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## Soliciting Sophisticates: A Modest Proposal for Attorney Solicitation

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## SOLICITING SOPHISTICATES: A MODEST PROPOSAL FOR ATTORNEY SOLICITATION

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The legal profession is currently undergoing a period of close scrutiny, both by its members and the general public.<sup>1</sup> The American Bar Association (ABA) is in the midst of reconsidering its *Code of Professional Responsibility* and may soon replace the current code with the *Model Rules of Professional Conduct*.<sup>2</sup> Both the *Code* and the *Model Rules*, however, like the *Canons of Professional Ethics* before them, have maintained a strict prohibition against the personal solicitation of prospective clients for pecuniary gain.<sup>3</sup> This prohibition survives despite considerable criticism<sup>4</sup> and judicial liberalization of promotional activities

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1. During the last several years, the American Bar Association (ABA) has undertaken an extensive review of its professional ethical standards. See Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804 (1982). At its last two meetings in August 1982 and February 1983, the ABA has debated the proposed *Model Rules of Professional Conduct*. See, e.g., Gest, *Guilty Secrets Are Still Safe with Lawyers*, U.S. NEWS & WORLD REP., Feb. 21, 1983, at 84; Press, *Lawyers' Ethics on Trial*, NEWSWEEK, Aug. 23, 1982, at 37. These debates have not been confined to the legal profession; public comment on the recent ABA activities regarding client confidentiality has been vigorous. See, e.g., *Lawyers on Trial*, BUS. WK., Feb. 28, 1983, at 112; Stone, *Are Lawyers So Special?*, U.S. NEWS & WORLD REP., Feb. 28, 1983, at 76.

2. The ABA project to revise professional ethics standards stemmed from the realization that the current *Code of Professional Responsibility* merely reorganized its predecessor, the *Canons of Professional Ethics*, without accommodating some of the needs of present-day legal practice. The project also marked an attempt to clarify apparent conflicts within the current ethical rules. See Kutak, *supra* note 1, at 804-05.

3. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-3, EC 2-4, DR 2-103, DR 2-104 (1980) [hereinafter cited as CPR]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (Revised Final Draft 1982) [hereinafter cited as MODEL RULES]; CANONS OF PROFESSIONAL ETHICS 27, 28 (1967) [hereinafter cited as CANONS]. Each of these codes of ethics allows personal solicitation when warranted by personal relations; both the *CPR* and *Model Rules* explicitly extend these personal relations to former clients. See CPR, *supra*, DR 2-104(A)(1); MODEL RULES, *supra*, Rule 7.3(a)(1). Although the prohibition against solicitation also precludes attorneys from requesting or compensating others for recommending employment, see CANONS, *supra*, at 28; CPR, *supra*, DR 2-103(B), (C); MODEL RULES, *supra*, Rule 7.2 comment, both the *CPR* and *Model Rules* permit attorneys to accept employment of referrals from certain types of organizations, CPR, *supra*, DR 2-103(C)(1)-(2), (D); MODEL RULES, *supra*, Rule 7.3(a)(2)-(3). The *Model Rules* differ from the *CPR* in that their provision limits solicitation to those instances discussed above, whereas the *CPR* prohibits all solicitation except as discussed above.

4. See, e.g., B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 140-53 (1970); M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 114-24 (1975); Pulaski, *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided?*, 1979 ARIZ. ST. L.J. 23, 55, 59-60; Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968); Simet, *Solicitation of Public and Private Litigation Under the First Amendment*, 1978 WASH. U.L.Q. 93; Note, *Attorney Solicitation: The Scope of State*

by attorneys.<sup>5</sup>

This Note advocates an amendment to the ethical standards governing attorneys<sup>6</sup> that will permit the personal solicitation for pecuniary gain of sophisticated prospective clients — that is, those persons having general knowledge of their legal needs and the expertise to assess adequately the information and presentation of an attorney.<sup>7</sup> Part I of this Note shows that lawyer solicitation is a form of commercial speech under recent Supreme Court decisions. It also asserts that, though the traditional reasons for banning lawyer solicitation still have some validity, these reasons do not justify prohibiting the solicitation of sophisticated clients. Part II suggests some potential benefits to the legal profession and clients resulting from the proposed solicitation amendment. In Part III, this Note offers a bright-line standard for “sophistication” that the bar might apply to this amendment so that lawyers can better determine the propriety of their activities. Finally, this Note concludes that adopting the amendment to permit the solicitation of sophisticated persons will not drastically change the way lawyers

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*Regulation after Primus and Ohralik*, 12 U. MICH. J.L. REF. 144, 176 (1978) [hereinafter cited as Note, *Attorney Solicitation*]; Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1184-85, *passim* (1972) [hereinafter cited as Note, *Advertising & Solicitation*].

5. The first major break from restrictions on lawyer self-promotion activity occurred in *Bates v. State Bar*, 433 U.S. 350 (1977), in which the Court struck down a general ban on lawyer advertising and ruled that advertising of price information for routine services was permissible commercial speech so long as it was not deceptive or misleading. *Id.* at 383.

The Court has recently ruled that state regulation of permissible forms of advertising must be narrowly drawn and must advance a substantial state interest. *In re R.M.J.*, 455 U.S. 191, 203 (1982). Thus, a state could not prohibit lawyer advertising that deviated slightly from specific language set out in the ethical rules. The Court also found a prohibition of mailings to non-clients unreasonable, because no state interest was articulated to warrant so broad a restriction. *Id.* at 206.

State courts have also contributed to the liberalization of attorney promotional activity. *See, e.g.*, *State Bar Grievance Adm'r v. Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979) (finding no improper solicitation by lawyer who solicited a union representative in person to recommend his services to union members, because representative's expertise and intermediary position did not create a potential for overreaching that warranted state prohibition); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (holding that direct mail solicitation to potential clients by lawyer may be regulated but not prohibited), *cert. denied*, 450 U.S. 1026 (1980); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978) (holding that direct mail solicitations cannot be prohibited). *But see* *Greene v. Grievance Comm.*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981) (prohibiting direct mailing to real estate brokers requesting referrals of clients for legal work), *cert. denied*, 455 U.S. 1035 (1982).

6. For the purpose of this Note, the *CPR* and *Model Rules* will ordinarily be referred to jointly in the text as “ethical rules,” “ethical code,” or “ethical standards.” Where relevant, differences between these codes will be discussed in the notes.

References to “lawyers” and “attorneys” shall include both individual practitioners and those working jointly in partnerships or firms. Also, “ABA” and “legal profession” will be treated as synonymous.

7. *See* *Plum Tree, Inc. v. Rouse Co.*, 58 F.R.D. 373, 376 (E.D. Pa. 1972); *State Bar Grievance Adm'r v. Jaques*, 407 Mich. 26, 38, 281 N.W.2d 469, 470 (1979).

attract new clients, and will benefit both lawyers and consumers of legal services by recognizing their legitimate commercial speech interests.

## I. RECONSIDERING STATE INTERESTS BEHIND THE PROHIBITION OF SOLICITATION

Solicitation by attorneys, whether through advertising or personal contact, has long been discouraged within the legal profession.<sup>8</sup> Although disapproval of lawyer advertising and solicitation originally was regarded as a rule of etiquette,<sup>9</sup> the ABA officially denounced solicitation as unprofessional in its original *Canons of Professional Ethics* in 1908.<sup>10</sup> When the ABA revised its ethical guidelines in 1969 by adopting its *Model Code of Professional Responsibility*, the disciplinary rules specifically made improper both advertising and private communications with prospective clients.<sup>11</sup> Since then, the profession has consistently opposed personal solicitation in ethical opinions,<sup>12</sup> and state courts have prohibited nearly every kind of personal solicitation of legal business.<sup>13</sup>

### A. Advertising and Solicitation as Commercial Speech

The ABA prohibitions of advertising and solicitation were adopted

8. Even as the bar was first forming in Britain, lawyers who advertised or solicited employment were viewed unfavorably by other members of the bar. See H. DRINKER, *LEGAL ETHICS* 210-12 (1953). This tradition has continued in the United States, receiving official professional approval in 1908 when the ABA *Canons of Professional Ethics* first appeared. See *id.* at 25. See *supra* note 3.

9. H. DRINKER, *supra* note 8, at 211 n.6.

10. "But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional." *CANONS OF PROFESSIONAL ETHICS* 27 (1908).

11. *CODE OF PROFESSIONAL RESPONSIBILITY* EC 2-3, 2-4, DR 2-101, 2-103, 2-104 (1969). The major difference between the original Code and the *CPR* is the treatment of advertising. The 1969 Code strictly prohibited such publicity, whereas the *CPR* merely regulates advertising activity. Compare *id.* DR 2-101 with *CPR*, *supra* note 3, DR 2-101.

12. See, e.g., ABA Comm. on Professional Ethics and Grievances, Formal Op. 1 (1924) ("Canon 27 . . . disapproves all forms of solicitation as unprofessional"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1456 (1980) (stating that lawyer may not send letter to other lawyers requesting referrals); ABA Comm. on Professional Ethics, Informal Op. 757 (1964) (stating that law firm with limited practice cannot entertain prospective clients).

13. State court decisions disciplining attorneys for various acts of solicitation ordinarily involve laypersons unsophisticated in legal matters. See, e.g., *Pace v. State*, 368 So. 2d 340 (Fla. 1979) (finding unlawful solicitation when lawyer approached high school athlete seeking to become his legal representative); *In re Perrello*, 270 Ind. 390, 394 N.E.2d 127 (1979) (disbarring lawyer for seeking employment by approaching individuals in the hallways of municipal court). Still, there appears to be no disciplinary proceedings involving the solicitation of sophisticated persons, and some support exists that these persons were not contemplated to be within the coverage of non-

and enforced by many states until 1977,<sup>14</sup> when the Supreme Court ruled that self-promotional activity by attorneys was commercial speech and entitled to some protections against state encroachments.<sup>15</sup> In *Bates v. State Bar*,<sup>16</sup> the Court struck down a blanket prohibition against advertising because it was an excessive restriction of freedom of speech.<sup>17</sup> The court ruled that the state had a legitimate interest in preventing deceptive and misleading advertising,<sup>18</sup> but held that truthful, dignified, and informative advertisements regarding routine services fell under the protection of the first amendment.<sup>19</sup>

Although *Bates* illustrated that the main function of regulations on advertising was consumer protection,<sup>20</sup> the Supreme Court did not address the rationale behind the rules regarding personal solicitation until 1978. In *Ohralik v. Ohio State Bar Association*,<sup>21</sup> the Court found that in-person solicitation for pecuniary gain was commercial speech, but that a state has a right to prohibit solicitation under circumstances likely to involve fraud, undue influence, intimidation, overreaching, or other forms of "vexatious conduct."<sup>22</sup>

According to Justice Marshall's concurring opinion, however, there

solicitation rules. See *Louisville Bar Ass'n v. Hubbard*, 282 Ky. 734, 739, 139 S.W.2d 773, 775 (1940) ("An attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected client . . .").

14. By 1977, all 50 states and the District of Columbia granted some form of official recognition to the ABA's *Code of Professional Responsibility*, though most states modified various provisions of the Code. See COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, AM. BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1977). After the decision in *Bates v. State Bar*, 433 U.S. 350 (1977), the ABA extensively amended the provisions on lawyer advertising; the states followed suit. See Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 808 (1982).

15. For discussions on the constitutional status of commercial speech, see generally Alexander & Farber, *Commercial Speech and First Amendment Theory: A Critical Exchange*, 75 Nw. U.L. REV. 307 (1980); Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV. 372 (1979).

16. 433 U.S. 350 (1977).

17. *Bates* and another attorney, O'Steen, established a legal clinic to handle routine (mostly uncontested) matters at low costs. They relied on a high volume of business to sustain the clinic, so they advertised some of the clinic's services and prices in violation of existing disciplinary rules that prohibited advertising.

18. 433 U.S. at 383-84.

19. See *id.* at 372-77.

20. See *id.* at 372-75, 379, 383-84.

21. 436 U.S. 447 (1978). The Court also decided a companion case, *In re Primus*, 436 U.S. 412 (1978), that involved an attorney who contacted a prospective client by letter on behalf of the ACLU. Although the letter was written on the stationery of her law firm, the Court reversed disciplinary action against Primus because her solicitation was "to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain." *Id.* at 422. This gave the solicitation full first amendment protections that could be affected only by narrow regulations that advanced the state's interest in preventing misleading, overbearing, or other improper conduct. *Id.* at 438-39. The associational and political interests in *Primus* received greater protection than the commercial speech interests in *Ohralik*.

22. 436 U.S. at 449, 462, 464.

are situations in which solicitation cannot be prohibited. Marshall noted that, by visiting the home and hospital room of two teenage girls who had been injured in an automobile accident, the lawyer Ohralik engaged in a classic example of "ambulance chasing."<sup>23</sup> Accordingly, Ohralik's misconduct stemmed not from his solicitations, "but rather the circumstances in which he performed that solicitation and the means by which he accomplished it."<sup>24</sup> Marshall suggested that "benign" solicitation, "where honest, unpressured 'commercial' solicitation is involved," should be permitted as a legitimate form of commercial speech subject only to narrowly drawn restrictions.<sup>25</sup>

In *In re R.M.J.*,<sup>26</sup> the Court again considered the legitimacy of restrictions on attorney commercial speech. The state of Missouri had disciplined an attorney for advertisements that had deviated from specific wording mandated by the state as well as for violating a prohibition against direct mailings to prospective clients. The Court held that, absent a showing that these rules promoted important state interests without being overly restrictive, the rules violated the attorney's first amendment rights.<sup>27</sup> In reaching its decision, the Court applied the commercial speech analysis set out in *Central Hudson Gas Co. v. Public Service Commission*,<sup>28</sup> which requires the state to assert a substantial state interest and to show that the interference with speech is proportional to the interest served.<sup>29</sup>

These recent decisions indicate how the Supreme Court has assumed the responsibility of defining the scope of permissible state restrictions on self-promotional activities by lawyers. Although states can regulate the time, place, and manner of these activities,<sup>30</sup> the Court will only approve broader restrictions if they promote important state interests. To determine the validity of the ABA's prohibitions of solicitation therefore requires a consideration of the interests underlying these rules.

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23. *Id.* at 469. For a definition of "ambulance chasing," see Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677, 684 n.43 (1954).

24. 436 U.S. at 470.

25. *Id.* at 472 n.3, 476. Although "benign" solicitation may be the proper scope of solicitation rules, see Comment, *Benign Solicitation of Clients by Attorneys*, 54 WASH. L. REV. 671, 688-89 (1979), such a standard is not sufficiently instructive to be an operative provision in the professional ethics code. Because of the inherent dangers and traditional prohibitions of in-person solicitation, this Note advocates a bright-line test for determining the proper bounds of solicitation. See *infra* notes 79-92 and accompanying text.

26. 455 U.S. 191 (1982).

27. *Id.* at 207. The Court also said: "States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive." *Id.* at 203.

28. 447 U.S. 557, 563-64, 566 (1980).

29. 455 U.S. at 207. The Court in *R.M.J.* indicated that the state has the burden of showing the legitimacy of its restrictions on commercial speech.

30. *Bates*, 433 U.S. at 384.

### B. Evaluating the Need for Nonsolicitation Rules

Because the states have relied heavily on the ABA in formulating ethical standards,<sup>31</sup> the legal profession retains extensive self-regulatory powers. Besides its traditional disapproval of in-person solicitation,<sup>32</sup> the legal profession has prohibited such solicitation for four primary reasons.

First, the bar has sought to protect the public from unscrupulous lawyers and to prevent laypersons from making uninformed decisions when selecting a lawyer.<sup>33</sup> The dangers of deception, overreaching, undue influence, intimidation, and misrepresentation have prompted the ban on in-person solicitation.<sup>34</sup> As a result, attorneys have been forced to depend upon client-initiated business relationships, relying on their professional and personal reputations to attract new clients.<sup>35</sup> Ironically, *Bates* showed that total bans on advertising and solicitation do not clearly address consumer protection concerns, because they restrict the flow of information to potential clients regarding legal services. Indeed, such bans represent a misconception of how reputational information is disseminated in a complex urban setting.<sup>36</sup>

31. See *supra* note 14.

32. See *supra* notes 8-13 and accompanying text.

33. See *Ohralik*, 436 U.S. at 457, 460; *Primus*, 436 U.S. at 445; *People v. Kitsis*, 77 Cal. App. 3d Supp. 1, 6, 143 Cal. Rptr. 537, 540 (1977), *cert. denied*, 436 U.S. 950 (1978); *State v. Moses*, 231 Kan. 243, 246, 642 P.2d 1004, 1007 (1982); *Reed v. Allison & Perrone*, 376 So. 2d 1067, 1068-69 (La. App. 1979); *Woll v. Kelley*, 409 Mich. 500, 525-26, 297 N.W.2d 578, 588-89 (1980); *Hahn v. Boeing Co.*, 95 Wash. 28, 35, 621 P.2d 1263, 1267 (1980); CPR, *supra* note 3, EC 2-8, 2-9; G. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* §§ 129-30, at 240-41 (1910); O. CARTER, *ETHICS OF THE LEGAL PROFESSION* 59 (1915); H. DRINKER, *supra* note 8, at 212; Pulaski, *supra* note 4, at 39; Simet, *supra* note 4, at 108; Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C.L. L. REV. 77, 90 (1973). See also *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 574 (Blackmun, J., concurring) ("Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques.").

34. See *Ohralik*, 436 U.S. at 462; *Primus*, 436 U.S. at 426; Florida Bar re Amendment to Integration Rule, 399 So. 2d 1385, 1387 (Fla. 1981); *In re Appert*, 315 N.W.2d 204, 211 (Minn. 1981); MODEL RULES, *supra* note 3, Rule 7.3 comment; Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RESEARCH J. 967, 976; Note, *Advertising & Solicitation*, *supra* note 4, at 1184-85; Comment, *supra* note 25, at 677.

In-person solicitation also poses the danger of conflicting interests where a lawyer subordinates the best interests of his client to his own interests. Courts have expressed special concern when the lawyer's interest is pecuniary, see, e.g., *Ohralik*, 436 U.S. at 461 n.19, and conflicting interests has become one of many justifications for solicitation bans. The concern over conflicting interests seems exaggerated after *Primus*, however, because lawyers can have their better judgment of the clients' needs blurred as easily by their political or civic interests as by their pecuniary ones. Pulaski, *supra* note 4, at 56-57. Furthermore, regulations to avoid conflicting interests need not be so broad as to ban solicitation. See, e.g., MODEL RULES, *supra* note 3, Rule 1.7 & Rule 1.7 comment (Lawyer's Interest).

35. See CPR, *supra* note 3, EC 2-3, 2-6; G. ARCHER, *supra* note 33, § 127, at 239; B. CHRISTENSEN, *supra* note 4, at 128-30.

36. *Bates*, 433 U.S. at 374 n.30. See B. CHRISTENSEN, *supra* note 4, at 131-34; Canby, *Com-*

A second reason for prohibiting solicitation is to preserve the standards and dignity of the profession. Because lawyers are officers of the court, undignified conduct could reflect badly on the entire system of justice.<sup>37</sup> In addition, lower professional standards could diminish the overall quality of legal services to society's detriment. Although these interests are important, the ban on in-person solicitation does not clearly protect either of them. The connection between solicitation and the erosion of professionalism is at best weak.<sup>38</sup> Moreover, contacting prospective clients in person is not per se undignified; discreet and informative solicitations can reinforce the professionalism of lawyers in the eyes of the public<sup>39</sup> and enhance the administration of justice.<sup>40</sup>

A third reason for prohibiting solicitation aims at maintaining the

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*mercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 401, 414-15 (1980); Francis & Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLAMETTE L.J. 221, 237-38 (1977); Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 371 (1970); Comment, *supra* note 25, at 678.

One might argue that the availability of advertising solves the problem of restricting information on attorney reputation. Although this might be true for ordinary laypersons, it is less convincing when sophisticated persons are involved. Sophisticated persons acquire reputational information through a network that includes large established law firms. See B. CHRISTENSEN, *supra* note 4, at 130; Note, *Advertising & Solicitation*, *supra* note 4, at 1203. Having an effective information system, these sophisticated persons need not, and probably do not, rely on advertisements for additional information. *Id.* Thus, smaller firms that are outside this network have no means of reaching sophisticated clients other than through personal solicitation. See also *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (holding that states can restrict informational commercial messages so long as the restrictions "leave open ample alternative channels for communication of the information").

37. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *State Bar Grievance Adm'r v. Jaques*, 407 Mich. 26, 48-49, 281 N.W.2d 469, 475 (1979) (Coleman, C.J., dissenting); CPR, *supra* note 3, EC 2-4, 9-6; MODEL RULES, *supra* note 3, Rule 7.3 comment; ABA Comm. on Professional Ethics and Grievances, Formal Op. 1 (1924); *id.*, Formal Op. 8 (1925); H. DRINKER, *supra* note 8, at 212; Note, *supra* note 23, at 677; Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 675 (1958).

38. See *Bates*, 433 U.S. at 368 ("the postulated connection between advertising and true professionalism [is] severely strained"); *In re Utah State Bar Petition for Appraisal of Changes in Disciplinary Rules on Advertising*, 647 P.2d 991, 998 (Utah 1982) (Durham, J., dissenting) (doubting whether requirement of dignified advertising will benefit potential clients); B. CHRISTENSEN, *supra* note 4, at 152; Note, *Advertising & Solicitation*, *supra* note 4, at 1190; Comment, *supra* note 37, at 68. See also *supra* note 34 (discussing quality of service when lawyer has conflicting interests).

Even if under some circumstances a correlation between solicitation and declining professional standards could be established, a total ban on solicitation would still be inappropriate because the restrictions would be broader than necessary. See *supra* notes 27-29 and accompanying text. Other, more effective methods can be employed to uphold professional standards.

39. See *Bates*, 433 U.S. at 369-71; L. ANDREWS, *BIRTH OF A SALESMAN* 77 (1980), B. CHRISTENSEN, *supra* note 4, at 151-53. To avoid potential harms from undignified presentations by lawyers, restrictions narrower than a total ban can be employed. See, e.g., CPR, *supra* note 3, DR 2-101 (A), (B).

40. See *Bates*, 433 U.S. at 376. To the extent that solicitation might stimulate frivolous lawsuits, direct restrictions can be formulated. See, e.g., CPR, *supra* note 3, DR 7-102; MODEL RULES, *supra* note 3, Rule 3.1.

self-perceived status of lawyers. Because lawyers view themselves as members of a learned profession performing a public service, they have sought to avoid the commercialism of ordinary trades and businesses.<sup>41</sup> Yet, the concern that commercialization will lower the status of lawyers is an insufficient reason for limiting solicitation. It stems from professional hubris rather than concerns for the general public welfare. Because restrictions on commercial speech must advance a substantial *state* interest,<sup>42</sup> the status of the bar is not a legitimate reason for prohibiting attorney solicitation.<sup>43</sup>

A final reason for banning solicitation is to promote harmony among members of the bar by preventing "client stealing."<sup>44</sup> Although this may advance good relations among lawyers, it causes the more obvious economic effect of limiting competition. Not only is such harmony not a state interest,<sup>45</sup> but it clearly violates national policy as reflected in strong antitrust laws designed to halt just this type of anticompetitive behavior.<sup>46</sup>

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41. See *Bates*, 433 U.S. at 368; ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935) (stating that solicitation is improper because it commercializes the bar; "[T]he practice of law is a profession and not a trade."); Pulaski, *supra* note 4, at 55; Note, *supra* note 23, at 684; Comment, *supra* note 37, at 675.

42. See *supra* note 29 and accompanying text.

43. See *Bates*, 433 U.S. at 371-72; B. CHRISTENSEN, *supra* note 4, at 152; Note, *Advertising & Solicitation*, *supra* note 4, at 1189-90. See also Shadur, *The Impact of Advertising and Specialization on Professional Responsibility*, 61 CHI. B. REC. 324, 324 (1980) (nonsolicitation rules are "trade unionist and not public-oriented in nature").

In addition, much of the recent criticism of the bar stems not from commercialization, but from ethical neutrality. See, e.g., Schanberg, *To Tell The Truth, We Can't*, N.Y. Times, Feb. 12, 1983, at 19, col. 4; *Lawyers for Hire for Anything?*, N.Y. Times, Feb. 11, 1983, at 26, col. 1 (each criticizing the ABA's decision preventing lawyers from disclosing criminal conduct of clients). To the extent commercialization has harmed the status of the bar, the cause has been attorneys' concern with fees rather than their efforts at attracting clients. See Press, *supra* note 1, at 37.

44. See CPR, *supra* note 3, EC 2-30; G. ARCHER, *supra* note 33, §§ 67, 69, at 146-47, 149; H. DRINKER, *supra* note 8, at 190-91, 211 n.6; Khactu, *Advertising, Market Power and the Public Interest: The Lawyers' Case*, 55 N.D.L. REV. 525, 547 (1979). Some have claimed that the restriction against client stealing is intended to curtail competition among attorneys. See M. FREEDMAN, *supra* note 4, at 114-15; Francis & Johnson, *supra* note 36, at 244-47; Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 721-22 (1977); Rigler, *Professional Codes of Conduct after Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185, 197-98 (1975). But see Comment, *Advertising and the Legal Profession: An Analysis of the Requirements of the Sherman Act and the First Amendment*, 8 U.C.L.A.-ALASKA L. REV. 67, 79 (1976) (claiming that advertising and soliciting restraints limit competition to protect smaller firms from encroachment by larger firms).

45. Although the efficient administration of justice requires a certain amount of cooperation between opposing attorneys, ethical codes already outline duties that lawyers have as officers of the court. See, e.g., CPR, *supra* note 3, EC 7-19 to -39, DR 7-102, 7-106; MODEL RULES, *supra* note 3, Rule 3.4. There is no important state interest in merely trying to promote good feelings among attorneys, though a modicum of courtesy is expected. See *In re Crumpacker*, 269 Ind. 630, 383 N.E.2d 36 (1978), *cert denied*, 444 U.S. 979 (1979).

46. See Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1976). Although the Supreme Court found no Sherman Act violation in *Bates*, the decision hinged on state action immunity. 433 U.S. at

In promulgating rules covering solicitation, the ABA has properly concerned itself with protecting prospective clients from unscrupulous attorneys and promoting the dignity of the judicial system.<sup>47</sup> To the extent that the ABA has developed rules against solicitation to avoid commercialization and client stealing, however, it merely promotes private concerns of the bar. These concerns are not state interests that justify restrictions on commercial speech.

### C. Discarding Nonsolicitation Rules for Sophisticated Persons

Although some state interests may justify the prohibition of in-person solicitation in many situations, these situations do not include the solicitation of "sophisticated" persons. Such persons do not require ordinary consumer safeguards against overreaching, undue influence, and intimidation, because they have the expertise to evaluate the promotional appeals of an attorney.<sup>48</sup> Nor do they need special rules to guard against deception; current ethical standards already prohibit misleading or deceptive communications.<sup>49</sup>

The state interests in preserving the dignity of the profession and the judicial system do not warrant prohibiting solicitations of sophisticated persons. Because these persons will have some knowledge of their legal needs, attorneys will presumably be most effective by presenting their service offerings in a dignified fashion. Information,

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359-63. A state may have interests that justify noncompetition among attorneys, *see infra* note 68, but promoting professional harmony is not one of them. *See also* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (disallowing state action immunity for a home-rule city in the absence of a clearly articulated and affirmatively expressed state policy to restrain trade).

47. Both Canon 2 of the *CPR* and Part 7 of the *Model Rules* focus on the interaction of lawyers with nonclients, and specific provisions appear in both Codes. *See, e.g.*, *CPR*, *supra* note 3, EC 2-3, 2-4, 2-8, 2-9, 2-10, DR 2-101 (A), (B), 2-103, 2-104; *MODEL RULES*, *supra* note 3, Rules 1.7, 7.1, 7.3(b). Similarly, Canon 7 of the *CPR* and Part 3 of the *Model Rules* set out to regulate lawyers in their capacity as officers of the court. *See, e.g.*, *CPR*, *supra* note 3, EC 7-19 to -39, DR 7-102, 7-106; *MODEL RULES*, *supra* note 3, Rules 3.1, 3.4.

48. *See* State Bar Grievance Adm'r v. Jaques, 407 Mich. 26, 281 N.W.2d 469 (1979); *see also supra* note 5. To the extent a sophisticated person is temporarily unable to make such evaluations, rules other than solicitation bans can afford them protection. *See, e.g.*, *MODEL RULES*, *supra* note 3, Rule 7.3(b).

Although courts have acknowledged invasions of privacy as potential dangers of solicitation, *see Ohralik*, 436 U.S. at 461; *In re Appert*, 315 N.W.2d 204, 211 (Minn. 1981), the proposal in this Note raises no such problem, because it identifies sophisticated persons primarily as business enterprises. *See infra* notes 82-88 and accompanying text. Such enterprises have a lesser right of privacy than individuals, *see* Annot., 43 L. Ed. 2d 871, 881 (1976), and specific rules can protect privacy interests without banning solicitation, *see, e.g.*, *MODEL RULES*, *supra* note 3, Rule 7.3(b)(2).

49. *CPR*, *supra* note 3, DR 2-101(A); *MODEL RULES*, *supra* note 3, Rule 7.1.

rather than a stylish presentation, will likely impress sophisticated persons. Thus, there is an aspect of self-interest to deter lawyers from undignified behavior when sophisticated prospective clients are involved.<sup>50</sup> In addition, lawyer advertising has apparently not affected perceptions of the dignity of the profession,<sup>51</sup> nor has it given reason to expect negative perceptions resulting from the use of "benign" solicitation.<sup>52</sup>

Thus, solicitation of sophisticated persons will not conflict with the longstanding and legitimate interests of the ABA in protecting consumers of legal services and preserving the dignity of the profession as an arm of the judicial system. Yet, allowing the solicitation of sophisticated persons as this Note proposes will promote the commercial speech interests of lawyers and potential clients by removing current restrictions that are unnecessary to protect sophisticated persons. As Part II will show, this will help to improve the public image of attorneys and their service offerings to clients.

## II. BENEFITING LAWYERS AND CLIENTS THROUGH THE SOLICITATION OF SOPHISTICATES

The proposed change allowing the solicitation of sophisticated persons is preferable to current ABA standards simply because it will protect the same interests without restricting the free flow of information. This

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50. "Also, many of the most desirable clients, imbued with the high respect both for their lawyer and his calling, would have no use for a lawyer who did not maintain the dignity and standards of his profession . . . ." H. DRINKER, *supra* note 8, at 212.

This view finds considerable indirect support in the way many attorneys practice indirect or "genteel" solicitation, where success often depends on cultivating friendly social relations as a prelude to business associations. *See id.* at 218; Francis & Johnson, *supra* note 36, at 246; Schuchman, *supra* note 4, at 256; Note, *supra* note 23, at 684-85.

51. Existing data on the effect of advertising on consumer attitudes are limited. Before their recent survey on lawyer and consumer attitudes toward attorney advertising, Professors Linenberger and Murdock had reviewed earlier studies and noted "the lack of compelling evidence that advertising will harm the image of the profession in the consumers' eyes." Murdock & Linenberger, *Legal Advertising and Solicitation*, 16 LAND & WATER L. REV. 627, 665-66 (1981). In their own study, they found that consumers "do not characterize advertising attorneys as bad or feel that advertising would create a bad image for the profession." Linenberger & Murdock, *Legal Service Advertising: Wyoming Attorney Attitudes Compared with Wyoming Consumer Attitudes*, 17 LAND & WATER L. REV. 209, 240 (1982). The study did indicate, however, that attorneys believed that advertising would harm the image of the profession. *Id.*

52. There is some belief that advertising may benefit the image of attorneys by providing more information to consumers. *See* Linenberger & Murdock, *supra* note 51, at 226-26 (citing study that found 80% of consumers disagreeing with the idea that advertising creates a bad public image of lawyers; over 80% agreed, however, that advertising would make the public more aware and more able to make informed choices of attorneys). Because in-person solicitation can benefit prospective clients by providing more detailed information than advertising, *see* Andrews, *supra* note 14, at 811; Shadur, *supra* note 43, at 327; Simet, *supra* note 4, at 104, it could result in more positive benefits to the profession's image than advertising. Also,

Note's proposal, however, will have other potential advantages in terms of the general reputation of the bar and the overall opportunities for better service to clients.

### A. *Improving the Public Image of Attorneys*

Reports are rife about the low esteem of lawyers in the eyes of the public.<sup>53</sup> Lawyers are commonly criticized for being dishonest<sup>54</sup> and for looking after their own interests and those of their clients over those of the public.<sup>55</sup> Although permitting the solicitation of sophisticated persons will not, of itself, dramatically enhance the reputation of lawyers in these regards, it is an important first step in improving the perceived integrity and social awareness of lawyers.

Most importantly, the proposed change gives the bar the opportunity to take the lead in protecting the legitimate commercial speech interests of both lawyers and prospective clients,<sup>56</sup> thus reversing the recent trend of having the Supreme Court develop ethical standards as in *Bates*,<sup>57</sup> *In re Primus*,<sup>58</sup> and *R.M.J.*<sup>59</sup> The *Ohralik* decision strongly suggested that the Court will not tolerate prohibitions of solicitation when no significant dangers of overreaching face prospective clients.<sup>60</sup> By adopting the change proposed in this Note, the ABA can reassert its ability to regulate itself independently and avoid being once again overruled by the Court.

Second, because much of the public disaffection with lawyers stems

personal solicitation may be the only available option for lawyers hoping to initiate business contacts with sophisticated persons. See *supra* note 36.

Although the proposal in this Note is more restrictive than Justice Marshall's notion of benign solicitation, see *supra* note 25 and accompanying text, it will permit the bar to enter the realm of permissible solicitation cautiously. Thus, the experience with the solicitation of sophisticated persons can instruct the bar on how and whether to allow more general solicitations.

53. See, e.g., L. ANDREWS, *supra* note 39, at 77; Schanberg, *What Price a Waiter's Life?*, N.Y. Times, June 22, 1982, at A27, col. 2.

54. Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 436-37 (1977); Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 202 (1978); Harris, *Lawyers' Abuse*, N.Y. Times, May 4, 1981, at 23, cols. 3-4. Much of this stems from Watergate and the role of lawyers in the scandal. See Auerbach, *The Legal Profession after Watergate*, 22 WAYNE L. REV. 1287 (1976); Waltz, *The Unpopularity of Lawyers in America*, 25 CLEV. ST. L. REV. 143 (1976).

55. See, e.g., *Lawyers on Trial*, *supra* note 1, at 112; Stone, *supra* note 1, at 76.

56. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipient both . . . . If there is a right to advertise, there is a reciprocal right to receive the advertising . . . .").

57. See *supra* notes 5 & 14-19 and accompanying text.

58. See *supra* note 21.

59. See *supra* notes 5 & 26-29 and accompanying text.

60. See *supra* notes 21-25 and accompanying text.

from well-publicized wrongdoings of attorneys,<sup>61</sup> the change in solicitation restrictions may help counter the image of lawyers as being dishonest. Specifically, the change will eliminate an element of hypocrisy that currently exists in the enforcement of the profession's ethical standards. Although the ABA has officially proscribed in-person solicitation from the time of the original *Canons of Professional Ethics*, it has nevertheless permitted attorneys to solicit indirectly by cultivating business ties through social, civic, and religious activities.<sup>62</sup> The primary motive of these attorneys is often no less economic than that of many "ambulance chasers"; their methods, however, are considered less objectionable.<sup>63</sup> Because direct appeals for business rely on information rather than tenuous personal relations, they can offer potential clients a more rational basis for selecting an attorney than indirect solicitations.<sup>64</sup> By officially permitting the solicitation of sophisticated persons, the ABA would close the gap between its rules and the conduct of those lawyers who currently solicit indirectly.<sup>65</sup>

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61. See *supra* note 54.

62. See ABA Comm. on Professional Ethics, Informal Op. 783 (1964) ("[L]aw practice is legitimately obtained through friendships and that friendship can be developed by entertainment, playing golf, or by any one of many other ways."); See also M. FREEDMAN, *supra* note 4, at 116-17; Francis & Johnson, *supra* note 36, at 246; Note, *supra* note 23, at 684-85.

63. See *In re Cohn*, 10 Ill. 2d 186, 196, 139 N.E.2d 301, 304 (1956) (Bristow, J., concurring); H. DRINKER, *supra* note 8, at 218; Agate, *Legal Advertising and the Public Interest*, 50 L.A.B. BULL. 209, 241 (1975); Francis & Johnson, *supra* note 36, at 246; Pulaski, *supra* note 4, at 55; Schuchman, *supra* note 4, at 256; Note, *supra* note 23, at 679. See also *Hearn v. Commissioner*, 309 F.2d 431, 432 (9th Cir. 1962) (suggesting lawyer's membership fees for private club can be a business expense for generating new clients). A number of commentators have noted that the brunt of nonsolicitation rules is borne primarily by new attorneys, solo practitioners, and small partnerships to the benefit of large established practices, see M. FREEDMAN, *supra* note 4, at 115; Francis & Johnson, *supra* note 36, at 241-42; Schuchman, *supra* note 4, at 245-46; Simet, *supra* note 4, at 106-07; Note, *Attorney Solicitation*, *supra* note 4, at 176; Comment, *supra* note 25, at 678-79, which often include the leaders of the bar who promulgate and enforce the restrictions, see Francis & Johnson, *supra* note 36, at 245-46, 267; Note, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 VA. L. REV. 1135, 1164-65 (1976); Note, *Advertising & Solicitation*, *supra* note 4, at 1203-04; Comment, *supra* note 36, at 351-52.

64. Social relations can protect prospective clients by restraining lawyers from making misleading or deceptive statements. Also, because social ties might often result in the prospective client initiating business discussions, the likelihood of overreaching is less than in personal solicitations. Nevertheless, the social relations developed through indirect solicitation, unlike personal solicitations, often give no indication of an attorney's professional approach or knowledge of a problem. Moreover, regarding sophisticated persons, the protective benefits from social relations are overstated because they need fewer protections. See *supra* notes 48-49 and accompanying text; see also *Greene v. Grievance Comm.*, 54 N.Y.2d 118, 133, 429 N.E.2d 390, 398, 444 N.Y.S.2d 883, 891 (1981) (Fuchsberg, J., dissenting) (stating that direct mailings to real estate brokers requesting referrals is no worse than "the far more amorphous collection of contacts with the coterie of friends, relatives, business or social acquaintances, and former clients who constitute the main source . . . for referrals"), *cert. denied*, 455 U.S. 1035 (1982).

65. A number of commentators have remarked that this gap between the ethical code and the conduct of attorneys harms the legitimacy of the code and the profession. See J. CARLIN, *LAWYERS ON THEIR OWN* 156-57 (1962); Schnapper, *supra* note 54, at 203; Comment, *Solicita-*

Finally, the change in solicitation rules can counter recent criticisms that the ABA treats itself and its members as if they are not bound by external standards.<sup>66</sup> The current ethical standards have lent credence to this criticism by expressly disapproving competition for persons who are already represented by an attorney.<sup>67</sup> There is no substantial need for restricting competition for sophisticated clients, whether or not they are already represented.<sup>68</sup> The legal profession should avoid taking a stance so contrary to the antitrust laws. As officers of the court, lawyers should not merely follow the letter of the law; they should be exemplars of its spirit.<sup>69</sup> Condoning the solicitation of sophisticated clients will be a step in that direction.

### B. *Improving Service Offerings to Clients*

The renewed competition resulting from the proposed change will not only improve the image of lawyers to the public, it will provide sophisticated consumers with the opportunity for more informed choices when selecting a lawyer and the possibility of lower legal bills. Both of these results allow the legal profession to better serve the public.

Current ethical standards discourage lawyers from contacting

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*tion by Attorneys: A Prediction and a Recommendation*, 16 HOUS. L. REV. 452, 477-78 (1979); see also *In re Leopold*, 469 Pa. 384, 394 n.12, 366 A.2d 227, 232 n.12 (1976) (finding that lenient enforcement of ethical codes harms the public, the courts, and the profession).

Besides closing the gap between the ethical rules and the conduct of members, the proposal in this Note has the additional benefit of enabling the less well-connected lawyers to seek clients actively within the professional code. Although it may not eliminate the economic classes of lawyers, see *supra* note 63, it will reduce some of the structural barriers between those classes, see *supra* note 36.

66. See, e.g., Gest, *supra* note 1, at 84; Stone, *supra* note 1, at 76. Although these examples refer specifically to ABA rules on the lawyer's obligation to disclose a client's criminal conduct, they represent a more general criticism that the proposed change can help to reduce.

67. See CPR, *supra* note 3, EC 2-30 ("If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter."). See also *supra* note 44.

68. There might be a need to protect from competition unsophisticated clients who have satisfactory relations with an attorney. Because these clients are unable to evaluate the abilities of an attorney, subjecting them to new offerings from other attorneys could undermine the goal of providing adequate representation to all people. The proposed standard does not, however, affect such clients. It only allows competition among attorneys for sophisticated clients. Courts have recognized that regulations of promotional and competitive activities can vary according to the sophistication of those involved. See *Bates v. State Bar*, 433 U.S. 350, 383 n.37; *United States v. National Soc'y of Professional Eng'rs*, 555 F.2d 978, 982 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

69. See CPR, *supra* note 3, Preamble ("As guardians of the law, . . . [a] consequent obligation of lawyers is to maintain the highest standards of ethical conduct."); MODEL RULES, *supra* note 3, Preamble: A Lawyer's Responsibilities ("A lawyer is . . . an officer of the legal system and a public citizen having special responsibility for the quality of justice . . . . A lawyer's conduct should conform to the requirements of the law.').

nonclients on legal matters.<sup>70</sup> This insulates members of the public from information concerning their legal rights and options.<sup>71</sup> Even persons represented by an attorney face this problem because of the limited perspective and expertise of any one attorney.<sup>72</sup> No attorney or firm has a monopoly on ideas, or even a full range of expertise. Permitting solicitation of sophisticated persons will open the channels of information to this segment of legal service consumers. In addition, the competition among attorneys can provide an important incentive for lawyer competency because prospective sophisticated clients will be able to evaluate to some degree the relative expertise of attorneys.<sup>73</sup>

Competition for sophisticated clients should also cause the cost of legal services to fall.<sup>74</sup> Lower bills not only benefit the legal service consumer, however, they also make lawyers appear more responsive to the concerns of clients and potential clients trying to reduce their business expenses.<sup>75</sup> The lower costs may also have indirect benefits

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70. The *CPR* closely regulates advertising, *CPR*, *supra* note 3, DR 2-101, and prohibits direct promotional communications with nonclients, *id.* DR 2-103, 2-104. The *Model Rules* are considerably less restrictive than the *CPR* regarding advertising and promotional mailings, *see* MODEL RULES, *supra* note 3, Rules 7.1, 7.2, but are equally strict regarding in-person solicitation, *see id.* Rule 7.4.

71. *See supra* note 36 and accompanying text. Of course, the ethical rules do not prohibit lawyers from giving unsolicited advice; they merely proscribe the acceptance of employment resulting from such advice. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978). In theory, therefore, the public is not insulated from information about legal rights and alternatives. In practice, however, absent the prospect of employment, lawyers have little incentive to offer unsolicited advice. *See Pulaski, supra* note 4, at 59.

72. In addition, by limiting contacts with persons who already are represented, those persons have less opportunity to learn about service and price options. *See Francis & Johnson, supra* note 36, at 267.

73. A sophisticated client can compare lawyers based on their presentations and their familiarity with the types of legal problems facing the solicited client. In addition, a sophisticated client can assess background and other information about lawyers to help determine their relative expertise.

74. A recent survey showed that both lawyers and consumers believe that advertising would result in higher prices for legal services. *See Linenberger & Murdock, supra* note 51, at 226. Yet, studies of legal clinics that advertise have indicated that such clinics offer lower priced services without lowering the quality of service. *See Murdock & Linenberger, supra* note 51, at 657-58. The effect of advertising on the cost of legal services to consumers therefore seems uncertain.

These studies, however, considered the costs of fairly routine services offered to persons unable to evaluate the quality of services. Nevertheless, one study showed that 85% of consumers would not necessarily rely on price in choosing a lawyer. *See Linenberger & Murdock, supra* note 51, at 226, 228. On the other hand, sophisticated clients who have knowledge of their legal needs and can judge the expertise of soliciting attorneys can rely more on costs when choosing among competing attorneys. This will likely force competitive attorneys to react to cost concerns and lower their prices. *See Francis & Johnson, supra* note 36, at 267 ("[L]imitations on advertising restrict the opportunity of a potential client to purchase legal services based upon considerations of price and quality, leaving lawyers little economic incentive to lower their prices.").

75. *See Chayes, Greenwald & Winig, Managing Your Lawyers*, HARV. BUS. REV., Jan.-Feb. 1983, at 84; "Managing" *Company Lawsuits to Stay Out of Court*, BUS. WK., Aug. 23, 1982, at 54.

to the legal profession, such as discouraging businesses from using nonlawyer employees to handle routine legal problems.<sup>76</sup>

By permitting the solicitation of sophisticated persons, the legal profession can display its ability to regulate itself effectively while taking steps to improve its public image and respond to concerns of legal service consumers. The ABA can do this without neglecting its concern for protecting potential clients from overreaching and deception or its responsibility for maintaining the dignity of the judicial system.

### III. "SOPHISTICATION": A STANDARD TO GUIDE ATTORNEYS

Implementing a new standard for the solicitation of sophisticated clients is essential to responsible self-regulation by the bar. Nevertheless, because of the dangers inherent in lawyer solicitation,<sup>77</sup> the ABA must exercise caution in relaxing restrictions on soliciting. The standard that Justice Marshall suggested in *Ohralik*, permitting noncoercive and informative, or "benign," solicitation,<sup>78</sup> offers inadequate guidance for practicing attorneys. A general standard of "sophistication" will suffer from the same weakness. Establishing a bright-line rule for sophistication therefore represents one way to administer the proposed amendment effectively. A bright-line rule can accommodate both the need for caution in relaxing solicitation rules and the demand for clear guidelines to assist attorneys<sup>79</sup> without complicating the enforcement of solicitation restrictions.<sup>80</sup>

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76. See Chayes, Greenwald & Winig, *supra* note 75, at 85, 87-88; "Managing" *Company Lawsuits to Stay Out of Court*, *supra* note 75, at 60, 65. Greater reliance on lay organizations for certain services increases financial pressures on lawyers, see Francis & Johnson, *supra* note 36, at 241-42, and challenges the ability of the bar to ensure competent service, see CPR, *supra* note 3, Canon 3, EC 3-1 to 5. Becoming more price competitive may therefore help to preserve the autonomy of the bar in regulating the practice of law.

77. See *supra* notes 22 & 34 and accompanying text.

78. 436 U.S. 447, 472. (Marshall, J., concurring). See *supra* notes 23-25 and accompanying text.

79. The vagueness of the current ethical rules has been a problem in regulating attorney conduct. See *What Lawyers Are Doing to Shed a Bad Image*, U.S. NEWS & WORLD REP., Aug. 23, 1982, at 53. Without clear rules on who can or cannot be solicited, attorneys face the dilemma of soliciting persons at the risk of violating ethical rules, or not soliciting at all. Neither alternative is desirable. The bright-line test proposed, see *infra* notes 82-88 and accompanying text, eliminates the dilemma.

80. Problems with enforcing restrictions on in-person solicitation were a major justification for upholding the prophylactic rule in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 464-67 (1978). See *Bates v. State Bar*, 433 U.S. 350, 383-84 (1977); see also *In re R.M.J.*, 455 U.S. 191, 206-07 (1982). With a bright-line test, a bar association or disciplinary committee can easily determine whether a certain in-person solicitation was proper. Because the proposed rule affects those unlikely to be harmed by solicitation, see *infra* text accompanying note 89, and likely to recognize and report improper conduct, see *supra* note 49, concerns about remedial measures raise no serious difficulties. See *Ohralik*, 436 U.S. at 457.

Although sophisticated persons can be described,<sup>81</sup> identifying them is considerably more difficult. A rule allowing solicitation of sophisticates must determine what persons are sophisticated. As a starting point, attorneys presumably qualify as sophisticated persons;<sup>82</sup> therefore, any in-person solicitation of another attorney should fall within this rule.<sup>83</sup> Similarly, a lawyer should be allowed to solicit any corporation that employs in-house counsel, because the corporation has available to it the sophistication and expertise necessary to evaluate the soliciting lawyer.

Because valid restrictions on lawyer solicitation arise largely from the desire to protect consumers,<sup>84</sup> existing consumer protection laws provide guidance in defining sophisticated persons. Notably, businesses are considered so sophisticated that consumer protection laws have not been extended to them.<sup>85</sup> Although the legal profession could likewise treat *all* businesses as sophisticates, a more realistic view would exempt smaller, less complex businesses from the sophisticate category,<sup>86</sup> thus

81. See *supra* text accompanying note 7.

82. B. CHRISTENSEN, *supra* note 4, at 164.

83. Thus, any lawyer can contact another attorney regarding the representation of the attorney or his business. Insofar as a lawyer approaches other practicing lawyers for referrals, this involves solicitation of a sophisticated person not as a prospective client but as an intermediary, raising other ethical concerns. See CPR, *supra* note 3, DR 2-103(C) ("A lawyer shall not request a person or organization to recommend or promote the use of his services . . .") (no counterpart in the *Model Rules*). To the extent that the solicited attorney acts as an authorized agent for a business or other person, however, such solicitation should be allowed. See *State Bar Grievance Adm'r v. Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979).

84. See *supra* notes 20-22 & 33-36 and accompanying text.

85. For example, the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1691 (1976), covers "consumer" transactions, which are those "primarily for personal, family, or household purposes." *Id.* § 1602(h). In addition, the act expressly exempts transactions "for business, [or] commercial . . . purposes." *Id.* § 1603(1). See 12 C.F.R. § 226.2(p), 226.3(a) (1982).

The Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1976 & Supp. V 1981) has a similar limitation. It governs only those products for sale to consumers or for "personal use, consumption or enjoyment of a consumer in or around a . . . household or residence, a school, in recreation, or otherwise." *Id.* § 2052(a)(1).

Other consumer protection legislation also limits protections to nonbusiness transactions or activities. See Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1) (1976); U.C.C.C. § 1.301(11)-(15) (1974); UNIFORM CONSUMER SALES PRACTICES ACT § 2(1), 7A U.L.A. 4 (1978) (also covering transactions "that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged"); 16 C.F.R. §§ 700.1(a), 701.1(b), 702.1(b) (1982) (consumer product warranty regulations having some express exclusions of products purchased "for commercial or industrial use"). That businesses do not need such special protections has not been overlooked by the courts, see *Plum Tree, Inc. v. Rouse Co.*, 58 F.R.D. 373, (E.D. Pa. 1972) ("Businessmen . . . are sufficiently sophisticated to recognize legal harm to themselves."), and legal commentators, see Note, *supra* note 63, at 1150.

86. Although businesspersons are presumably more sophisticated than ordinary consumers, see *supra* note 85, the knowledge and expertise needed to make an informed selection of an attorney may differ significantly from the knowledge and expertise related to their businesses. The point at which a businessperson becomes adequately sophisticated obviously cannot be determined precisely. This uncertainty may therefore warrant additional protections for those smaller

ensuring that only businesses of a certain size and complexity would be open to lawyer solicitation. The amount of total sales<sup>87</sup> or the number of employees<sup>88</sup> of a business can serve as indicia of whether that business is "sophisticated."

Although this standard will not eliminate all the dangers of in-person solicitation, it does identify a group that is not susceptible to the harmful effects of these dangers. Furthermore, those attorneys, corporations with in-house counsel, and qualifying businesses that are solicited still will be protected by the general standards in the ethical rules. Specifically, sophisticated persons can rely on existing prohibitions against misleading or deceptive communications by lawyers<sup>89</sup> and against soliciting persons when circumstances make them unable to make rational judgments.<sup>90</sup> If the bar perceives a need for more protections, one approach might be to include a "cooling off" period after a solicitation during which the prospective client can rescind any agreement for legal representation.<sup>91</sup>

Defining sophisticated persons as either businesses of a certain size, attorneys, or corporations with in-house counsel accords with common notions of the classes of persons not needing the protection of consumer statutes and fairly approximates the groups having the attributes of sophistication.<sup>92</sup> This definition also provides a practical and enforceable bright-line standard to guide attorneys in their promotional activities.

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businesses that encounter few laws or government regulations in their daily business dealings.

87. The Securities Act of 1933, §§ 2(15)(ii), 4(6), 15 U.S.C. §§ 77b(15)(ii), 77d(6) (Supp. V 1981), relies on a similar standard in exempting certain sales of stocks from the act's registration requirements. The exempted sales are those to "accredited investors," which the regulations define in terms of net assets, net worth, or current and expected income. See 17 C.F.R. § 230.215 (1982). See also 17 C.F.R. § 230.501(a) (1982).

Providing the exact indicia of sophistication is beyond the scope of this Note, but a gross sales or total assets standard offers the bar an approach to establish a bright-line test that can still protect those potential clients most susceptible to the dangers of solicitation.

88. No consumer protection act determines coverage according to the number of employees involved, but other laws do. See, e.g., Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1976) (only an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" are covered by the act). Although the number of employees may have no direct relation to consumer protection, it does provide a gauge for the business's exposure to laws and regulations. This, in turn, can be an indication of the sophistication of potential clients in recognizing and understanding their legal problems.

89. CPR, *supra* note 3, DR 2-101(A); MODEL RULES, *supra* note 3, Rule 7.1.

90. MODEL RULES, *supra* note 3, Rule 7.3(b)(1). Although the CPR has no specific provision to this effect, it does prohibit nearly all solicitation, CPR, *supra* note 3, DR 2-104(A), and it must operate under *Ohralik*, 436 U.S. 447 (1978). See *supra* notes 21-25 and accompanying text.

91. Such a protection could follow the regulations requiring door-to-door sellers to inform buyers of their right to rescind a purchase agreement during the three business days after a purchase. 16 C.F.R. § 429.1 (1982). See *Ohralik*, 436 U.S. at 464-65, 464 n.23 (comparing in-person solicitation to other face-to-face sales).

92. See *supra* note 7 and accompanying text.

## CONCLUSION

In view of recent Supreme Court decisions expanding the scope of commercial speech interests of attorneys, as well as the state interests in protecting consumers and maintaining the dignity of the judicial system, allowing solicitation of sophisticated prospective clients seems necessary. This Note proposes that the legal profession permit the solicitation of sophisticates. It also recommends a practical and enforceable bright-line rule that treats attorneys, corporations with in-house counsel, and certain businesses as sophisticated persons. By adopting this proposal, the legal profession will more closely comport with the proper restrictions on commercial speech and may indirectly benefit from improved client service and a better public image. In so doing, the bar will once again take the lead in establishing professional ethical standards for attracting business.

—*Victor P. Filippini, Jr.*