attorney communicates information that is false, deceptive, or misleading is prohibited;⁸⁹ and

(2) solicitation of clients in situations that, to an attorney of ordinary prudence,⁹⁰ present a significant risk of undue influence, invasion of privacy, or overreaching is prohibited.⁹¹ Any solicitation undertaken during a period in which the client's judgment may be expected to be impaired, such as after an accident involving bodily injury or a funeral, unless a reasonable time period has transpired to allow for recovery, shall be presumed to be improper.

The suggested test, by focusing on the circumstances under which the solicitation takes place, would protect benign commercial solicitation. The motive of the soliciting attorney and the characterization of the speech as commercial or political would be irrelevant under this test, and thus many of the difficulties engendered by the current rules and court doctrine described earlier⁹² would be avoided.

The suggested test does not present a *per se* ban against solicitation merely because it is "in-person." Although in-person solicitation often

(2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

ABA Code of Professional Responsibility Amendments, Report to the Board of Governors of the Task Force on Lawyer Advertising, 46 U.S.L.W. 1, 12 (Aug. 23, 1977).

88. See text accompanying note 29 *supra*. Although Justice Rehnquist construed the circumstances surrounding attorney Primus' solicitation differently than did the majority, he also argued in favor of a circumstances test: "I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved." 436 U.S. at 443 (Rehnquist, J., dissenting).

89. This provision is, in essence, a restatement of the holding in *Bates v. State Bar*, 433 U.S. 350, 383 (1977), substituting "solicitation" for "advertising."

90. The proposed test adopts an objective standard, measured by the ethical judgment of an attorney of ordinary prudence. This idea is presented in Comment, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1199 (1972).

91. These rules would apply, of course, not only to the individual attorney, but also to the attorney's representatives.

92. See Part III *supra*.

involves a serious potential for overreaching,⁹³ the proposed rule is drafted on the assumption that such overreaching is not inevitable and that this danger can be best protected against by considering the in-person aspect as one factor in determining whether the circumstances of the solicitation present a significant risk of harm to the client's interests.

Application of the suggested test would not have produced different results in *Primus* or *Ohralik*. *Primus*' solicitation of her client did not take place under circumstances in which the potential client's judgment was impaired, nor did *Primus* convey false, deceptive, or misleading information.⁹⁴ Conversely, attorney *Ohralik*'s solicitation was improper because, to an attorney of ordinary prudence, the solicitation took place under circumstances that represented an unacceptable risk of overreaching.⁹⁵

The suggested test helps to eliminate the confusion about the outcome of cases falling "between the poles" of *Primus* and *Ohralik*, primarily because motive is an irrelevant factor in the suggested test.⁹⁶

93. See *Ohralik*, 436 U.S. at 457-58, 464-65 (discussion of the increased potential for harm associated with in-person solicitation).

94. 436 U.S. at 434-36 (Court analysis of *Primus*' solicitation concludes that there was no "undue influence, overreaching, misrepresentation, or invasion of privacy" and thus there was no potential for harm to the client).

95. See 436 U.S. at 467-68 (Court's review of the circumstances leads to the conclusion that *Ohralik*'s conduct constituted a "striking example of the potential for overreaching").

96. As an example of the application of the suggested test, consider the following hypothetical. An attorney in private practice becomes aware that a certain nursing home is defrauding its elderly patients by diverting a portion of the monthly support payments paid by the patients into various collateral money-making schemes instead of spending that money for the services of a registered nurse who is supposed to be available 24 hours a day according to the patients' contracts. Instead, the registered nurse is available only during the daytime, while a less expensive and less qualified licensed practical nurse is on call at night.

The issue presented by this hypothetical is whether the attorney can approach the elderly patients under circumstances that are noncoercive, nondeceitful, and dignified and offer to represent their legal interests. The attorney's purpose of soliciting the business is to realize commercial gain.

Under the current rules and doctrine, any attorney who did so solicit, and accept employment therefrom, would violate DR 2-104(A) of the ABA Code. See note 15 *supra*. The solicitation does not fall within any of the exceptions from the general rule listed in DR 2-104(A)(1) through (5). See *id.* Although the hypothetical fact situation falls directly within Justice Marshall's definition of benign commercial solicitation, the fact that the solicitation would be in-person and for commercial gain would seem to place this solicitation within the *Ohralik* rule, under which it would be improper.

If viewed under the suggested test, however, one reaches the opposite result. Motive and speech characterization are irrelevant. The inquiry is into the circumstances under which the solicitation takes place. Since the circumstances of the hypothetical are stated

To show the greater predictability afforded by the suggested test, it is instructive to turn to the situations suggested by the Justices themselves that would be incapable of ready resolution or would be determined in an unsatisfactory manner under the current doctrine.

Justice Rehnquist, in his dissent in *Primus*, described a hypothetical in which an attorney was so intent on resolving substantial civil liberties questions that he allowed his zeal to take precedence over the interests of a client.⁹⁷ Justice Rehnquist argued that under the majority's doctrine, such conduct might not be prohibited. Under the suggested test, if such an attorney pursued an unwilling client to the point that the attorney became an unwanted nuisance, the attorney's solicitation would be proscribed by the second prong as a case of unacceptable overreaching.

The majority opinion in *Primus* left lingering doubt about the outcome of a case in which an attorney had solicited a client out of dual motives, for purposes of both political expression and commercial gain.⁹⁸ The answer to this hypothetical cannot be determined under the suggested test without knowing the circumstances under which the solicitation took place, but suffice it to say that since motive is irrelevant under the suggested test and the "circumstances" aspect is to be viewed under objective criterion, the task of resolving the question is easier and the outcome more predictable.

As well as protecting much socially valuable conduct and producing more predictable results, the suggested test also avoids the equal protection issue discussed earlier.⁹⁹

An obvious criticism of the suggested test is that it gives the courts very little guidance for application in particular cases. It would require many cases and much judicial gloss to determine exactly how the test applies to particular situations. The suggested test is not meant to be an ultimate solution to the problem of deciding solicitation cases, but rather is intended to serve as a touchstone for needed revisions of the ABA Code. If the ABA revises the current Code, particularly DR 2-103¹⁰⁰ and DR 2-104,¹⁰¹ in keeping with the spirit of

to be noncoercive, nondeceitful, and dignified, the solicitation is protected by the suggested test. There is no need for any type of judicial avoidance technique to achieve what intuitively seems to be a just result.

97. 436 U.S. at 445-46 (Rehnquist, J., dissenting).

98. *Id.* at 430-31 n.24, 436 n.30. The majority in *Primus* acknowledged that the dual motive dilemma was left unanswered.

99. See Part III-C *supra*.

100. Relevant portions are reproduced in note 14 *supra*.

101. Relevant portions are reproduced in note 15 *supra*.

the suggested test, then the benign commercial solicitation problem will be resolved. In the absence of such a rewriting, however, the courts could, nonetheless, revise the existing rules on a case-by-case basis guided by the two prongs of the suggested test.

V. CONCLUSION

There are numerous social policy arguments that favor protection of benign commercial solicitation of clients by attorneys which, when taken together with the doctrinal and constitutional infirmities of the current nonsolicitation doctrine, present a compelling case for revision of both the ABA Code and current court doctrine. Ideally, this change should come from the ABA. President Carter recently remarked before the California bar:

One of the greatest failings of the organized bar in the past century since the American Bar Association was founded is that it has fought innovations. When greater competition has come to the legal profession, . . . when lawyers have begun to advertise or compete—in short, when the profession has accommodated the interests of the public—it has done so only when forced to.¹⁰²

Should President Carter's criticism prove again to be true, and the organized bar fail to adopt the needed reform, the courts should take the initiative and jettison the current rules and doctrine with their many infirmities and adopt in their place the suggested two-pronged test which shifts the focus away from the motive of the soliciting attorney and the characterization of the speech as commercial or political expression and focuses instead on the circumstances of the solicitation.

Joe Wishcamper

102. *President Carter's Attack on Lawyers, President Spann's Response, and Chief Justice Burger's Remarks*, 64 A.B.A.J. 840, 845 (1978) (text of President Carter's speech).